Present: Ennis J. and Schneider A.J. 1916.

SUPPRAMANIA CHETTY *et al.* *v.* THE FISCAL, WESTERN PROVINCE.

266—D. C. Colombo, 42,104.

Action against Fiscal for negligence—Loss of goods seized under writ—Burden of proof—Prescription—When does cause of action arise?—Civil Procedure Code, s. 362.

Under writ issued in execution of plaintiff's decree for Rs. 3,357.90 the defendant as Fiscal seized and took into his custody goods valued at Rs. 3,456.51, and placed guards outside the shop. On September 28, 1914, the Fiscal's officer discovered that some goods, valued at Rs. 1,560.75, were stolen. Plaintiff knew of the theft on September 30. The remainder of the goods were sold on October 7 and realized Rs. 1,715.55.

Plaintiff instituted this action on July 2, 1915, for damages, alleging that the loss of goods was attributable to the fraud or gross negligence or gross want of ordinary diligence on the part of the guards appointed by the Fiscal.

Held, that the action was barred under section 362 of the Civil Procedure Code, as it was brought nine months after the cause of action had arisen.

Prescription generally runs in cases of tort from the date of the tort, and not from the occurrence of the damage. But there is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage.

In actions for negligence the mere fact that injury has been caused is not enough to throw on the defendant the burden of proof as to negligence, although in certain circumstances the burden may be shifted, *e.g.*, where a barrel was let fall from a window on the plaintiff as he was walking on the street.

THE facts are set out in the judgment of Schneider A.J.

Bawa, K.C. (with him *Ratnam*), for the plaintiffs, appellants.—The law imposes a duty on the Fiscal to produce on the date of sale the goods seized by him and given to his custody (Civil Procedure Code, section 227). Plaintiff's cause of action did not arise on the Fiscal's failure to keep the goods safe, but on the loss arising as the result of his negligence, *i.e.*, on October 7, 1914, when the proceeds of sale failed to satisfy plaintiff's decree (*Ram. 1877, p. 338*). The private right of the plaintiff infringed is the right to have the goods which were seized sold on the day appointed for the sale and the proceeds applied in satisfaction of his decree.

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No action is maintainable against the Fiscal unless pecuniary loss is suffered (*L. R. 7 Q. B. 175*). The Fiscal is in the same position as an English sheriff (*Ram. 1877, p. 344;* D. C. Colombo, 69,938). The goods having been lost in the custody of the Fiscal, the burden of rebutting negligence is on the Fiscal (*32 L. J. Ex. 13*). The facts prove gross negligence.

F. J. de Saram, for the defendant, respondent.—Section 362 of the Civil Procedure Code requires the plaintiff to prove affirmatively gross negligence (*2 Bal. 73*). Gross negligence imports more than the want of ordinary care (*Beven 269; 6 E. & B. 8911*). It must amount to something approaching fraud (*Beven 421.*) The plaintiff has failed to prove even want of ordinary care. The plaintiff's cause of action arose at the date of the actual breach of duty or negligence, and not from the date of the discovery of the negligence (*5 B. & C. 2591*). Plaintiff knew of the loss on September 30. Even if the cause of action arose on that date, the action is barred. The breach of duty occurred when the goods were stolen. [Schneider A.J. referred to *8 S. C. C. 153.*] Counsel referred to *Wendt 32.*

Bawa, K.C., in reply, referred to *2 Browne 196.*

Cur. adv. vult.

August 3, 1916. ENNIS J.—

This suit was instituted on July 2, 1915, against the Fiscal of the Western Province for damages, for an amount since reduced to Rs. 1,560.75, in that certain goods seized by the Fiscal at the instance of the plaintiffs were stolen while in the custody of the Fiscal through the gross negligence of the Fiscal, whereby the plaintiff suffered loss to the amount claimed, the goods of the debtor remaining in the hands of the Fiscal being insufficient to satisfy the plaintiff's decree to that extent. The plaintiff asserted that he was not aware of the loss till the day of sale, viz., October 7, 1914. The learned Judge has found that the plaintiff knew of the loss on September 30, 1914, and that the theft took place between August 25 and September 28, 1914. With these findings of fact I see no reason to interfere, as there is ample evidence to support them.

The first and second appellants are the plaintiffs, substituted in the place of the original first plaintiff, who died after the institution of the action.

Section 362 of the Civil Procedure Code, so far as it is material to the present case, provides that every person charged with the duty of executing a writ "shall be protected thereby from civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the execution of such process by him, or in the case of the Fiscal by his officers, except when the loss or damage for which the claim is made is attributable to any fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence or abuse of authority on the part of the

person executing such process. Provided that no action shall be maintainable ..... unless such action be brought within nine months after the cause of action shall have arisen."

The learned Judge has found that no gross negligence has been proved, and that the claim is barred by prescription. The argument in appeal was practically confined to these points. The finding on the first point is, in my opinion, right. In actions for negligence the mere fact that injury has been caused is not enough to throw on the defendant the burden of proof as to negligence, although in certain circumstances the burden may be shifted, *e.g.*, where a barrel was let fall from a window on the plaintiff as he was walking in the street (*Byrne v. Boadle*[1]). In the present case the circumstances are that thieves effected an entry into the locked house in which the goods were kept through the roof, and that people could go on the top of the roof without being seen by any one on the roadside. The Fiscal in the usual way caused the goods to be locked up in the house, and placed two watchers as guards over the premises. These circumstances are not sufficient to shift the burden of proof on to the defendant, and it was therefore not incumbent upon him to call the guards to rebut a presumption of gross negligence.

In view of my opinion on this point, it is hardly necessary to discuss the next, but as the matter was fully argued I will deal with it.

The question is, At what point of time did the plaintiff's cause of action arise? In D. C. Colombo, No. 69,993,[2] the plaintiff sued the Fiscal for damages for eviction from premises sold to him by the Fiscal, who failed to give notice of a mortgage of which he was aware at the time of sale. The plaintiff was subsequently evicted at the instance of the mortgagee. The Court enunciated the principle that it was not sufficient to show that the Fiscal had done something or failed to do something which he ought to have done, but that the plaintiff must show that some private right of his had been infringed in consequence. In that case the Court held that no private right of the plaintiff had been infringed at the time of the sale by the suppression of the fact that a mortgage existed, as the plaintiff was in a position to enjoy the full benefit of his purchase until the mortgagee pressed his claim, which might never happen.

In this case the English authorities were considered, and the decision being one of a Full Court is binding on us. The principle was applied in *Karolis v. Woutersz*,[3] where the plaintiff surrendered to the Fiscal for seizure and sale a mortgage bond in favour of a third party. The Fiscal sold to the plaintiff himself. The plaintiff put the bond in suit, but his case was dismissed on the ground of irregularity in the seizure and assignment. He then took action

[1] *32 L. J. Ex. 13.*

[2] *Ram. 1877, 338.*

[3] *8 S. C. C. 153.*

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for damages against the Fiscal, and it was held that his cause of action arose upon the latter's failure to make a valid seizure and assignment, and prescription ran from that date.

Lawrie J. said the loss was a continuing one, which commenced from the moment the Fiscal made a mistake, and that at the time of action he was suffering the same loss, namely, that of not having in his pocket money which the Fiscal ought to have recovered for him, and distinguished the case from D. C. Colombo, No. 69,933, where the plaintiff after a lapse of years suffered loss by eviction.

In *Fielding v. The Municipal Council of Colombo*,[1] the horses of the plaintiff becoming frightened by being squirted by a water cart owing to the neglect of the defendant's servant bolted, one of them injuring itself so severely that it had to be shot two months afterwards. It was held that the action was in time, having been brought within three months of the horse's death, on the ground that where the extent of the injury is doubtful the cause of action accrues when the doubt ceases.

Lawrie J. said: "Mere ignorance of the plaintiff as to the exact meaning of pecuniary loss would not excuse delay in bringing the action. For instance, if a carriage be badly broken, and it is sent to the builders for repairs, the repairs may not be made for more than three months, and until the bill be sent in the owner may not know whether he could claim £10 or £50. That is not a case in which the action may be delayed. But when it is doubtful what the extent of the injury will be where the injury lessens or grows from day to day, it is reasonable to hold that the cause of action accrues when the doubt ceases when the injury is complete." Moncreiff J., after dealing with the English cases, came to the conclusion that the cause of action might be said to arise at the time of the neglect, but, inasmuch as a cause of action does not arise until the plaintiff has sustained damage, he saw no reason or justice in holding that the cause of action dates from the moment damage begins to show itself, and held that the cause of action only became complete and definite at the later date, and that the plaintiff was entitled to sue within the prescriptive period from that date. This case conflicts with the principle laid down in D. C. Colombo, No. 69,933; a private right of the plaintiff seems to have been infringed at the time of the negligent act, and the loss was a continuing one. In the present case the private right of the plaintiff that the Fiscal should keep the goods safely was infringed at the time of loss, and the loss continued. I would follow the principle laid down in D. C. Colombo, No. 69,933, and *Karolis v. Woutersz*,[2] which were both cases in respect of the negligence of the Fiscal, and hold that the cause of action arose at the time of the neglect, and that the action has consequently been instituted after the prescriptive period. I would accordingly dismiss the appeal with costs.

[1] *2 Browne 196.*

[2] *8 S. C. C. 153.*

SCHNEIDER J.—

The third plaintiff in the present action, and the original first plaintiff (in whose stead the present first and second plaintiffs have been substituted) in action No. 38,765 of the District Court of Colombo, obtained a hypothecary decree in their favour for the sum of Rs. 3,357.90 and interest. Under writ issued in execution of this decree the defendant as Fiscal seized and took into his custody the property mortgaged, which consisted of the stock in trade lying in a shop at Padukka. This stock in trade consisted of almirahs and boxes containing rice, cloths, curry-stuffs, &c. The defendant's officer who effected the seizure says he took the usual steps, viz., sealing the almirahs and boxes, locking the doors, fastening them with padlocks, and taking possession of the keys. It is proved that he made an inventory and a valuation of the goods. He also placed two guards outside the shop. The value of the goods as appraised was Rs. 3,456.51. The seizure was effected on July 17, 1914. On July 29 a small portion of the goods, as being perishables, was sold, and realized Rs. 20.45. In August the defendant's officer went inside the shop and found everything in order. The sale was fixed for August 25; but it was stayed at the request of the decree-holders. At the request of the proctor for the decree-holders on September 3 the sale was re-fixed for October 7. In the meanwhile, viz., on September 28, the same officer who had effected the seizure went to the shop to effect a seizure of the same goods under another writ. He found the guards on duty and the doors secured as he had left them, but on entering into the shop he discovered that the seals of the almirahs had been broken and some of the contents removed, the thieves had effected an entrance by cutting the laths and making an opening in the roof. The shop was a two-storied building facing the high road, with a garden at the back. The roof could be reached by climbing a tree at the back of the building. The opening of the roof effected by the thieves was not visible from the high road, nor could any one on the roof be seen from the high road. It is agreed that the value of the goods stolen is Rs. 1,560.75, and that the remainder of the goods sold on October 7 realized Rs. 1,715.55. Reckoning some cash in the shop, and deducting from the proceeds of execution the costs of execution, the plaintiff's decree remained unsatisfied to the extent of Rs. 1,812.22. The plaintiffs instituted this action on July 2, 1915, to recover from the defendant the value of the lost goods, alleging that the loss was attributable to " the fraud or gross negligence or gross want of ordinary diligence on the guards appointed by the defendant, and deputed by him to look after and guard the said property. And that the plaintiffs became aware of the said theft or removal only on the day of the second sale, to wit, October 7, 1914, and that a cause of action has therefore arisen to the plaintiffs to sue for and recover from the defendant the value of the said goods. " (Plaint, paragraph 7).

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The learned District Judge has held it as proved that the plaintiffs knew of the theft on September 30. I think he has so held rightly; but the date when the theft came to the knowledge of the plaintiffs is not material in the view I take of the law.

It is clear that the draftsman of the plaint had the provisions of section 362 of the Civil Procedure Code before him while drafting the plaint. And that, in his opinion, the period of prescription was to run as from the date when the theft came to the knowledge of the plaintiffs. Section 362 provides that " every person charged with the duty of executing any process shall be protected thereby from civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the execution of such process by him, or in the case of the Fiscal by his officers, except when the loss or damage for which the claim is made is attributable to any fraud, gross negligence, or gross irregularity of proceedings, or gross want of ordinary diligence on the part of the person executing such process. Provided that no action shall be maintainable ..... unless such action shall be brought within nine months after the cause of action shall have arisen. "

Of the issues framed and tried, I need refer only to the 3rd and 4th, viz. :—" 3. Is the plaintiff's claim prescribed? 4. Were the goods stolen or removed through the fraud or gross negligence or gross want of ordinary diligence of the defendant or his agents? "

The learned District Judge has held in favour of the defendant on both these issues. The plaintiffs appeal. The fourth is a mixed issue of fact and law. I entirely agree with the learned District Judge's holding on this issue. There is no suggestion, much less proof, of fraud. The facts do not warrant an inference of negligence, much less of gross negligence. By the latter term I understand " greater negligence than the absence of that ordinary care which under the circumstances a prudent man ought to have taken " (Earle J. in *Cashil v. Wright*[1]). Beven in his *Negligence in Law* says: " So long as the sheriff is in possession of the goods of the debtor, he is bound to exercise the same degree of care in their preservation that a man of ordinary discretion and judgment may reasonably be expected to exercise in regard to his own property. He does not insure the goods, but is in the position of an ordinary bailee for the purposes of custody and sale. He is, therefore, not liable for an accidental fire, not yet for the loss by theft, robbery, or other accident without want of ordinary care on his part " (p. 269, third edition).

" The sheriff is *pro hac vice* in exactly the same position as our Fiscal " (Clarence J. on page 344 of *Ramanathan's Reports for 1877*). But the effect of the provision in section 362 of the Code is to deny an action against our Fiscal, unless the damage is attributable to gross negligence or gross want of ordinary diligence. It

[1] 6 *E. & B. 8911.*

will be thus seen that our law is more exacting in its requirements as to actions against the Fiscal than in the English law. I think it cannot be said that an ordinary boutique keeper would have done any more for the safety of the goods in his shop during his temporary absence than the Fiscal did in this instance. I doubt that in the circumstances the shopkeeper would have placed two guards.

The third issue was argued at some length. Its decision turns upon the question, What is " the cause of action? " The period of prescription is to be reckoned from the date " the cause of action " shall have arisen (section 362 of the Civil Procedure Code). Did the cause of action arise when the theft took place (*i.e.*, on some date between August 25 and September 28, 1914), as was *contended for on behalf of* the respondent Fiscal; or when the fact of such theft came to the knowledge of the plaintiffs-appellants (*i.e.*, September 30, 1914), as was argued on their behalf in the lower Court, or as was contended on their behalf on appeal, when the remainder of the goods were sold and it was definitely ascertained that the plaintiffs' decree was not wholly satisfied (*i.e.*, October 7, 1914)? This action was instituted on July 2, 1915, hence, unless the cause of action arose on October 7, 1914, the action is barred by lapse of time.

To determine what the plaintiffs' cause of action is in this case, it becomes necessary to ascertain the general principle upon which actions are granted to private individuals against public officers. This principle is the same under the English or the Roman-Dutch law. It is well expressed by Best C.J. in *Henley v. Mayor of Lyme Regis*[1]: " I take it to be perfectly clear that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. " As regards the public officer, the determining test is the notion of duty placed on him by statute (*vide* the decision of *Robinson v. Gell* [2]). As Beven puts it: " An action for negligence is maintainable against the sheriff, not because the plaintiff has sued out a writ and delivered it to the sheriff, who has not executed it, and thereby has broken an implied contract, but because the plaintiff has a cause of action or judgment against the defendant, which gives him an interest in the writ, and creates a duty by law apart from contract in the sheriff to him. "[3] But it is not the breach of duty alone which gives rise to the cause of action, but " an injury " in consequence to the plaintiff. It was argued that this " injury " is the suffering of pecuniary loss. The current of the decisions is against this view, which finds no support either from general principles. On general principles it is to express but a truism to say that the foundation of an action for damage is not that damage has been caused, but that there has been a

[1] *5 Bing. 91, 107; 1 Bing. N. C. 222.*

[2] *12 C. B. 191.*

[3] *Beven (Negligence in Law) 273; and Jones v. Pope, 1 W. M. S. Saund, 34, 37, 38.*

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violation of a private right resulting in pecuniary or moral damage. *Injuria sine damno* gives a cause of action, while *damnum sine injuria* does not.

It is true that Beven says that an action is not maintainable against a sheriff for not levying, unless actual " pecuniary damage " is shown. In support he cites *Stinson v. Farnham.*[1] This decision does not support his statement. In that case an execution-creditor delivered a writ of *fi fa* to the sheriff, who proceeded to execute it by seizing goods upon certain premises, but which were then in fact in possession of the holder of a bill of sale, to whom they had been assigned. The sheriff subsequently released the seizure, and pleaded to the action against him that the goods did not belong to the judgment-debtor, and that, therefore, the plaintiff had sustained no damage. Cockburn C.J. in the course of his judgment says: " The action is founded on tort, from wrong done by the sheriff in making a false return. The rule is not only a wrongful act committed, but damage thereby caused to entitle the injured person to maintain the action. " Note, therefore, that he does not refer to the damage as being pecuniary, but that the word " damage " is used in the sense of *injuria* or injury. The reasoning of Cockburn C. J., as I follow it in his judgment, is this. The action is for " false return. " The return was *nulla bona*. In a sense this was false, as the sheriff had in fact seized the goods. Having done that, he should have caused the decree-holder and the execution-creditor to interplead as to their rights. The bill of sale was in fact a valid one, and hence the return was not false in that sense, and therefore there was no damage, that is, no injury done to the plaintiff, as the goods could neither have been seized nor sold. I have been unable to discover a single decision by the English Courts to support the proposition that there must be pecuniary damage sustained in order to be entitled to maintain the action. In some of the English cases for false return to a writ of *fi fa* against the sheriff (which is a form of action analogous to our action against the Fiscal) it is true that the word " damage, " and not " injury or infringement of a right, " is used. But the cases themselves show that the word " damage " is used as the equivalent of *injuria*. The view of the English law, which is identical with that of the Roman-Dutch law on this point, was well expressed by Lord Holt in *Ashby v. White*[2]: " Every injury to a right imports a damage in the nature of it, though there be no pecuniary loss. " That it is the *injuria*, and not actual pecuniary loss, which is the foundation of the action, is clear from the case of *Williams v. Mortyn.*[3] There the debtor, who was in the custody of the sheriff for mesne process, was taken by the sheriff out of jail to give evidence in some other place after the writ was returnable. But the debtor was returned to jail the same day.

[1] *L. R. 7 Q. B. 175.* [2] *1 Sm. L. C. (11th edition) 240; 2 Ld. Raym. 938.*
[3] *4 M. & W. 145.*

It was held that this was an escape, but that the plaintiff's action failed, not because he had suffered no damage, but that as the debtor was only a prisoner under arrest on mesne process no right of the plaintiff had been infringed by the escape, as the nature of the sheriff's duty in the circumstances was to have the debtor ready either to be removed or to have some declaration served on the part of the plaintiff. But it was held that, if the debtor had been a prisoner under an execution, the action would have lain, because the escape would have infringed the creditor's right to have his body continuing in jail until satisfaction of the debt. Clarence J. in the anonymous case reported in *Ramanathan's Reports for 1877, p. 344*,[1] thus summarizes the English law: " Now, in the English cases against the sheriff, who *pro hac vice* is in exactly the position of our Fiscal, it is very clearly laid down from *Williams v. Mortyn* (*ubi supra*) that in an action against a sheriff it is not enough to show a wrongful thing done by the sheriff, but, to maintain your action, you must go further back and show some damage, not necessarily pecuniary damage, but a breach of some definite right of the plaintiffs."

I think I need say no more to show that the words " damage " or " damages " when used in this connection are used as meaning breach of right, and that the action against the Fiscal is maintainable when the refusal or neglect to perform his official duty has resulted in the breach of a right of some individual.

To ascertain the plaintiffs' rights and the Fiscal's duty for the purpose of this case, we must look to the writ issued in the action under which writ the execution was based. The right of the plaintiff is correlative to the duty of the Fiscal. The action was one on a mortgage. The writ, whether under an ordinary decree or hypothecary, is, as far as I am aware, the same in form, which is form 43 given in the second schedule to the Civil Procedure Code, and which by virtue of the provision in section 225 is made a substantive part of the Code. This form is intituled as of the action, and is addressed to the Fiscal. It runs: " Levy and make of the houses, lands, goods, debts, and credits of the above-named ————, by seizure, and, if necessary, by sale thereof, the sum of ———— rupees, which the said————has recovered against the said ———— by a judgment of the Court bearing date the ———— day of ————, 19—, and have that money before this Court on the ———— day of ————, 19—, to render to the said ———— and inform this Court for what sum or sums, and to what person or persons, you have sold the property respectively: and have you here this mandate. The duty, therefore, of the Fiscal is to seize and sell the debtor's goods to the amount mentioned in the plaint. This implies the duty to keep the goods seized in safe custody. The right of the judgment-creditor is that the Fiscal shall carry out

[1] *D. C. Colombo, No. 69,938.*

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this duty. As Beven says: "The seizure of goods by the sheriff does not vest any property in the creditor under whose writ the seizure is made. The property vested thereby in the sheriff is no more than that which results from his being the officer of the law, and is to enable him to sell the goods and raise the money. The goods are in fact *in custodia legis* for the benefit of those who are entitled to them, the property in the meanwhile remaining in the debtor." [1]

The plaintiffs' claim in this action must, therefore, be based on the fact that the Fiscal, in neglect of his duty to keep in safe custody certain of the goods he had seized, permitted the same to be stolen, whereby the plaintiffs' right or rights that he should keep those goods in safe custody and bring them to sale for the purpose of satisfying the decree have been violated. Whether you regard the right as consisting of two parts, or the two parts as consisting of a separate right, the breach was the theft, because the duty to safeguard the goods, as also the duty to bring them to sale, were violated by the Fiscal, inasmuch as it was not possible to bring them to sale once they had been stolen. The period of prescription, therefore, began to run from the date of the theft. Mr. Bawa argued for the plaintiffs that the period of prescription began to run from October 7, 1914, because it was only then that it was definitely ascertained that the plaintiffs had suffered damage, because the rest of the goods under seizure, besides those stolen, might have satisfied the plaintiffs' decree. It seems to me that this argument is based on the fallacy that the cause of action is the accrual of pecuniary damages. I have endeavoured to show that it is not so. But, apart from that, this argument is open to the criticism that it is based on the wrong assumption that the valuation placed by the Fiscal is not the true valuation of the goods, because, if that valuation be accepted, it must have been evident from the moment of the theft that the plaintiffs' decree would not be wholly satisfied without the stolen goods. In principle, in actions for damages such as this, the measure of damages is the value of the goods, and not the amount of the writ, and this value is that placed on them by the Fiscal.

This is the principle of the decision in *Carpen Chetty v. Conolly*. [2] The argument also ignores the fact that the Fiscal can seize no more than is sufficient to satisfy the writ, and hence the removal of any portion of the goods seized must ordinarily, and will be presumed to, deprive the decree-holder of his right to have the decree fully satisfied. In my opinion this case does not fall within the category of cases of the class of that reported in *Ramanathan for 1877*, to which I had already alluded. There the action was based on the fact that the Fiscal had neglected to inform the plaintiff of the existence of a mortgage over the property which was sold to the plaintiff, whereby the plaintiff was induced to purchase it for its full value, and that, after he had been put in possession, the

[1] *1 Beven (Negligence in Law) 273.*

[2] *4 S. C. C. 33.*

mortgagee sued and had the plaintiff ejected. Clarence J. points out that the mere concealment by the Fiscal, or the fact of the plaintiff's purchase, did not of themselves constitute a cause of action, because there was no necessary *constat* that the property in his hands would ever be come down upon for the mortgage debt, and that it was the eviction which constituted the cause of action, as, till then, the plaintiff was in the enjoyment of the full benefit of his purchase.

I am unable to adopt the decision in *Fielding v. The Municipal Council of Colombo*,[1] because it follows no principle. Moncreiff J. holds that the cause of action arose with the injuring of the horse, and yet, on grounds of equity, apparently holds that prescription should be reckoned from the death of the horse, which took place two months thereafter. He cites the cases of *Bonomi v. Backhouse* [2] as illustrating the principle that in a certain class of cases "the cause of action dated from the infliction of damage." But if I may say so with all respect to so eminent a Judge, it seems to me that he has misapplied the principle of the decision in *Bonomi v. Backhouse*.[2] In that case the defendant as owner of certain mines in 1849 withdrew the pillars of coal which had been left as supports to the roofs in some of the old workings. In consequence the roofs fell and the adjacent strata one after another subsided in slow succession, and in 1854 the plaintiff's house was injured by the subsidence of the neighbouring ground. It was held that the plaintiff's cause of action arose when his house was injured, and not till then, because the removal of the pillars was no injury to the plaintiff, as they stood on the defendant's land. Therefore, the principle of the decision is that the cause of action arises with the injury or infraction of a private right. In *Fielding v. The Municipal Council of Colombo* [1] as I apprehended the law, the squirting of the water upon the horse was not *injuria*, but when in consequence the horse was injured, that constituted the tort. It was competent to recover the damages, not only for the injury as ascertained at the time of the injury, but as likely to accrue thereafter from the injury.

As I understand the law and read the English decisions in regard to prescriptions, the rule is well established that prescription generally runs in cases of tort from the date of the tort, and not from the occurrence of the damage. But there is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage. This is the case of *Bonomi v. Backhouse*.[2]

The leading case in regard to the application of the statute of limitations is that of *Howell v. Young*,[3] referred to in many of our local cases. This illustrates the principle as I have formulated it.

[1] *2 Browne 196.*

[2] *9 H. of L. C. 503.*

[3] *5 B. & C. 259.*

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The present case, in my opinion, falls entirely within the principle of the decision in *Mustappa Chetty v. Conolly* [1] and *Karolis v. Woutersz.*[2] In the latter case the defendant in 1884 seized and sold the right, title, and interest of a mortgage in a certain mortgage bond. The plaintiff became the purchaser and obtained an assignment of the bond from the defendant. The plaintiff sued upon the assignment in 1886, when he lost his action, as it was discovered that the seizure was bad for the non-observance of certain formalities by the Fiscal. This omission of the Fiscal came to the plaintiff's knowledge only in 1886. It was held that prescription began to run as from the date the Fiscal had omitted to make a valid seizure.

For these reasons I agree that the appeal should be dismissed, with costs.

Appeal dismissed.