1954 *Present :* **Gratiaen J. and Fernando A.J.**

W. M. D. D. G. WIJERATNE, Appellant, *and* K. D. GABRIEL, Respondent

*S. C. 451—D. C. Colombo, 19,487*M

Delict—Actio legis Aquiliae—*Computation of prescriptive period*—*Damage is gist of action*—*Prescription Ordinance* (*Cap. 55*), *s. 9.*

In actions under the lex Aquilia and in other actions in which proof of patrimonial loss is a condition of liability, the period of prescription does not begin to run until some damage has actually occurred.

Plaintiff was the Headmaster, and the defendant an Assistant Master, of a school. Plaintiff alleged that defendant "falsely and maliciously in order to put the plaintiff into trouble and to cause him loss" falsified certain attendance registers of the school on June 15, 1944, and that in consequence of an investigation by his employers into these irregularities his services as Headmaster were discontinued on December 1, 1947. He claimed that a cause of action accrued to him for the recovery of Rs. 7,500 as damages from the defendant. Defendant pleaded that the action, which was instituted on May 28, 1948, was prescribed.

Held, that the date of commencement of the prescriptive period of two years under section 9 of the Prescription Ordinance was December 1, 1947, and not June 15, 1944.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *C. G. Weeramantry*, for the plaintiff appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant respondent.

Cur. adv. vult.

May 26, 1954. GRATIAEN J.—

This is an appeal against a judgment upholding, on a preliminary issue of law, a plea that an action for damages instituted on 28th May, 1948, was prescribed. The defendant had raised a further preliminary issue as to whether the averments in the plaint disclosed a cause of action against him, but this plea was eventually withdrawn.

Section 9 of the Prescription Ordinance admittedly governs the case, so that the action could not be maintained unless it was instituted "within two years from the time the cause of action shall have arisen". The dispute is as to when precisely (assuming the averments in the plaint to be true) the plaintiff's cause of action first accrued to him. In the

absence of any allegation of concealed fraud, the period of limitation begins to run " from the earliest time at which an action could be brought " —*Reeves v. Butcher* [1].

We must first analyse the averments in the plaint (after discounting its unnecessary and irrelevant flourishes) so as to ascertain the true nature of the cause of action on which the plaintiff based his claim. It is alleged :

(1) that the plaintiff had at all relevant dates been the Headmaster, and the defendant an assistant master, of St. Lucia's Bilingual School in Kotahena (paragraphs 2 and 3) ;

(2) that the defendant " falsely and maliciously in order to put the plaintiff into trouble and to cause him loss " falsified certain attendance registers of the school *on 15th June, 1944* (paragraphs 5 and 7) ;

(3) that in consequence of an investigation by the plaintiff's employers into these irregularities his services as Headmaster were discontinued on 1st December, 1947 (paragraph 6), and he suffered consequential loss and damage which he assessed in a sum of Rs. 7,500 (paragraph 8) ;

(4) that a cause of action had accrued to the plaintiff to sue the defendant for the recovery of such damages (paragraph 8).

The question for our decision is whether, *if these averments be true*, the cause of action originally arose on 15th June, 1944 (as the learned judge has held) or whether it only became complete on 1st December, 1947, when the plaintiff lost his professional employment as Headmaster as a direct consequence of the irregularities maliciously committed by the defendant on the earlier date. If the latter view be correct, the plea of prescription admittedly fails.

The gist of the plaintiff's complaint is that he suffered patrimonial loss on 1st December, 1947, and that the " real and proximate cause of the loss or injury " was the wrongful conduct of the defendant (committed on 15th June, 1944, and specified in paragraphs 5 and 7 of the plaint).

The analogy of the English decisions where in the case of certain torts, " the proof of real damage is the foundation of the plaintiff's right " is instructive, because in such a situation the cause of action arises only when the plaintiff's enjoyment of his rights (whether they be of property or employment or take some other form) has been interfered with " by the actual occurrence of the mischief "—*Backhouse v. Bonami* [2], *Darley Colliery Co. v. Mitchell* [3].

In this country, if an aggrieved party's claim is based on an actionable wrong, the question as to when his cause of action first arose must of course be answered with reference to the Roman-Dutch law. In actions under the *lex Aquilia and in other actions in which proof of patrimonial loss*

[1] *(1891) 2 Q. B. 509 at 511.*
[2] *(1861) 9 H. L. C. 543 (–11 E. R. 825).*
[3] *(1886) 11 App. Cas. 127.*

is a condition of liability, the period of prescription (as in England) does not begin to run until some damage has actually occurred. Gardiner J.P. summarised the law as follows in *Coetzee v. S. A. R.* [1]:

> "There is no 'cause of action' until everything has happened which would entitle the plaintiff to judgment. Now in delict, a wrongful act or omission does not always by itself entitle a person complaining of it to judgment. There are cases where it does, e.g., where *contumelia* is involved. But there are many cases where the wrongful act does not give the plaintiff a right to judgment unless damage has been sustained, and *the damage need not be contemporaneous with the wrongful act* . . . . There may be a wrong without, at the time, any damage, and after an interval damage may for the first time result."

As the present action was instituted within two years of the date on which the plaintiff claims to have suffered damage through deprivation of his employment as Headmaster of the school, the learned judge was not justified in deciding the preliminary issue of prescription in favour of the defendant.

Certain local decisions were referred to us in which the impact of section 9 of the Prescription Ordinance (and of analogous statutory provisions) on actions for delict has been discussed—*Alla Pitche v. Adams* [2], *Karolis v. Woutersz* [3], *Wadurala v. Sunderland Rubber Co.* [4] and *Suppramaniam Chetty v. Fiscal W. P.* [5]. The true principle is that where an act whether lawful or wrongful at its inception is not actionable *per se*, but becomes so only by reason of consequential damage, prescription runs only from the actual happening of the damage.

The learned judge seems to have assumed that this principle is confined to cases where the conduct complained of was at its inception "lawful" but nevertheless becomes actionable when it subsequently caused damage to the plaintiff. This is not correct. In England, some categories of "wrongful acts" are not actionable unless and until they have caused actual damage to the aggrieved party—e.g., negligence, nuisance and deceit—*Pollock on Torts* (14th Ed.) pp. 150–1. Similarly, under the Roman-Dutch law, "the *actio legis Aquiliae* is only available for an *injuria* resulting in pecuniary loss (*damnum injuria data*)"—*Matthews v. Young* [6].

In the present case, "damage is the gist of the action", and the institution of proceedings by the plaintiff before he actually suffered pecuniary loss would have been premature—because his cause of action was incomplete until the defendant's alleged plan (previously conceived and put into execution) succeeded in its purpose.

I observe that in *Nelson v. Municipal Council, Colombo* [7] this Court went so far as to hold that "where a cause of action accrues to the aggrieved party only at the date of the occurring of actual damage, a fresh cause of action arises in respect of each succeeding damage",

[1] *(1933) C. P. D. 565.*
[2] *(1877) Ram. Rep. 338.*
[3] *(1888) 8 S. C. C. 153.*
[4] *(1914) 18 N. L. R. 76.*
[5] *(1916) 19 N. L. R. 126.*
[6] *(1922) S. A. A. D. 492 at 504.*
[7] *(1909) 13 N. L. R. 43.*

This may well be so where the act complained of was *ab initio* lawful, or in the case of a wrongful act which in truth constitutes a continuing cause of action, but not otherwise. " Where a negligent or wrongful act has caused *some damage*, a right of action accrues immediately for all the damage flowing from the unlawful act, *including prospective* damage " —*Oslo Land Co. v. Union Government* [1]. In situations of that kind, the difficulty of assessing the prospective damage cannot alter the fact that the cause of action has in fact already occurred.

In my opinion the judgment under appeal should be set aside and the case remitted for trial according to law on the merits. Should the plaintiff ultimately succeed in establishing a good cause of action, the damages awarded to him must of course be restricted to the pecuniary loss (actual and prospective) sustained or to be sustained on or after 1st December, 1947, by reason of the *injuria* complained of. The averment that the plaintiff had, in addition, " suffered pain of body and mind " is extraneous to the true cause of action and therefore irrelevant to the issue as to damages.

The defendant must pay to the plaintiff the costs of this appeal and of the abortive trial. All other costs will be costs in the cause.

FERNANDO A.J.—I agree.

Judgment set aside.