very materially to limit the effect of this section by confining its operation to cases of simple non-feasance. In that case the plaintiff alleged that the defendants took up a sidewalk, and by not filling in, a hole was left, in consequence of which the plaintiff tripped and was thrown on to the roadway, sustaining injury thereby. No notice of the accident was alleged to have been given as required by s. 606 of the Municipal Act. Nor had the action been commenced within the time limited by that section.

The plaintiff filed a jury notice, and on a motion to strike it out as being contrary to the provisions of s. 104, it was contended that the wrong alleged on the part of the defendants was not mere non-feasance, but misfeasance in that the defendants removed the former sidewalk and actually created the bad state of repair. The Master in Chambers, however, came to the conclusion that the case was within the statute, and struck out the notice; on appeal to the Chancellor the notice was restored, because, as he thought, not only the method of trial, but also the question of whether the plaintiff could maintain the action at all, was incidentally involved by the determination of the question whether or not it was a case of misfeasance or non-feasance, and therefore, in his opinion it was better to leave the question open till a later stage.

From this decision an appeal was had, by leave, to the Divisional Court (Britton, Teetzel and Riddell, JJ.), and the order of the Chancellor was reversed and the order of the Master in Chambers was restored. Mr. Justice Riddell dealt very fully with the question, and came to the conclusion that s. 104 is not confined to cases of mere non-feasance, but in effect applies to every action for injuries sustained through "non-repair" of streets or sidewalks, however occasioned, where it is sought to make a municipality liable, and in his opinion "non-repair" means "a condition" quite irrespective of the question of how it has been brought about. At the same time the Divisional Court did not agree with the suggestion that the determination that the case was triable without a jury, necessarily involved the conclusion that the action was one within s. 606 of the Municipal Act.