ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

DWARKA NATH GUPTO (PLAINTIFF) *v.* THE CORPORATION OF CALCUTTA (DEFENDANTS).* 1890 *September* 15.

Calcutta Municipal Consolidation Act (IV of 1876), s. 357—Limitation—Accrual of right to sue—Notice in writing—Continuing damage.

The plaintiff in April 1888 sued the defendants for damages for injuries caused by the defendants' works to his house. On the case coming on for hearing it appeared that the notice of action served upon the defendants was defective in form, and the suit was on the 11th December 1888 dismissed with liberty to the plaintiff to bring a fresh suit for the same cause of action.

On the 15th December 1888 the plaintiff served the defendants with a fresh notice, and on the 15th March 1889 instituted the present suit. It appeared from the plaintiff's evidence that in the beginning of December 1888 the house had been reduced to such a condition that it was incapable of sustaining further damage;

Held, that the right to sue accrued to the plaintiff upon the happening of damage by reason of the subsidence arising from the defendants' act; that the plaintiff had not shown that a right to sue upon which the suit could be maintained had accrued within three months before the institution of the suit as required by section 359 of the Municipal Act (IV of 1876), and within the terms of the notice of the 15th December; and that the suit was therefore barred.

The Darley Main Colliery Co. v. *Mitchell* (1) distinguished.

Per PIGOT, J.—*Semble* that, as to whether, under section 357, damage arising out of a subsidence referred to in the notice, but arising after the date of the notice, could be recovered without fresh notice and fresh suit, a liberal construction should be placed upon section 357 as to the requirements of the notice.

THIS was a suit brought to recover Rs. 17,675 from the Corporation of Calcutta for damages alleged to have been sustained by the plaintiff's house by reason of the negligent, improper, and unworkmanlike manner in which the workmen, employed by the defendants in the construction of a reservoir in the vicinity of the plaintiff's house, carried out the work. The plaintiff also claimed further damages sustained by reason of the alleged

* Original Civil Appeal No. 11 of 1890, against the decree of Mr. Justice Wilson, dated the 12th March 1890.

(1) L. R. 11 App. Ca., 127; L. R. 14 Q. B., D., 125.

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wrongful acts of the defendants after the completion of the works, and alleged that the house was still suffering damage by reason thereof; he claimed Rs. 540 for loss of profits from December 1887 to date of suit. The plaint was filed on the 15th March 1889.

The construction of the reservoir was commenced in November 1887 and the works were finished in June 1888.

The plaintiff brought a suit in April 1888 against the defendants for damages for injuries caused by the defendants' works to his house.

In this suit he claimed the same sum of Rs. 17,675: he also claimed in respect of further damage and claimed Rs. 171 for loss of profits from December 1887 to date of that suit. The case came on for hearing in December 1888 before Mr. Justice Trevelyan, when it appearing to that learned Judge that the notice of action served upon the defendants under section 357 of the Calcutta Municipal Act was defective in point of form, inasmuch as it did not state the place of abode of the plaintiff according to the requirements of that section, the suit was on the 11th December 1888 dismissed, with liberty to the plaintiff to bring a fresh suit for the same cause of action.

On the 15th December 1888 the plaintiff served the defendants with fresh notice of action, and on the 15th March 1889 instituted the present suit.

The present suit came on for hearing before Mr. Justice Wilson, who dismissed it, on the ground that the suit was barred by section 357 of the Municipal Act (IV of 1876), which section corresponds with section 427 of Act II of 1888. The plaintiff appealed.

Mr. *Woodroffe* and Mr. *Bonnerjee* for the appellant.

Mr. *T. A. Apcar* and Mr. *Sale* for the respondents.

Mr. *Woodroffe*.—The excavation was not an act done under the Municipal Act, so the limitation prescribed by section 357 does not apply. We gave them notice *ex cautelâ*, which does not estop us. Even if the Act applies, the cases show that the right of suit arises as each damage occurs. Here there has been a continuing wrong, as to which the cause of action arises *de die in diem*. The Court below erred in thinking on the evidence that the house

could not have sustained further damage after December 1888. The evidence is there was more and more subsidence owing to the weight of the building and the withdrawal of subterranean water by drainage into the defendants' reservoir. The section should be construed strictly. Our cause of action is the damage, and we are not bound to sue until that is ascertained. The following cases were referred to in the argument:—*Darley Main Colliery Co.* v. *Mitchell* (1), *Lamb* v. *Walker* (2), *Backhouse* v. *Bonomi* (3), *Midland Railway Company* v. *Withington Local Board* (4), *Rajrup Koer* v. *Abul Hossein* (5).

Mr. *Bonnerjee* followed on the same side.

Mr. *Apcar* for the respondents contended that the only cause of action was under the Act, and that no damage had been proved to have been sustained within the period of limitation. He referred to the following cases:—*Whitehouse* v. *Fellowes* (6), *Lloyd* v. *Wigney* (7), *Smith* v. *London and South-Western Railway Co.* (8), *The Mersey Docks Trustees* v. *Gibbs* (9), *Jolliffe* v. *Wallasey Local Board* (10), *Price* v. *Khilat Chandra Ghose* (11), *Cook* v. *Leonard* (12), Addison on Torts, Fifth Edition, 712, *Popplewell* v. *Hodkinson* (13), *Ullman* v. *Justices of the Peace for the Town of Calcutta* (14), *Waterhouse* v. *Keen* (15).

Mr. *Woodroffe* in reply—In the Court below the case of the *Darley Main Colliery Co.* v. *Mitchell* (1) was cited, and issues were framed. This Court should look not to the mere wording of the plaint, but to the issues settled for trial, *Rajah Rup Singh* v. *Rani Baisni* (16). There is no finding except upon the question of limitation. The case should be remanded upon the merits, the question of limitation being set aside. The case comes within the *Darley Main Colliery Co.'s* case and *Backhouse* v. *Bonomi* (3).

(1) L. R. 11 App. Ca., 127; L. R. 14 Q. B. D., 125.
(2) L. R. 3 Q. B. D., 389.
(3) 9 H. L. C., 503.
(4) L. R. 11 Q. B. D., 788.
(5) I. L. R., 6 Calc., 394.
(6) 10 C. B. N. S., 765 (785).
(7) 6 Bing., 489.
(8) L. R. 5 C. P., 98.
(9) L. R. 1 E. & I. Ap., 93 (112).
(10) L. R. 9 C. P., 62 (82).
(11) 5 B. L. R. Ap., 50.
(12) 6 B. & C., 351.
(13) L. R. 4 Ex., 248.
(14) 8 B. L. R., 265.
(15) 4 B. & C., 200.
(16) L. R. 11 I. A., 149 (155).

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[PIGOT, J., referred to section 24 of the Limitation Act (XV of 1877) and the cases cited at page 51 of Satis Chandra Ray's edition.] It is said that there is no right to the support of subterranean water, and *Popplewell* v. *Hodkinson* (1) is relied on; but that case may be distinguished (see *Chasemore* v. *Richards* (2), *Elliot* v. *North-Eastern Railway Company* (3), *Rigby* v. *Bennett* (4).

The judgment of the Court (PETHERAM, C.J., PRINSEP and PIGOT, JJ.) was delivered by

PIGOT, J., who (after stating the facts) continued :—The present suit came on for hearing before Mr. Justice Wilson, who dismissed it, on the ground that the suit was barred by section 357 of the Municipal Act. He said:—"The question is whether on the plaintiff's own evidence it is shown that any right to sue accrued within three months before the 15th March, on which date the present suit was brought. I think it is not so shown."

The suit was dismissed on the ground of limitation alone: there was no finding on the other issues in the case.

The plaintiff appeals against the decree of the Original Court. Section 357 is as follows:—"No suit shall be brought against the Commissioners or any of their officers or any person acting under their direction for anything done under this Act until the expiration of one month next after notice in writing has been delivered or left at the office of the Commissioners, or at the place of abode of such person, stating the cause of suit and the name and place of abode of the intending plaintiff. Unless such notice be proved, the Court shall find for the defendant. Every such suit shall be commenced within three months next after accrual of the right to sue and not afterwards. If any person to whom any such notice of suit is given shall before the suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover in any such action when brought; and if no such tender shall have been made, it shall be lawful for the defendant in such action, by leave of the Court where such action shall be pending at any time before issue joined, to pay into Court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into Court."

(1) L. R. 4 Ex., 248.
(2) 7 H. L. C., 349.
(3) 1 J. & H., 145; 10 H. L. C., 333.
(4) L. R. 21 Ch. D., 559.

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In his judgment the learned Judge says:—

"In order to see whether the plaintiff can maintain this suit we must see how the plaintiff's case stands on his evidence. The really important evidence is that of Rameshwar Nath, who was the adviser of the plaintiff and who had been an Executive Engineer in the service of Government. He spoke from the notes which he had made at the time he visited the premises, and his evidence is clear that at the time the tank was excavated serious damage was caused to the plaintiff's house which he attributed to the excavation. For the purposes of the former suit this witness prepared an estimate of the damage done to the house up to that time, and he prepared it on the basis of a new building having to be put up because at that time the house was practically a wreck. He said there was nothing to be done but to pull it down. He said that even the materials were of no value because it would cost as much to pull down and cart away the materials as they were worth. He spoke to the injuries on the 1st December. At that time all the injuries had been incurred and the house was a ruin." I think that this is an accurate statement of the purport of this witness' testimony as to the amount of damage already done to the house more than three months before the institution of the suit.

For the appellant it was contended that the case did not come under section 357 at all; that the excavation by the defendants was in itself an act which the defendants were entitled to do [*Darley Main Colliery Co.* v. *Mitchell* (1)]; that the subsidence of the plaintiff's land whereby the damage was caused was the cause of action, and not the excavation by the defendants; and that therefore this was not a suit for anything done under the Act within the meaning of the section.

Assuming for the purposes of the argument that the *Darley Main Colliery Co.* v. *Mitchell* (1) and that class of cases are applicable to the present, I think that it cannot be deduced from the principles laid down in those cases that section 357 does not apply to the present. Taking it that in such a case the cause of action is a subsidence which causes a disturbance of the plaintiff's enjoyment of his land, the defendant surely can only be liable if that

(1) L. R. 11, App. Ca., 127; L. R. 14, Q. B. D., 125.

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subsidence is attributable to his act or default. In the judgment of Fry, L. J., (pp. 139-140, L. R. 14 Q. B. D.) adopted by learned Counsel for appellants in the case of *The Darley Main Colliery Co.* v. *Mitchell* the principle on which that decision rests is expounded.

Now with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry what is the cause of action in a case of this description. As has been pointed out by Bowen, L. J., very clearly, there are two possible ways of stating that cause of action. It may be said that the subsidence attributable to the defendants is itself an interference with the plaintiff's enjoyment of his property, and as such is the cause of action in itself, or it may be said that the cause of action is the defendants' allowing the cavity to continue without giving proper support to the superadjacent land, and the damage which follows from that circumstance to the plaintiff. To my mind it is not very material to inquire which of the two is the more accurate way of stating the cause of action. Like Bowen, L. J., I incline to consider that the more simple and more correct mode of statement is to say that the subsidence of land attributable either to the acts or default of the defendants is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action.

The mere withdrawal of the stratum of coal in itself is a perfectly legitimate and lawful act, and it is only because it is done without doing something else which would prevent the injury to the plaintiff that the cause of action arises.

I think it cannot be successfully contended that in such a case the suit is not brought for anything done by the defendants, whether it be said that the subsidence "attributable to the defendants" is the cause of action in itself, or that the cause of action is "the defendants allowing the cavity to continue without giving proper support, &c." In either view the defendant is liable by reason of, or "for," an act done by him; whether that be an act of commission or of omission, is quite immaterial. If it be necessary to seek authority as to acts of omission from this point of view, it has been decided that omission to repair the handrail

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of a bridge is a "something done" under the Highway Act (*Holland* v. *Northwich Highway Board*) (1), and in an action for damages resulting from such omission, plaintiff was non-suited, because the action was not brought within three months. A suit could not lie against a defendant at all unless for something done by him, leading (at any rate) to the cause of action. It is plain that here the defendants are sued for something done by them under the Act, and that section 357 applies.

The case being, as I think, within section 357, the question is whether the plaintiff has shown that a right to sue on which this suit can be sustained accrued within the period prescribed by the section, and within the terms of the notice of December 15th. It is clear, I think, that the right to sue accrues—assuming as most favourable to him the applicability of the *Darley Company* case —to the appellant upon the happening of damage by reason of a subsidence arising from the defendants' act. Without damage no suit will lie; (*Smith* v. *Thackerah*) (2), a case the great authority of which cannot be affected by the observations, intentionally thrown out as speculative (as I understand them), of Bowen, L.J., at page 137 of his judgment in the *Darley Company* case.

Now Rameshwar Nath's evidence is clear, in my opinion, as to this—that more than three months before suit the house had been reduced to such a condition, from whatever cause, that it was incapable of sustaining further damage. A further subsidence (of which indeed there is no evidence whatever) might perhaps have caused further changes in the ruined structure: the walls, or parts of them, might have fallen in, or fresh cracks have begun, or old ones widened; but these changes would be merely the displacement of materials already valueless as they stood, and could not amount, in any true sense, to fresh damage to the plaintiff's house.

In truth, the exigencies of the appellant's case before us compelled him to deal with Rameshwar's evidence very differently from that in which, as I suppose, he would have dealt with it if the question of limitation had not arisen. It was suggested that that evidence did not really amount to what the learned Judge understood to be the effect of it, or that, if it did, it was exaggerated; and that Rameshwar's picture of total ruin was probably

(1) 34 L. T., 137. (2) L. R., 1 C. P., 564.

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coloured by a professional impulse, which would lead him to take a fastidious view of dilapidated buildings, and to encourage rather than to avert a complete condemnation of them, and an entire reconstruction of them with skilled professional assistance. This argument was put with great skill, and with much lightness of touch. But in plain words it amounts to an attempt to discredit the evidence of the plaintiff's own witness, his chief witness, upon whose estimate the claim in the former and in the present suit was based; and to do this, not because he has turned out hostile to the appellant, but because he has been too favourable to him; and has so completely supported his case as to prove it out of Court on the point of limitation.

I think it would be of the worst example to allow a party in appeal so to deal with the most material part of his evidence, and that the appellant must be made to abide by the fair meaning of what Rameshwar said, which I see no reason whatever to doubt. That evidence proves that no damage and therefore no right to sue could have accrued after the beginning of December. The leave to bring a fresh suit granted on December 11th could not, of course, operate to prevent the operation on the present suit of the provisions of section 357.

Then it was said that this was a case of continuing damage. If this be granted, plaintiff could only sue for damage accruing within the three months. *Wilkes* v. *Hungerford Market Co.* (1) [3rd point not overruled, as the case was on another point, in *Ricket's* case in Dom. Proc. (2)]. No subsidence is proved to have taken place after December 1st, 1888, and whether any such subsidence did take place or not, it is certain, as has been already said, that no damage to the plaintiff in respect of the house did or could have occurred after that time.

I think the appeal must be dismissed with costs.

PIGOT, J.—I may add an observation not necessary for the judgment in this case, but which may arise, having regard to the recent English cases cited before us in cases to which section 357 of the Municipal Act may be applicable, with respect to the scope of the notice required under that Act.

(1) 2 Bing. N. C. at pp. 294-5. (2) L. R., 2 H. L., 175.

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Whether or not damage arising out of a subsidence referred to in the notice, but arising after the date of the notice, could be recovered, without fresh notice and fresh suit, may be a question. If the subsidence alone constituted the cause of action, of course subsequent damage arising from it might be recovered in a suit brought within three months from the subsidence. If the damage arising from the subsidence be the cause of action, as seems to be the result of the cases, then only what is stated in the notice can be recovered, and nothing arising after it.

It may be that the Courts in the face of the recent decisions, if this be the effect of them, might be asked to place a liberal construction on the words of section 357 as to the requirements of the notice.

Appeal dismissed.

A for the appellant: Baboo *Mooraly Dhur Sen.*

A for the respondents: The *Offg. Government Solicitor* (Mr. *A. Eddis*).

A. A. C.

PRIVY COUNCIL.

LUCHMESWAR SINGH (PLAINTIFF) *v.* CHAIRMAN OF THE DARBHANGA MUNICIPALITY (DEFENDANT).

[On appeal from the High Court at Calcutta.]

*P.C.** 1890 *12th March* *25th April.*

Minor—Guardian, Powers of, to deal with minor's estate—Application of the Land Acquisition Act, 1870, *to the land of a minor—Insufficiency of compliance with the other requirements of the Act, without actual compensation to the minor's estate—Recovery of land by minor on coming of age.*

The guardian of a minor's estate has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, 1870; although the owner, had he been of full age, might have waived it.

* *Present:* LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.