

1921.

Present : Bertram C.J. and Ennis J.

ISMAIL *et al.* v. ISMAIL.

325—D. C. Tangalla, 1,824.

*Prescription—Action for specific performance—Breach of contract—
Starting point of period of prescription—Demand and refusal.*

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 of contract occurs 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 is no breach, unless there is 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.

THE facts appear from the judgment.

E. W. Jayawardene, for defendant, appellant.

Drieberg, K.C. (with him *Keuneman*), for plaintiffs, respondent.

July 19, 1921. BERTRAM C.J.—

The question which we have to decide in this case is one on which there appears to be a dearth of authority. Briefly stated, that question is, in the case of an action for specific performance, from what date does the period of prescription run. It has been settled by the case of *Emis v. Sango*¹ that the period of prescription in the case of an agreement to transfer land is governed by section 7 of the Prescription Ordinance, and that, consequently, the claim is prescribed on the expiration of six years, but the question is from what precise point does that period start. The facts in the present case are as follows. The defendant agreed with the two plaintiffs for the execution of certain improvements on some land belonging to him for the purpose of the manufacture of citronella oil. Upon the execution of these improvements, and upon the expiration of a period of two years, during which one of the plaintiffs was to recoup himself for all expenses which he had incurred, there was an obligation on the part of the defendant. That obligation is as follows: "That after the said necessary matters shall have been perfected during the given period as aforesaid, and also after the recouping of the expenses incurred therefor by the second part within the given period,

¹ (1911) 1 Court of Appeal Cases 66.

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the first part shall transfer by means of two conveyances two-third parts in equal shares of the said two lands and of all the citronella and the boiler thereon unto the second and third parts."

It will be observed that the obligation to execute the conveyances was to come into effect "after" certain necessary matters had been perfected, and "after" the recouping of the expenses incurred. Now, there is no doubt that, on the expiration of the period of the two years which I have referred to, an obligation to execute the conveyances arose. But, according to section 7, the prescriptive period runs not from the coming into existence of the obligation, but from the breach of the agreement. The question at what point the breach of any agreement takes place must, of course, depend upon the facts of the particular case. In the present case the obligation was to execute these conveyances "after" certain things had happened. No fixed date was given for the execution. The question often arises whether a demand and the refusal of a demand is necessary to constitute a breach of a contract for the purpose of initiating the period of prescription. The learned Judge expressed the opinion that in this case a demand was necessary. There is surprisingly little authority on the question, but this, I think, we may affirm. 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 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. Now in this case there certainly was no refusal either on demand or otherwise. There was a delay, a reasonable delay, which appears to have been due to all parties contemplating that the title of the defendant which was at the time defective would be perfected by the obtaining of a Crown grant. Settlement proceedings were at the time in progress, and it was understood that when these proceedings were concluded, a grant would be made. Pending the conclusion of those proceedings

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certain interim arrangements were made. From time to time the plaintiffs asked the defendant to execute the deed. He said he would do so when the settlement was concluded, and this was acquiesced in by the plaintiffs. It is clear, therefore, that there has been no refusal on the part of the defendant to carry out the agreement. Therefore, it seems to me there was no breach until, when shortly before the commencement of this action, the plaintiffs made a formal demand, and that demand was refused.

In my opinion, therefore, the appeal must be dismissed, with costs.

ENNIS J.—I agree.

Appeal dismissed.
