1942 *Present* : **Jayetileke J.**

ABEYSIRIGOONEWARDENE *v.* ABEYSIRIGOONEWARDENE.

154—C. R. Galle, 22,634.

Prescription—Agreement to pay money to another—Failure to carry out the agreement—Cause of action—Time of accrual.

On January 31, 1935, plaintiff, who was the administrator of an estate, paid to A.A.G. a sum of Rs. 550, which was due to the defendant and his brother and sisters as heirs of the deceased. The money was paid to A.A.G. as guardian of defendant and a receipt obtained. A.A.G. died without having paid the amount to defendant and the plaintiff was compelled by Court on citation issued against him to pay the defendant Rs. 110.

Plaintiff instituted the present action against the defendant as heir in possession of A.A.G.'s estate for the recovery of the said sum.

Held, that the breach of the agreement to pay the money to the minors occurred about January, 1935, and that the cause of action to recover the money from A.A.G. accrued to the plaintiff about that time.

Seneviratne v. Siriwardene (*16 N. L. R. 376*) followed.

Ismail v. Ismail (*22 N. L. R. 476*) distinguished.

APPEAL from a judgment of the Commissioner of Requests, Galle.

L. A. Rajapakse, for defendant, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wickremenayake* and *H. A. Chandrasena*), for plaintiff, respondent.

Cur. adv. vult.

August 27, 1942. JAYETILEKE J.—

This appeal raises a very short point. The plaintiff was the administrator of the estate of one Dissanayake, which was administered in testamentary proceedings No. 7,356 of the District Court of Galle. The defendant, who was one of the heirs of the deceased, was represented by his father, A. A. Goonewardene, the tenth respondent, as he was a minor. The defendant's minor brother and sisters, who were the seventh, eighth and ninth respondents, were also represented by the tenth respondent.

On January 31, 1935, the plaintiff paid to A. A. Goonewardene a sum of Rs. 550, which was due to the defendant and his brother and sisters as heirs of the deceased, and obtained from him a receipt P1. That receipt is in the following terms:—"The purport of a hand writing caused to be drawn and granted on this 31st day of January, 1935 . . . . . I, the undersigned, Albert Arnolis Abeyesiri Goonewardene, presently of Kurunegala, who is appointed guardian of minor children under testamentary case No. 7,356, D. C. Galle, of the estate of Mr. A. P. Dissanayake, late of Regalam estate in Kurunegala, do hereby admit and acknowledge to have received a sum of Rs. 550 from R. D. A. Goonewardene of Agaliya, the administrator of the said estate, for and on behalf of the said minors, the heirs of the said estate, at Agaliya, in my capacity as guardian of the said minors.

Signed on a stamp of five cents.
A. A. Goonewardene. 31.1.35."

A. A. Goonewardene died on April 15, 1939, without having paid the amount to his children. On May 8, 1940, the defendant and his brother moved under section 720 of the Civil Procedure Code for a citation on the plaintiff to show cause why a decree should not be entered, directing him to pay each of them Rs. 110.

On March 29, 1941, the District Judge, after inquiry, held that the payment made by the plaintiff to A. A. Goonewardene did not discharge him and ordered him to pay the defendant Rs. 110.

On May 8, 1941, the plaintiff instituted this action against the defendant as heir in possession of A. A. Goonewardene's estate for the recovery of the sum of Rs. 110, which he was decreed to pay the defendant. The learned Commissioner of Requests entered judgment in plaintiff's favour and the defendant has appealed.

The question which I have to determine is whether the plaintiff's claim is prescribed. The answer to the question depends on the date when the cause of action to recover the sum of Rs. 550 from A. A. Goonewardene accrued to the plaintiff.

The position taken up by the plaintiff at the trial was that the money was paid to A. A. Goonewardene to be paid to his minor children. The language of P1, which is simple and straightforward, supports that view. I think it is a fair inference from the words used in P1 that when A. A. Goonewardene accepted the money from the plaintiff he agreed to pay it to his minor children.

The law as laid down by the Roman-Dutch Law writers is that a contract must be performed at the time stipulated, or if no particular time is mentioned, then within a reasonable time. What is meant by reasonable time must be gathered from all the circumstances of the case, such as the nature of the transaction, the intention of the parties, the distance, *et cetera.*

Voet says that in the case of unconditional obligations, that is, to which a particular day or a condition has not been added, the liability begins to exist and performance can be demanded at once, so that what has been promised is owing here and now and can be demanded for at once. This must, however, be accepted with some moderation of the time for performance. (*Bk. 45, Ch. 1, Sec. 19.*)

Grotius says that when anything is promised to be performed but no date is fixed for performance, it is understood that the obligation may be performed at once unless the fulfilment as, for instance, the delivery of a house, necessarily requires some time. (*Bk. 3, Ch. 3, Sec. 51.*)

In *Mackay v. Naylor* [1], it was held that the general rule is that obligations for the performance of which no definite time is specified are enforceable forthwith, subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance. The Court, in determining whether the period is reasonable, must have regard to all the circumstances of the case.

A. A. Goonewardene could and should have paid the money into Court immediately after he received it. The breach of the agreement to pay the money to the minors, therefore, occurred about January 31, 1935, and the cause of action to recover the money from A. A. Goonewardene accrued to the plaintiff about that time.

The plaintiff's action must, therefore, fail as it was not instituted within three years from the accrual of the cause of action. The case of *Seneviratne v. Siriwardene* [2] appears to be indistinguishable from the present case. In that case, the vendor of a land requested the vendee to pay the purchase price to a person to whom he owed money. The vendee agreed to do so but failed to pay. It was held that the cause of action to recover the money from the vendee accrued on the date of the agreement by the vendee to pay.

Mr. Weerasooria, for the respondent, contended that as no demand had been made by the plaintiff during the lifetime of A. A. Goonewardene, the cause of action arose on the latter's death. He relied very strongly on the case of *Ismail v. Ismail* [3], in which Bertram C.J. said :—

"For every period of prescription there must be a definite starting point. Sometimes a definite date is fixed upon it for the purpose of an obligation; sometimes it is not. In the latter case, it is sometimes said that there must be a performance within a reasonable time, but the expiration of such a reasonable time would clearly be altogether too indefinite a point as a starting point for prescription. As we have no definite authority on the point, the case is one of first impression, and on careful consideration I would suggest that the following

[1] *(1917) T. P. D. 537.* [2] *16 N. L. R. 376*

[3] *22 N. L. R. 476.*

principles may be applied to the question. When the time for the performance of an obligation is fixed, so that there can be a definite starting point for the running of the period of prescription, the breach may well, in ordinary circumstances, be considered as occurring when the performance does not take place within the time so fixed. But when there is no fixed date for the performance, but there is only an obligation to do any act within a reasonable interval after a given date, there cannot be said to be a breach, unless there has been a refusal, either on demand or otherwise, to perform the obligation, or unless the person liable has in some way disabled himself from performing the contract."

There are two reasons why I cannot treat the observations of Bertram C.J. as binding upon me. Firstly, the facts of that case were entirely different from those in the present case and the point which I have to consider did not arise. Secondly, the judgment was one delivered without any citation of authority and with the greatest respect for the learned Chief Justice I wish to say that his observations seem to me to be wrong in principle.

I would, therefore, set aside the judgment appealed from and dismiss the plaintiff's action with costs here and in the Court below.

Appeal allowed.