

Present: The Hon. Mr. J. P. Middleton, Acting Chief Justice,
and Mr. Justice Pereira.

Dec. 31, 1909

NELSON *et al.* v. THE MUNICIPAL COUNCIL,
COLOMBO, *et al.*

D. C., Colombo, 27,847.

Continuing cause of action—Blocking up of culvert—Damage—Prescription—Municipal Councils' Ordinance, 1887, s. 278.

Where the blocking up of a culvert results in damage to a person by depriving him of the lawful use of the culvert, a cause of action accrues to the aggrieved party only on the date of the occurring of actual damage; where a certain amount of damage occurs, there is only a cause of action for that amount; a fresh cause of action arises in respect of each successive damage.

A PPEAL from a judgment of the Acting District Judge of Colombo (J. R. Weinman, Esq.): The Municipal Council of Colombo blocked up a culvert situated near the plaintiffs' premises on June 12, 1908, and thereby caused water to collect and stagnate

¹ *4 B. & C. 959.*

² *27 L. J. Ex. 23.*

³ *2 East P. C. 496.*

⁴ *29 L. J. Q. B. 70, 72.*

Nelson v. The Municipal Council, Colombo.
 Dec. 31, 1909 in a drain passing in front of plaintiffs' premises. The plaintiffs on November 4, 1908, sued the Municipal Council and its Chairman (E. M. de Couey Short, Esq.) to recover damages caused by the act of the Council. The defendants pleaded that the action was barred by prescription (section 278, Municipal Councils' Ordinance, 1887). The plaintiffs contended in the District Court that the claim was not prescribed, because, until some day within the three months immediately preceding the institution of the action, the defendants had held out hopes to the plaintiffs that the obstruction would be removed. The learned District Judge held that the action was prescribed, and dismissed the action.

The plaintiffs appealed.

Bawa (with him *F. M. de Saram*), for the appellants.—Section 278 has no application. The Council has done no act under the provisions of the Ordinance. We are suing the Council for omission to do things cast upon it by law, and not for having done anything under the provisions of the Ordinance. [PEREIRA J.—The cause of action averred in the plaint is the blocking up of the culvert.] The plaint puts it in a positive form; but the cause of action as averred in the plaint covers the omission to remove the obstruction.

Even if the cause of action be the act done by the defendants in blocking up the culvert, it is not barred by section 278, as it is a continuing cause of action, Counsel cited *Backhouse v. Bonomi*,¹ *Crumbie v. Wallsend Local Board*,² *Earl of Harrington v. Corporation of Derby*,³ *Fielding v. Municipal Council of Colombo*.⁴

Schneider (with him *F. J. de Saram*), for respondents.—The act complained of was done under section 191 of the Ordinance. Even if the act be *ultra vires* and not justifiable under the Ordinance, section 278 would apply (*Carimjee Jafferjee v. Colombo Municipality*)⁵.

*Earl of Harrington v. Corporation of Derby*³ contemplates the case of an act done day by day. It was not alleged in the District Court that the cause of action was a continuing one.

Cur. adv. vult.

December 31, 1909. PEREIRA A.J.—

The claim in this case against the second defendant need not be considered, because counsel for the appellants, if I understand him aright, did not desire to press his appeal against the District Judge's order dismissing the plaintiffs' claim as against that defendant.

The action may be regarded as an action against the Municipal Council only. The cause of action averred in the plaint, to put it briefly, is that the defendants, on or about August 7, 1908, stopped

¹ (1858) 9 H. L. 503.

² (1891) 1 Q. B. 503.

³ (1905) 1 Ch. 205.

⁴ (1901) 2 Br. 196.

⁵ (1905) 8 N. L. R. 292.

up a culvert across the road whereby large quantities of rain and other water " arising and proceeding from the plaintiffs' premises were prevented and hindered from running, flowing, and passing off in their usual course through and out of the said culvert. "

Dec. 31, 190

 FERREIRA
 A.J.

*Nelson v. The
 Municipal
 Council,
 Colombo*

The only issue that appears to have been decided by the District Judge is whether the plaintiffs' claim is prescribed under section 278 of the Municipal Councils' Ordinance, which provides, *inter alia*, that no action shall be instituted against the Municipal Council for anything done or intended to be done under the provisions of the Ordinance except within three months next after the accrual of the cause of action. The cause of action pleaded in the plaint is clearly the blocking up of the culvert, and that that was the cause of action relied on by the plaintiffs is clear from the issues also agreed on by the parties. The first issue was as to when the culvert was blocked up; and the second, whether the plaintiffs' action was prescribed. Immediately before the trial, the plaintiffs admitted that the culvert had been blocked up some time before June 29, and the defendants' counsel accepted the date " for the purposes of issue No. 2 "; and it is clear from the evidence led that the plaintiffs' contention in the Court below was that the claim was not prescribed, because, until some day within the three months immediately preceding the institution of the action, the defendants had held out hopes to the plaintiffs that the obstruction would be removed. That could not, of course, help the plaintiffs, and judgment was entered against them. At the argument of the appeal, however, the plaintiffs' counsel pressed that the real cause of action intended to be relied on was the accrual of damage as a consequence of the blocking up of the culvert. If that is so I can only say that the plaint conceals rather than discloses the real cause of action, and also that the issues have been framed on a different basis. Clearly, the plaintiffs cannot succeed on the issues framed; but I shall examine the present contention with a view to considering whether the plaintiffs should, as an indulgence, be allowed to proceed thereon on proper terms.

The argument is that when an act such as the blocking up of a culvert is wrongfully committed, a separate cause of action accrues to the aggrieved party on each occasion he suffers loss or damages as a consequence of the act. Now, the blocking up of the culvert in question must have been done under the provisions of the Ordinance, because section 191 of the Ordinance authorizes Municipal Councils to do such acts; but, inasmuch as by that section a discretion is vested in Municipal Councils as to discontinuing culverts, no action would lie against them, unless the work was done so negligently, carelessly, or unskilfully as to cause damage to somebody. There is no pretence of any negligencé, carelessness, or unskilfulness here on the part of the defendant Council in the mere act of discontinuing the culvert. The section of the Ordinance, however, provides that

Dec. 31, 1909 the discontinuance should be subject to certain conditions, namely, that it should not " create a nuisance, " and that if by reason thereof any person is deprived of the lawful use of the culvert, the Council should with due diligence provide some other as effectual as the one of which he is deprived.

PERRERA
A.J.

Nelson v. The
Municipal
Council,
Colombo

In this case what the plaintiffs say is that the act complained of was not so done as not to create a nuisance; and the question is whether, on each occasion the plaintiffs suffered damage by reason of the nuisance so created, a fresh cause of action accrued to them for the recovery of the loss sustained. The case of *Crumbie v. Wallsend Local Board*¹ cited by Mr. Bawa appears to be quite in point. That case followed the decision of the House of Lords in *Darley Main Colliery Co. v. Mitchell*²; and applying the decision to this case, it appears to me that, in the case of an act such as that complained of here, there is no cause of action until damage has actually occurred, and that when a certain amount of damage has occurred there is only a cause of action for that amount, and that a fresh cause of action arose in respect of each successive damage.

Considering all the circumstances of this case, I think that the plaintiffs should be allowed the indulgence of correctly stating their cause of action and proceeding to trial thereon.

I would set aside *pro formá* the judgment dismissing the plaintiffs' claim as against the first defendant, and remit the case to the Court below with liberty to the plaintiffs to amend their plaint by setting forth the particulars of damage sustained by them in the course of the three months immediately preceding the institution of the action, and claiming, as relief, judgment for such damage only. The case should thereafter be proceeded with to trial upon proper issues.

The plaintiffs, in my opinion, should pay the defendants' costs incurred so far in the Court below, and bear their own costs of this appeal. The defendants' costs of this appeal and all other costs of both parties should, I think, abide the final result of the action. I would affirm the order dismissing with costs the plaintiffs' claim as against the second defendant.

MIDDLETON A.C.J.—

I agree to the order proposed.

Case remitted.

¹ (1891) 1 Q. B. 503.

² (1886) 11 A. C. 127.