tween the said road of the plaintiffs and said railway of the defendants, the water whereof had always remained and flowed in and through said swamps, *without overflowing or injuring in any* way the said road of the plaintiffs, or any part thereof, &c. Yet the defendants, well knowing, &c., and contriving, &c., maliciously, unlawfully, negligently and unskilfully, made and caused to be made certain other drains and water-courses, out of and from the said drain lying alongside the said railway as aforesaid, and cut, extended, and opened the same, and still keep the same open, through and across the swamps and lands overflowed with water last aforesaid, and until they reached the said drain of the plaintiffs, and joined and intersected the same, and by and through the said drains so made by the defendants as last aforesaid, large quantities of water, which before then had flowed in the said drain of the defendants alongside the said railway, were caused to run into the said drain of the plaintiffs; and also, and by means of the said drains of the defendants, the waters of the said swamps were diverted and carried from, and prevented from running and flowing in their natural courses, as they otherwise would have done, and were carried into the said drain or water-course of the plaintiffs, so that the waters in the said last mentioned drain were raised, and by the means aforesaid caused to overflow the said road of the plaintiffs for a long space of time, and by reason of the waters so brought down and discharged by the said drains of the defendants, the said road of the plaintiffs was rendered wet and soft, and unfit for travel, and was greatly injured; and the plaintiffs were compelled to expend, and necessarily expended large sums of money in repairing the said road, and repairing the injuries which had been done thereto, and in rendering the said road fit to be used and travelled upon as a highway, as it before had been used and travelled upon; and also were compelled to expend a large sum of money in enlarging their said drain, in order to carry off the water so discharged upon their said road by the said drains of the defendants as aforesaid, and in order to preserve the said road from being injured by the said water so discharged, and to prevent the said water from coming and continuing upon the said road.

The defendants demurred, assigning for causes of demurrer:

1. That the plaintiffs show no special injury to themselves, apart from the injury to the public in general.

2 That the cause of action stated is the subject of an indictment only, and not of an action of damages.

Connor, Q. C., for the demurrer, cited Streetsville Plank Road Co. v. Hamilton and Toronto R. W. Co., 13 U. C. R. 600.

Prince contra, cited 16 Vic., ch. 190, sec. 25.

ROBINSON, C. J.—I do not find any such provision in our statutes respecting concession lines or other public allowances for roads in townships, as is contained in the statute 13 & 14 Vic. cap. 15, respecting public roads within cities and incorporated towns: that is, vesting the roads in the municipality, and making it their duty to keep them in repair, and providing a remedy for the neglect of that duty.

The only objection taken to the declaration by the defendants is, that the injury complained of is of such a nature that the only remedy is by indictment for nuisance, for that the plaintiffs show no special damage accruing to them in a particular manner, which should give them a greater right to sue in a civil action, than all persons having occasion to use the road would have. I think that objection to the declaration does not lie, for that the plaintiffs do show a peculiar damage to them from the injury complained of, for they allege the road to be their own, and that they were compelled to expend large sums of money in order to repair the road and secure it against further injury from the water, which they say the defendants brought upon their road from the wrongful, negligent, and unskilful manner in which the defendants constructed their rail ay.

That certainly is a damage sustained by the plaintiffs in particular, and not in common with all the other inhabitants of the county.

The plaintiffs aver the road to be theirs, and that they were obliged to make the repairs spoken of. All this they would have to prove upon the trial; that is, if the defendants chose to traverse their statements.

If we could say that the averments could not be true, then of course the declaration would be bad on demurrer; but we cannot hold that the plaintiffs' statement is on the face of it untrue, for *we cannot tell that the road spoken of may not be one of those* roads made under the Joint Stock Road Company Act, 16 Vic. cap. 190, or the previous statutes, and now owned by the municipality of Sarnia, in which case the municipality would be bound to keep it in repair; and so they have suffered a special damage, if the defendants have, by their misconduct in acting upon the powers given by their charter, occasioned unnecessarily the injury complained of.

Judgment must, I think, be given for the plaintiffs, but the defendants may amend by pleading within a fortnight on payment of costs.

MCLEAN, J.—The plaintiffs complain of an injury to a road, of which they are *proprietors;* and if they are in fact the *proprietors* of the road, they certainly in their declaration show a good cause of action. We cannot assume that they are not proprietors, though we are aware that the municipal corporations are not proprietors of the several roads which they are bound to repair and keep in order. *The road stated in the declaration, for aught we can* at present know about it, may be a plank or macadamized road, made by a joint stock company, and since purchased by the municipality. In such a case I incline to think that the municipality could sue for any injury as the proprietors of the road, in the same manner and to the same extent as the company by which the road was originally constructed.

If the road is in fact an ordinary road on the concession line between two concessions, and the plaintiffs have no interest in it in any other way than as representing the township, and exercising a general superintendence over the public roads, the defendants can put in issue the right of property of the plaintiffs, and prevent their recovery. At present I think the declaration discloses a good cause of action, and that the plaintiffs are entitled to judgment.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for plaintiffs on demurrer.

STANDLEY AND THE MUNICIPALITY OF VESPRA AND SUNNIDALE.

By-law—Delay—Refusal to quash.

Upon an application to quash a by law establishing a road, where two years had been allowed to elapse, and money had been expended under it, the objections not being clearly established, the court refused to interfere.

Quære, as to the power of the court to quash for objections not appearing on the face of the by-law.

D'Aarcy Boulton obtained a rule on the municipality of Vespra and Sunnidale, to show cause why their by-law No. 87 should not be quashed. Firstly, because, the said by-law being passed for the establishment of a road in the township of Sunnidale, no notice was given of the intention to pass it, by posting up notices to that effect, as the statute requires; secondly, because the road passes through the orchard and barn-yard of the applicant, which is contrary to law.

The by-law was passed on the 26th of July, 1856, and it laid out the road established by it, by courses and distances, definitely and precisely.

Read showed cause, and cited *Lafferty and The Municipal Council of Wentworth and Halton*, 8 U. C R. 232.

Boulton, contra, cited *Dennis* v. *Hughes et al*, 8 U. C. R. 444; *Hodgson and The Municipal Council of York, &c.*, 13 U. C. R. 268.

ROBINSON, C. J., delivered the judgment of the court.

We have read the affidavits filed on both sides. There is nothing wrong on the face of the by-law. Looking at it, therefore, without the aid of any extrinsic information, we cannot say that it is either wholly or in part illegal, and therefore subject to be quashed by this court under any power expressly given to us by the municipal acts. But the applicant complains that it is nevertheless illegal, by reason of something extrinsic and not appearing on the face of the by-law.

It was passed, he alleges, without the requisite notice being given of the intention to pass it, and moreover it runs through his orchard and barn-yard. He must have known both those objections at the time, yet he has allowed two years to pass without complaining, and in the mean time expense has been incurred by