

former law after the by-law was quashed, before the suit could be begun, should not be used by the party as a part of the time within which his written notice of action is also to be served; or why this could not have been done under the former law, if the act 14 and 15 Victoria, chapter 64, could have been extended to corporations in other respects. Requiring a party to wait one month before he shall bring his action, and to give a month's notice in writing of his intention to bring it, does not necessarily involve the loss of two months' time, but really means no more than that after the by-law is quashed the party injured shall not bring his action until he has given one month's notice in writing of his intention to bring it. The difficulty which has been stated to have been in the way in applying the 14 & 15 Victoria, chapter 64, to municipal corporations, does not in this respect appear to me to have really existed.

In those cases in which the by-law is not illegal, but in which the corporation have acted so as to subject them to an action while fulfilling a public duty, either under the common law or imposed upon them by act of Parliament, there can be no special reason why the protection of the act, chapter 126, should not be equally extended to the body corporate, which it is admitted is applicable, and does extend to their officers and agents in the self-same cases.

The great purpose of the statute was, and is, to give protection to all those who are fulfilling a public duty, that is, who are performing acts which they are bound or required to perform, by reason of their public functions or character. They are permitted, in such cases, to tender amends for their wrongful conduct before they are sued for it. And why should this right, if granted at all, not be extended to corporations, as well as to their officers and servants? If there be any reason for making any distinction in such a case, probably it might be thought the corporation was entitled to greater protection than their subordinates, because it is frequently, though perhaps not universally, that it is the officer who is alone to blame—the corporation being held responsible merely as the principal, according to the maxim, "*respondet superior*;" and because corporations are commonly more severely amerced by juries than individuals are.

This act of parliament, however, only applies to any act or any thing done, and not to such omissions as are referred to in section 337 of the Municipal Act, or what was formerly the 13 & 14 Victoria, chapter 16, section 1 (*Carr v. The Royal Exchange Company*, 1 B. & S. 956;) and this perhaps is an answer to the argument, that in order to extend the 14 & 15 Victoria, chapter 64, to municipal corporations, the three months' period of limitation in the act of 1850 must be held to have been repealed, and the period extended to six months by the act of 1851 in every case.

The result of my consideration is, that by the express terms of section 202 of the Municipal Statute, where any act which gives a cause of action, has been done under an illegal by-law, order, or resolution, no action can be brought against the corporation "until one month has elapsed after the by-law, order, or resolution has been quashed, nor until one month's notice

in writing of the intention to bring such action has been given to the corporation." And for the reason before given, I think the limitation of six months next after the act complained of was committed, mentioned in chapter 126, does apply to municipal corporations. That by the express terms of section 337 the limitation of proceedings against the corporation for not keeping roads and highways in repair, is three months, which section, being restricted to cases of non-feasance is not within the provisions of statute 126. And that in all other cases of acts done not under an illegal by-law, but done in the performance of their public duty, municipal corporations are entitled to notice of action under chapter 126, before they can be rightly sued in like manner and to the same extent that their officers and servants are; and therefore that this later statute extends to and includes municipal corporations.

In this particular case the declaration shews the defendants had assumed this road; and that they afterwards made, formed, graded, and gravelled it. In the performance of which work this cause of action is alleged to have arisen. This is the power which they have under sections 339 and 340 of the present act. The declaration does not say this road was assumed by by-law, but this may be presumed as against the plaintiff. The evidence shews that the defendants, "in the exercise of their powers and duties under the Municipal Acts, built a gravel road," &c., and did the act from which the plaintiff contends he acquired his right of action. These acts were done in the year 1858, and the action was not brought until the year 1862.

The defendants moved for a nonsuit, because no notice of action had been given, and because the action had not been commenced within six months from the act committed. The motion for nonsuit was over-ruled, and the plaintiff recovered a verdict and \$100 damages. The defendants afterwards moved the Court of Queen's Bench for a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered pursuant to leave reserved, which the court refused to grant, in consequence of the series of decisions of that court which were adverse to the defendants' application.

For the reasons before given, I think the nonsuit should have been ordered to be entered; and that there should be now a direction that the Court of Queen's Bench do order such nonsuit to be entered, upon the grounds which were taken at the trial.

I am not satisfied that the plaintiff can maintain an action for the cause stated in his declaration, that is, for the defendants "making a ditch for about two chains on the land of the plaintiff, through which the defendants caused water to flow from the road on to the plaintiff's land," because section 323 of the Municipal Act provides that "every council shall make to the owner of real property entered upon, taken, or used by the corporation in the exercise of its powers, in respect to roads, &c., due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration."