APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1917, February, 2, 5 and 6.

BATHULA VENKANNA (FIRST DEFENDANT), APPELLANT,

v.

NAMUDURI VENKATAKRISHNAYYA AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Limitation Act (IX of 1908), art. 113—Contract between two parties that on payment of a specified sum by one to the other, the latter would transfer a decree in his favour to a third party—Suit by such third party for specific performance of the contract—Limitation—Starting point.

A agreed with *B* that on the latter paying him a specified sum of money he would transfer a decree in his favour to *C*. In a suit by *C* against *A* for the specific performance of the contract by the execution of a deed of transfer,

—Held, that the suit was governed by the second part of article 113 and time began to run from the date on which *C* had notice that performance was refused and not from the date of payment to *A* by *B* of the sum agreed in the contract.

Applicability of the doctrine of *certum est quod certum reddi potest* to third parties, considered.

SECOND APPEAL against the decree of A. RAGHUNATHA RAO, the Subordinate Judge of Cocanada, in Appeal No. 82 of 1914, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 714 of 1912.

Facts appear from the judgment.

G. Venkataramayya for *V. Ramesam* for the appellant.—The lower Court relies on section 10 of the Limitation Act. Section 10 requires two conditions:—an express trust and a specific purpose. Obviously in this case, the agreement (Exhibit F) does not create any express trust for a specific purpose.

The object of the suit contemplated by section 10 must be for the purpose of following in the *cestuique trust's* hands the suit property. Exhibit F creates no such right. The lower Court finds that under article 113 of the Limitation Act the suit is barred. *Ahmed Mahomed Pattel* v. *Adfein Dooply*(1) is a direct ruling on the plain language of the section.

* Second Appeal No. 842 of 1915.

(1) (1877) I.L.R., 2 Calc., 323.

M. Patanjali Sastri for *P. Narayanamurti* for the first respondent.—Section 10 of the Limitation Act does not govern the case. The contract does not contain the date of performance and therefore the second part of article 113 applies. I rely on *Juggomohun Ghose* v. *Manickchund*(1), *Merchant Shipping Co.* v. *Armitage*(2) and *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*(3).

The other respondent did not appear.

G. Venkataramayya in reply.—The rulings relied on by the other side relate to the interpretation of the Interest Act. No reasons are given by the learned Judges in *Merchant Shipping Co.* v. *Armitage*(2). Further, at about the same time, the opposite view was taken in *Duncombe* v. *Brighton Club and Norfolk Hotel Co.*(4). The conflicting rulings on the interpretation of the Interest Act are therefore no safe guide. The first part of article 113 applies on the construction of Exhibit F. The date of transfer by the first defendant in favour of the plaintiff is fixed to be the date of payment by the first defendant to the second defendant. The second part of the article applies only where there is no indication in the contract as regards the date of performance. Moreover, in *Virasami Mudali* v. *Ramasami Mudali*(5) it has been held that even under the second clause of article 113, a specific demand from the plaintiff should be an express condition in the contract to make the date of refusal the starting point; otherwise a mere personal right is created enforceable immediately after the date of payment by the second to the first defendant. In this view the suit is barred even under second part of article 113.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff to compel the first defendant to execute a duly registered transfer in respect of a decree in a suit (Original Suit No. 364 of 1904). The first defendant was the holder of this decree and he had by an agreement (Exhibit F) made with one Jayanti Venkayya agreed that on Jayanti Venkayya paying to him the amount of that decree, he would transfer the decree to

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(1) (1859) 7 M.I.A., 263. (2) (1873) 9 Q.B., 99.
(3) (1893) A.C., 429. (4) (1873) 10 Q.B., 371.
(5) (1880) I.L.R., 3 Mad., 87.

VENKANNA v. VENKATA-KRISHNAYYA.

AYLING AND NAPIER, JJ.

the plaintiff. The particular clauses of that agreement which are important are to the following effect:—

"1. The amount was to be paid within six months. The transfer in favour of the present plaintiff was to be made as soon as the amount in respect of this *razinama* was paid."

It is to enforce this latter clause that this suit is brought. No point has been taken that it was not open to the plaintiff, not a party to the contract, to bring a suit for specific performance; so we must deal with it as if that right did vest in him. The lower Appellate Court has held that the suit is primarily barred under article 113 of the Limitation Act, but that the circumstances under which the first defendant received the money from the second defendant constituted him a trustee for the plaintiff within the meaning of section 10 of the Limitation Act, and it therefore held that the suit was not barred. Before us this contention was not relied on by the respondent and we think rightly, for it would be quite impossible to bring this case within the language of that section. But it has been urged by the respondent that the contract does not contain the date fixed for the performance and that therefore the second clause "when the plaintiff has notice that performance is refused" is the starting point for limitation and that therefore the suit is not barred. For the appellant it is contended that the date is fixed for the performance and the suit is out of time. Admittedly of course no specific date was fixed, and the question that remains is whether it is possible in these circumstances to apply the doctrine *certum est quod certum reddi potest*, so as to bring the case within the article. A very careful argument has been addressed to us by both sides. We have been strongly pressed with the decisions of the Privy Council in *Juggomohun Ghose* v. *Manickchund*(1) and of the Court of Queen's Bench in *Merchant Shipping Co.* v. *Armitage*(2) and *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*(3). These decisions turned on the construction of the Interest Act which is as follows:

'that upon all debts or sums certain, payable at a certain time the jury on the trial of any issue may allow interest."

(1) (1859) 7 M.I.A., 263. (2) (1873) 9 Q.B., 99.
(3) (1893) A.C., 429.

There is no doubt that the Privy Council in dealing with this clause have given a very restricted meaning to it, and their Lordships give their reasons for so deciding at great length. They point out that the sum may never be due and that even if due it is uncertain in amount at the time of the contract and it necessarily follows of course that the amount which will be payable for interest will be equally uncertain. They also point out that this provision is an alteration of the common law and is in its nature penal and for these reasons they construe the Act strictly.

Merchant Shipping Co. v. *Armitage*(1) was argued before the Exchequer Chamber and the decision that there was no principal sum payable at a time certain on which interest could run was given by the court after the decision on the main question in respect of which the case is really reported. No reasons are given by the learned Judges for that decision. It appears that about the same time the opposite view was taken by the Court of Queen's Bench in *Duncombe* v. *Brighton Club and Norfolk Hotel Co.*(2). Their Lordships did not consider the policy of the Act but confined themselves to applying the doctrine of "*certum est, etc.,*" in its entirety. They quote and follow the language of Lord KENYON in an old case which language is reproduced as being a correct exposition of the doctrine in Broom's Legal Maxims; vide page 479. That language certainly is in the widest terms, for it applies the maxim whether the time can be ascertained by any process of computation at the time the contract is made or whether it cannot. I will quote a few words :

"That certainty need not be ascertained at the time, for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *Id certum est quod certum reddi potest.*"

We have therefore a clear conflict on the language of the Interest Act.

Now we have not to decide this question on the construction of that Act, and we must bear in mind the essential difference

(1) (1878) 9 Q.B., 99.

(2) (1873) 10 Q.B., 371.

VENKANNA v. VENKATA-KRISHNAYYA.

AYLING AND NAPIER, JJ.

between the Interest Act and the Limitation Act. As pointed out in the Privy Council case the Interest Act is penal and imposes a higher liability than was known to Common Law. It should therefore be construed strictly. On the other hand, the Limitation Act is one which operates as a bar to a claim that is legally enforceable, and it should therefore be construed as much as possible in favour of the person whose right is sought to be barred. There are indications that the courts of this country have been inclined to give a liberal application to this language in article 113. *Muhi-ud-din Ahmad Khan* v. *Mujlis Rai*(1) is one case. The decision of Mr. Justice BODDAM in *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabadrudu*(2) is another. We do not think it necessary, however, to express a final opinion on this point because in this case there is here an element which seems to us to render the doctrine inapplicable. It may be that it is right to apply the doctrine fully between the actual parties to the contract who would get the benefit and be subject to the liabilities under the contract and to whom therefore the date of payment of the money would become certain some time or other to their knowledge. But in cases where a person is entitled to bring a suit on the contract who may not and need not and very likely may not be aware of the date becoming fixed, we cannot think that the doctrine will apply. Taking this case, for instance, the second defendant was bound to pay the amount within six months to the first defendant, and on the date of that payment the first defendant was bound to transfer the property to the plaintiff. He might have paid it within two days, and the plaintiff need not have known anything about it. He might have paid it, as in fact he did, three days after the due date and the plaintiff might not have known anything about it. He might not have paid it till years after the due date and the first defendant might have accepted payment and the plaintiff might not have known anything about it. It seems to us therefore that in cases where a right to enforce specific performance rests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine *certum est quod certum reddi potest*, can have no application. We therefore on this narrow ground alone hold that the suit is not

(1) (1884) I.L.R., 6 All., 231. (2) (1907) I.L.R., 30 Mad., 486.

barred by reason of the first part of the article 113 and that as he is within time under the second part of the article the claim is not barred. It is admitted that there is no defence on the merits. The appeal will therefore be dismissed with costs.

S.V.

VENKANNA v. VENKATA-KRISHNAYYA.

AYLING AND NAPIER, JJ.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

RAMANAMMA *alias* VIDCHI PATNAYAKAM AND ANOTHER (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

BATHALA KAMARAJU AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

1917, February, 9.

Limitation Act (IX of 1908), art. 13—Attachment of property before judgment—Order raising the attachment—Decree in the suit—Subsequent suit for a declaration that the property is liable to be attached for the decree—Existence of the order, whether bar to such suit.

An order releasing certain properties from attachment before judgment, is no bar to a subsequent suit for a declaration that they are liable to attachment in execution of the decree in the prior suit, and such suit is not governed by article 13 of the Limitation Act.

Bisheshar Das v. *Ambika Prasad* (1915) I.L.R., 37 All., 575, not followed.

SECOND APPEAL against the decree of T. RAJARAM RAO the Temporary Subordinate Judge of Rajahmundry in Appeal No. 109 of 1915 preferred against the decree of N. NARASIMHAM, the Additional District Munsif of Rajahmundry, in Original Suit No. 125 of 1914.

The respondents Nos. 1 and 2 carried on a joint trade in hides. The first respondent filed a suit against the latter for winding up the business and for payment to him of whatever might be found due. During the pendency of the suit, he filed a petition for attachment before judgment. The Court made the order. The appellants, the wives of the second respondent, preferred a claim petition alleging that the second respondent had sold his properties to them and praying that the attachment might be raised. The Court made an order in their favour on 6th December 1910. The suit was eventually decreed

* Second Appeal No. 916 of 1916.