1935 *Present:* **Koch J.**

BARTHOLOMEUSZ *v.* ISMAIL.

181—M. C. Colombo, 3,779

Sunshade—Erection over a street—Lateral projection—Continuing offence—Limitation—Municipal Councils Ordinance, No. 6 of 1910, ss. 155, 156, 157, and 236.

Where the accused erected a balcony and a sunshade as a lateral projection, which did not start from a foundation in a street,—

Held, that he had offended against the provisions of section 156 of the Municipal Councils Ordinance, No. 6 of 1910.

The offence created by the section is a continuing one and limitation will not run against it so long as the projection remains.

Sections 156 and 157 of the Ordinance contemplate totally different proceedings.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

H. V. Perera, for accused, appellant.

L. A. Rajapakse, for complainant, respondent.

37/23

October 10, 1935. KOCH J.—

The appellant under the plaint filed in the case was charged "with having caused on or about March 6, 1934, a balcony and a sunshade to be placed over the footway opposite premises Nos. 71-73, Norris road, Pettah, in breach of section 156 of Ordinance No. 6 of 1910". The prosecution was entered on October 19, 1934. A preliminary objection was raised by the appellant's counsel in the lower Court that the offence was prescribed under section 236 of the Ordinance. This section requires the complaint in respect of an offence committed in breach of the Ordinance to be made within three months next after the commission of such offence. The complainant's counsel thereupon moved to amend the plaint by substituting the words "August 10, 1934" for the words "March 6, 1934". The accused's counsel, Mr. Jansz, had no objection to the amendment but reserved his right to contend that the offence, if any, was committed on March 6, and not at a later date. The learned Magistrate allowed the amendment. Mr. Jansz acted reasonably in not objecting to the alteration of the date, and the Magistrate was right in allowing the application. Whether the offence was in point of fact committed on March 6, or on August 10, I shall deal with later, as there are other points raised by the appellant's counsel in appeal which I would wish to decide first.

The first of these points is that assuming the facts to be correct, no offence was committed under section 156, and that the Chairman, if he felt that the rights of the Municipality had been interfered with, should have proceeded under the section next following—section 157—and should have noticed the appellant in writing to remove the projection within fourteen days, failing which the party noticed would have been liable to a fine of Rs. 150 and the Chairman could himself cause the projection to be removed and recover the expenses of the removal from such party.

Mr. H. V. Perera's contention was briefly that section 156 referred to an obstruction or encroachment which was caused as the result of a vertical erection or building from the base of a street upwards, but that here we are concerned with a sunshade and balcony that were the result of a lateral projection over and above a street and did not start from a foundation in a street. I do not agree. I am of opinion that section 156 contemplates a projection such as is complained of in this case. The section *inter alia* speaks of "setting up any bracket, sunshade, or other obstruction or encroachment". A bracket or sunshade would ordinarily be considered a lateral projection built into a vertical wall, but the matter is concluded by the amendment to this section, which is found in section 7 of Ordinance No. 12 of 1932. This amendment consists in adding to section 156 the words "or from allowing the putting up temporarily of sunshades and any *other similar projections*". "Sunshades" therefore are to be considered projections, and projections are acts of lateral structures. I therefore hold that section 156 applies.

The next point is that the Chairman after March 6, 1934, entered into negotiations with the appellant with a view to permitting the alleged

encroachments to remain if adequate fees were duly paid, a proceeding sanctioned by a Municipal by-law. It is argued that this amounted to an election on his part to act under section 157, and the election once made does not entitle the Chairman to take proceedings under the earlier section. I see nothing in this argument.

The third point, which is really subsidiary to the last one, is that the appellant was willing as the result of these negotiations to pay fees due for the encroachments ; that although the charge is in respect of a sunshade and a balcony the latter did not occupy a larger air space than the former, and that the appellant was only liable, if at all, to pay for one of them, and not for both which the Chairman insisted upon ; that the Chairman was wrong in so insisting, and if it is so held, the proceedings under section 157 are complete and there should be no prosection under section 156.

I again agree with the learned Magistrate that each of these projections is a separate projection and each of them is a distinct and separate tresspass on the air space above the street. The fact that one is immediately above the other can make no difference to the different acts of trespass or encroachment.

Another point was that the appellant had built these projections with permission. I agree with the Magistrate that no such permission can be implied from the documents relied on.

There is left the point I reserved for the end. In holding that the appellant could be prosecuted under section 155, I did so because I agree with the respondent's argument that sections 156 and 157 contemplated totally different proceedings. Section 156 made the actual *builder* liable, while section 157 gave the Chairman, if he so desired, the right to adopt the procedure therein set out in respect of the *owner or occupant*. It is conceivable that these parties may be different, and in my opinion it would be reasonable to suppose that the Chairman could choose to avail himself of either section or if he so determined both. The sections are not alternative. The builder may erect and immediately after completion of the erection may sell. The Chairman would have the right to proceed under section 156 against the vendor (builder) and under section 157 against the vendee (owner).

It would follow therefore that the wrongful act took place on the original date mentioned in the plaint, and subsequent negotiations cannot affect this fact. In that case over three months had elapsed and the prosecution under section 156 would be barred unless something intervened to take the offence out of the operativeness of section 236. That something, it is argued by the respondent, is that the offence must be regarded as a continuing one. I think he is right.

Burnside C.J. in *Akbar v. Slema Lebbe*[1] held that an offence under section 175 of the Municipal Ordinance, No. 7 of 1887, was a continuing one. The learned Chief Justice depended for this decision on the ruling in the case of *The Metropolitan Board of Works v. Anthony & Co.*[2] Now

[1] *2 Cey. Law Reps. 127.*

[2] *54 L. J. M. C. 39.*

section 175 of the old Ordinance is very much to the same effect as section 156 of the later Ordinance. There is this difference, however ; section 175 does not include the words "bracket" or "sunshade". It is sought therefore to differentiate Lawrie J.'s decision on the ground that the section under which he decided only referred to actual obstructions set up on streets and not to lateral projections over streets. For the reason I have already stated I do not think that the principle differs. In my opinion it is the same in either case. The lateral projection is as much a trespass on the Council's rights as an obstruction raised from a street base. One has only to conceive the projection being extended sufficiently long to reach the opposite edge of the street to appreciate how effectively a tall vehicle that proceeds along such street can be obstructed.

I think the conviction is right and the appeal must be dismissed.

Affirmed.