

CASES
 DETERMINED BY THE
SUPREME COURT OF CANADA
ON APPEAL
 FROM
DOMINION AND PROVINCIAL COURTS
 AND FROM
 THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE CITY OF SAINT JOHN (DE- } APPELLANTS; 1892
 FENDANTS). }
 AND *Feb. 19, 1922.
 JAMES J. CHRISTIE (PLAINTIFF) *May 2.
 ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence not pleaded—34 V. c. 11 (N.B.)—25 V. c. 16 (N.B.)

The act incorporating the town of Portland (34 V. c. 11 [N.B.]) gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By s. 84 the provisions of 25 V. c. 16 and amending acts, relating to highways, apply to said town and the powers, authorities, rights, privileges and immunities vested in commissioners and surveyors of roads in said town are declared to be vested in the council. By another act no action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, remaining subject to the said provisions, and eventually a part of the city of St. John.

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a side-walk in said city and breaking his leg. More than a month before the action was commenced plaintiff's solicitor wrote to the council notifying them of the injuries sustained by plaintiff, and concluding: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:" except this no notice of action was given, but want of notice was not pleaded. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said side-walk. After Portland became a part of St. John the latter city became defendant in the case for subsequent proceedings.

Held, Strong J. dissenting, that the city was liable to C. for the injuries so sustained.

Held, per Ritchie C.J. and Strong J., that the letter of the solicitor was not a sufficient notice of action under the statute.

Per Ritchie C.J. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.

Per Taschereau, Gwynne and Patterson JJ. Notice was not necessary; the liability of the city did not depend on s. 84 of 34 V.c. 11, but on the sections making it the duty of the council to keep the streets in repair; and the only privilege or immunity possessed by the commissioners and surveyors of roads was that of exemption from the performance of statute labour.

Per Strong J. One of the "immunities" declared to be vested in the council was that of not being subject to an action without prior notice and no notice having been given in this case C. could not recover.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial.

The action was originally brought against the city of Portland for injuries sustained by the plaintiff in walking along a plank side-walk in said city and stepping on a rotten plank which gave way whereby he broke his leg. The city of Portland subsequently became a part of the city of St. John and the latter city

appeared as defendants in the proceedings in the action after the union.

The action was twice tried, the verdict for the plaintiff on the first trial having been set aside and a new trial granted (1).

The main contention of the defendants is that they were entitled to notice of action which was not given, the notice relied on by plaintiff being, as they contend, insufficient. It was a letter from plaintiff's solicitor to the council as follows:—

JULY 9th, 1888.

The Council of the City of Portland:

Gentlemen,—In behalf of Mr. J. J. Christie, of the city of Saint John, dealer in shoe findings, and as his attorney, I have to notify you that on Friday last, in consequence of a defective side-walk in your city, he fell and received severe injuries from which he is now, and for weeks will be, confined to his bed. As it is Mr. Christie's intention to claim damages from you for such injuries I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to.

They rest this defence on statutes governing the town of Portland before it was incorporated as a city, which are as follows:—

The town was incorporated by 34 Vic. ch. 11 and the 84th section of that act provides that:—

“All the provisions of an act made and passed in the 25th year of the reign of Her present Majesty, intitled, ‘An act in amendment and consolidation of the Laws relating to Highways and of the several Acts in amendment thereof,’ except so far as the same are altered by or inconsistent with the terms of this act, shall extend and apply to, and are declared to be in force, so far as the same are applicable, within the said town of Portland; provided, that the several powers and authorities, rights, privileges and immunities by the said Acts of Assembly vested in the General Sessions

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of the Peace for the city and county of Saint John and Commissioner and Surveyors of Roads within the said town shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe."

Then 31 Vic. ch. 19 sec. 1, provides that: "The provisions of the first and second sections of the Revised Statutes, ch. 56, 'Of Actions against Officers and Recovery of Penalties,' * * * shall extend and apply to Commissioners of Highways for anything done in the execution of any office created or the duties of which are performed under any of the provisions of an act made and passed in the 25th year of the reign of Her present Majesty, intituled An Act in Amendment and Consolidation of the Laws relating to Highways or of any Act or Acts in amendment thereof or in relation thereto."

R. S. N. B. ch. 56 secs. 1 and 2 above referred to are as follows:—

"Sec. 1. No action shall be brought against any person for anything done by virtue of an office held under any of the provisions of this title, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county where the cause of action arose."

"Sec. 2. The defendant in any such action may plead the general issue and give any part of this title and the special matter in evidence. If it appear that the defendant acted under the authority of this title, or of any regulations made by the powers conferred thereby, or that the cause of action arose in some other county, the jury shall give him a verdict."

Under these statutory provisions the defendants claimed that one of the rights, privileges and immu-

nities enjoyed by a Commissioner of Highways was that no action could be brought against him for anything done in the execution of his duties without a month's previous notice thereof, and that such right, privilege or immunity was vested in the Council of the town of Portland and is enjoyed by the defendants.

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The defendants claimed, also, that the broken plank causing the accident was beyond the line of the street and on private property as to which they were not liable.

The jury found the questions of fact in favour of the plaintiff, certain questions being submitted which, with their answers thereto, were as follows:—

1. Was the side-walk properly constructed in the first instance?

Yes.

2. Were the two streaks of plank spoken of by Tomney placed by him on the vacant lot, and outside the line of the side-walk ordered by Supervisor Dunlap?

No.

3. Were those planks within the city line?

Yes.

4. Did the city use, or by their conduct invite the public to use, the whole side-walk, at this place, including the two streaks, next to or on the vacant lot?

Yes

Verdict for plaintiff—Damages \$1 500.00.

The defendants moved for a nonsuit or new trial which the court refused, the majority holding that notice of action was not necessary. They then appealed to this court.

Jack Q.C., Recorder of St. John, for the appellants: The corporation is not liable for non-feasance. *Dwyer v. The Town of Portland* (1).

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As to the general liability of a corporation for negligence see *Burns v. City of Toronto* (1); *Oliver v. Worcester* (2); *French v. City of Boston* (3); *Ross v. Fedden* (4).

As to limitation of action see *Burton v. Mayor, etc., of Salford* (5).

Pugsley, Sol.-Gen. of New Brunswick, for the respondent, referred to *Clarke v. The Town of Portland* (6); *The Town of Portland v. Griffiths* (7).

Sir W. J. RITCHIE C. J.—On the merits of this case I think the verdict of the jury is not open to objection and should not be disturbed, and therefore the simple point in the case turns on the question of notice of action. Were defendants entitled to notice of action? If so, was it given? If not, was want of notice pleaded or was it necessary to plead it? The statutes in England that require notice of action to be given make special provisions therefore as in 11 & 12 Vic. ch. 44 s. 9, which requires that the notice should be in writing, in which notice the cause of action and the court in which the case is intended to be brought shall be clearly and explicitly stated, and upon the back thereof shall be endorsed the name and place of abode of the party intending to sue, and also the name and place of abode or business of the attorney or agent, if such notice has been served by such attorney or agent. In the present case the statute simply states "that no action shall be brought unless within three months after the act committed and upon one month's previous notice in writing," but nothing as to the contents of notice.

(1) 42 U.C.Q.B. 560.

(2) 102 Mass. 496.

(3) 129 Mass. 592.

(4) L.R. 7 Q.B. 661.

(5) 11 Q.B.D. 286.

(6) 19 N.B. Rep. (3 P. & B.) 189.

(7) 11 Can. S.C.R. 333.

In England it has been held that in construing notice of action under the various statutes requiring them the court will not subject them to too nice and narrow an examination, the object being that they should be plain and intelligible to plain men. See *Jones v. Nicholls* (1).

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The notice in this case is as follows :—

JULY 9th, 1888.

THE COUNCIL OF THE CITY OF PORTLAND :

Gentlemen,—In behalf of Mr. J. J. Christie of the city of St. John, dealer in shoe findings, and as his attorney, I have to notify you that on Friday last, in consequence of a defective side-walk in your city, he fell and received severe injuries from which he is now, and for weeks will be, confined to his bed. As it is Mr. Christie's intention to claim damages from you for such injuries I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to. I remain,

Yours truly,

MONT. McDONALD,

Attorney-at-Law.

I cannot think this a sufficient notice ; there is nothing whatever to convey to the Council of the City of Portland an intention to bring an action.

If it was necessary to plead want of notice this was clearly not done, the only pleas being :

1. That it was not the duty of the defendants to keep the said streets and highways, and the side-walks thereof, in a safe and proper condition for the passage to and fro over and along the same of the city of Portland and other good and worthy subjects of our lady the Queen, as alleged.

2. That the defendants were not bound to keep the said Straight Shore Road and the side-walks thereof in repair as alleged.

3. That the defendants did not undertake to repair and keep in repair the said Straight Shore Road and the side-walks thereof as alleged.

4. That the defendants did not construct upon and along the said street, road and highway, upon one side thereof, a plank side-walk for the public to walk upon, as alleged.

5. That the defendants did not negligently and improperly construct

1892 the said side-walk and afterwards negligently and improperly repair
 THE CITY the same, and that in consequence of such neglect and improper con-
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 JOHN the said side-walk became and was dangerous and unsafe for persons
 v. walking along and upon the same as alleged.
 CHRISTIE. By statutes, 1 R.S.N.B. cap. 56, ss. } And the said defendants, by
 Ritchie C.J. 1 and 2; 31 Vic. cap. 19 ss. 1 } E. R. Gregory, their attorney,
 ——— and 2; 34 Vic. cap. 11 s. 84. } say they are not guilty.

That it was necessary the following cases would seem clearly to establish, there being no statute authorizing the general issue to be pleaded and the special matter to be given in evidence under it. The general issue merely denies the fact of the commission of the injury complained of. In *Davey v. Warne* (1) where an act provided that plaintiff should not recover in an action for anything done in pursuance of the act unless 21 days' notice of action was given, it was held that the defendant must plead the want of such notice or he could not avail himself of it. This case seems to be directly in point. In this case Alderson B., delivering the judgment of the court says, "as to the notice of action, we are of opinion that the want of it ought to have been pleaded as a defence to the action. It is an important point, but I do not entertain any doubt about it."

See also *Richards v. Easto* (2) and *Law v. Dodd* (3) which are equally in point.

STRONG J.—I can come to no other conclusion than that this appeal must be allowed for the reason that the appellants were entitled to notice of action and that no such notice was given. This was the opinion of Mr. Justice Tuck on the first application for a new trial in this cause. The 1st and 2nd sections of 31 Vic. cap. 19 made the 1st and 2nd secs. of cap. 56 of

(1) 14 M. & W. 199.

(2) 15 M. & W. 244.

(3) 1 Ex. 848.

the Revised Statutes of New Brunswick applicable to Commissioners of Highways, and by the provisions of the last mentioned enactment one month's notice of action was required to be given to public officers to whom the statute applied.

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By 34 Vic. ch. 11 sec. 84 the provisions of an act passed in 25 Vic., amending and consolidating acts relating to highways, were made applicable to the town of Portland, and it was provided that the powers, authorities, rights, privileges and immunities vested in the commissioners and surveyors of roads "within the said town" were vested in the town council of Portland. Subsequently these powers and immunities were successively transferred to the city of Portland and to the present appellants.

The first question raised is whether the right to notice of action is included within the word "immunities," and differing with great respect from the learned Chief Justice of New Brunswick I am of opinion that it is. The exceptional right not to be sued as an ordinary individual without a preliminary notice according to the course of the common law is surely a privilege and immunity. I can think of no general and comprehensive word by which such a right could be better expressed than this word "immunity."

It is said however, (and it was the ground on which Mr. Justice King in his judgment on the first motion for a new trial held that notice was not requisite), that the right to notice under the provision mentioned does not apply to the surveyors of roads but is confined to the commissioners of roads, and that the negligence imputed to the city in the present case was a neglect imputable to it in its character of surveyor of roads rather than in that of commissioners of roads. With great respect I am unable to agree in this distinction. As commissioners of roads the city were bound to re-

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pair, and the accident for which the action is brought arose from a neglect to repair. I regard the surveyors as executive or subordinate officers to carry out the duties imposed on the commissioners, but I take it that the commissioners are bound to repair and to see that the surveyors properly perform their duties in executing repairs of the streets and side-walks. Further, it appears to me that the duties of the two offices of commissioners and surveyors transferred to the city have become so blended that any distinction between them in respect of such a matter as that of repairing cannot be any longer maintained, and that the city is entitled in all matters relating to streets to the immunities of the commissioners.

That the letter of Mr. Macdonald on the 9th of July, 1888, addressed to the Portland Council and received by the mayor, was not a sufficient notice of action to meet the requirements of the statute can scarcely be doubted. The case of *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1), referred to by Tuck J. is conclusive on this head (2).

The appeal should be allowed.

TASCHEREAU J. — I would dismiss this appeal. I do not think a notice of action was necessary. Mr. Justice King fully demonstrates it in his judgment in the court below on the first motion. On the second ground taken for a new trial, that there was no evidence of such negligence as would make the appellants liable, I think they also fail. The defect was not a latent one; on the contrary, the evidence shows that this side-walk, which was built of plank and raised about two feet above the level of the ground, had been allowed to go to decay so that it had become dangerous. The

(1) 9 App. Cases 365. in Clerk & Lindsell on Torts, pp.

(2) And see also cases collected 86 to 88.

other grounds for their motion taken by the appellants have been disposed of by the judgment appealed from against their contentions. I see no ground of appeal in any of them.

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GWYNNE J.—The town of Portland was incorporated by a statute of the legislature of the province of New Brunswick, 34 Vic. ch. 11. By the 57th section of that act the town council was empowered to make by-laws, among other things :

To provide for making, paving, flagging, planking and repairing the streets, side-walks, crossings, roads, &c.

Also, by subsec. 17 :

To cause lands lying along and below the level of any way, side-walk, street or thoroughfare to be properly inclosed and fenced at the cost and expense of the owners, and to recover such expenses with costs in a summary manner, provided that the said town shall not be in any way liable for any injuries or damages whatsoever occasioned by the neglect of such owners to erect and maintain any such fence, but the said owners shall be liable therefor.

Then by the 83rd section it enacted that :

The town council shall have the sole and exclusive management and control of all roads, bye roads, highways, streets, side-walks, &c., &c., within the said town, and power to repair, amend and clean the same, &c., &c., and shall control the expenditure of all moneys assessed and collected or expended from the general revenues of the said town, for and on account of the making, repairing and improvement of any such roads, bye roads, highways, streets, side-walks, &c., &c.

Then by section 117 it is enacted that the town council shall have power at their first meeting after the annual election of councillors in each year, or so soon thereafter as may be, to determine and direct what sum of money to the amount of fifteen thousand dollars shall be raised and levied in the town for, among other purposes named, "making and repairing the roads, streets, &c., &c., within the said town." Then by section 128 it is enacted that :

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All assessments which now are or hereafter may be required to be levied in the said town for town or county purposes, shall be levied and assessed and collected under the provisions and according to the principles of this act, anything in any law or statute contained to the contrary notwithstanding.

Then the statute defines the provisions and principles upon which assessments are to be made, in the sections from 129 to 141 inclusive. By the 129th section it is enacted that :

All rates, taxes or assessments levied or imposed upon the said town shall be raised as follows :—

1st. One-tenth of the whole amount of such rate, tax or assessment shall be assessed and levied by an equal tax on the poll of every male inhabitant of the said town above the age of 21 years.

2nd. The remaining nine-tenths of the whole amount of such rate or assessment shall be assessed and levied in due proportion upon the whole value of all real estate situated in the said town of Portland, and upon the personal estate of the inhabitants thereof wherever the same may be, after deducting from such personal estate the just debts of such inhabitants respectively, and also upon the amount of annual income or emoluments of such inhabitants derived from any office, profession, trade, business, place, work, labour, occupation or employment whatsoever within the province, and not from invested real or personal estate of such inhabitants, and also upon the capital stock, income or other thing of joint stock companies or corporations, &c.

Now it cannot be doubted, I think, that by the above sections alone, without any other, exclusive power to make and repair the streets and side-walks in the town was vested in the corporation, and that, to enable them effectually to exercise the power, they are empowered to pass by-laws for raising and levying all rates, taxes and impositions which can be levied, collected and enforced for that or any other purpose. Under these powers they did in 1878 construct the side-walk where the plaintiff sustained the injury of which he complains. That side-walk was suffered to fall into and was in a very defective condition when the plaintiff sustained his injury: it therefore, upon the authority of the *Borough of Bathurst v. Macpherson*,

(1) became a duty imposed upon the corporation to maintain the structure supplied by them for public use in a fit state of repair, the neglect to discharge which duty would subject them to an action at the suit of a person injured thereby whatever might be their liability to put their streets and side-walks into, and to keep them in, a good state of repair. It is not, perhaps, necessary in the present case, for the reason above given, to determine what is the full extent of the obligation imposed upon the appellants generally in relation to the streets, &c., placed under their exclusive control and management. But the general impression I think is, and for my part I am prepared to express the opinion, that when such exclusive powers are vested in municipal corporations as they are constituted in this Dominion the correlative obligation to exercise the powers is imposed, and that neglect to discharge such obligation gives to a party injured a right of action. The provision made by subsection 17 of the 57th section of the act, which exempts the corporation from liability for injury sustained by any person from the neglect of the owners of lands lying along and below any side-walk to fence their property from the side-walk, would seem to imply that the legislature entertained the view that for injuries ensuing from a defective side-walk within the limits of streets which by the statutes are placed under the sole and exclusive management and control of the town council, the corporation are liable. Evidence was given by the defendants for the purpose of establishing that, and it was strongly insisted that the evidence so given did establish that, the place where the plaintiff sustained injury and the cause of such injury arose outside of the line of the street, with the view of claiming the benefit of exemption from liability under the pro-

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vision of the said 17th subsection of section 57, as the land adjoining did lie along and below the level of the side-walk ; but the jury, with all the evidence upon that subject before them, have found that the injury was sustained within the limits of the street, and for defect of a very grave description within the limits of the side-walk on the street, and I cannot say that this finding was not warranted by the evidence. Moreover it is to be observed that the particular plank, the defective condition of which was the immediate cause of the injury, had been laid by the defendants or under their authority, and extended, as by the defendant's own contention is claimed, beyond the limits of the street. However the jury have found that the injury occurred within the limits of the street, and by defect in the side-walk within such limits.

For the purpose of determining the question as to the liability of the defendants, apart from the question whether or not they were entitled to notice of action, there is no necessity whatever, in my opinion, to refer to the 84th section of the act at all. The liability of the defendants rests wholly upon the other sections of the act above quoted, and the fact that they had constructed the sidewalk where the injury was sustained. However the defendants contended that under that section they were entitled to notice of action. But this contention appears to me to involve the assumption that the liability of the corporation, if any there be, arises under the provisions of this 84th section, the object and utility of which, as affecting an action like the present, I confess I have been unable to see. The section enacts that :

All the provisions of an act made and passed in the 25th year of the reign of Her present Majesty intituled, "an act in amendment and consolidation of the laws relating to highways and of the several acts in amendment thereof" except so far as the same are altered by or inconsistent with the terms of this act, shall extend and apply to and are

declared to be in force, so far as the same are applicable, within the said town of Portland : Provided that the several powers and authorities, rights, privileges and immunities by the said acts of Assembly vested in the General Sessions of the Peace for the City and County of St. John, and commissioners and surveyors of roads within the said town, shall be and the same are hereby vested in the town council to be exercised in such manner and through such officers, agents and persons as they shall prescribe.

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The act above referred to as passed in the 25th year of Her Majesty's reign is ch. 16 of the statutes of that year. The powers and authorities vested in the commissioners and surveyors of highways by that act were designed solely to enable them "to enforce and superintend the performance of the statute labour for such districts as they should be assigned to by the justices in general sessions," as appears by the 2nd section of the act. By the 11th section they were required and empowered "carefully to mark out all the roads laid out, altered or extended under their direction by the provisions of this act," in the manner described in the section. By the 15th section it was enacted that:

All the public roads, streets and bridges in each county shall be cleared, maintained and repaired by the male inhabitants thereof being twenty-one years of age (with certain exceptions) who shall work, either in person or by sufficient substitutes, with such instruments as the surveyors shall direct, the number of days as follows, namely, all persons of twenty-one years of age and above—three days; and for any real or personal estate he may possess not exceeding four hundred dollars—one day; exceeding four hundred and not exceeding twelve hundred—two days; exceeding twelve hundred and not exceeding two thousand dollars—three days—and so on in like manner for every eight hundred dollars one day additional for any real or personal estate he may possess not to exceed thirty days in any one year.

Then by section 16 it was enacted that the estates of females and minors should be assessed in the same manner as the estates of residents, but that any assessment upon their property might be paid for in labour by substitutes. Then by section 18 the commissioners in each parish were required:

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By the 1st day of May in each year to make a list of the inhabitants of such parish and assess the number of days to be performed by them respectively according to the best of their judgment, &c., &c.

Then by the 19th section they were empowered:

Previous to the commencement of the labour to receive from any person assessed to perform such labour 50 cts. for each days' labour required in lieu of the labour.

And in such case they were required to let out the work by public auction to the lowest bidder and to apply such commutation in payment of the work performed by the persons to whom it should be so let. By section 20 the surveyors were required when directed by the commissioners:

To summon at the most suitable time between the 1st day of May and the 1st day of August in each year the inhabitants, giving at least six days' notice either by personal service, or by leaving the notice at the place of residence, or by publishing the same in writing in three of the most public places in the district which shall contain the names, the number of days' work to be done by each person respectively, and the instruments to be used by each, the labour to be expended in making or improving the roads and bridges in the best manner, subject to the orders of the commissioner.

In short, the whole duty imposed by the act upon commissioners and surveyors of highways is that of providing for the distribution of statute labour under the above sections, and a few others relating to roads in the snow in winter, and the only "privilege and immunity" conferred by the act upon the commissioners and surveyors of highways is contained in the 36th section, which enacts that:

All commissioners and surveyors of roads shall be exempted from the performance of statute labour.

By the 42nd section for any neglect of duty imposed upon them by the act, they are subject:

For every offence to a penalty of not less than eight dollars nor more than twenty dollars to be recovered on the complaint of any freeholder, one-half to be paid to the person suing for and recovering the same and the other half to be applied for the improvement of the roads in the district where the offence was committed.

Now the provision which is made for the repairing of the streets, side-walks, &c., of the town of Portland by the act 34 Vic. ch. 11, and for raising the funds necessary for that purpose by a poll tax upon every male inhabitant, and rates and taxes levied upon all real and personal property in the town, is so essentially different from the method by statute labour as provided by 25 Vic. ch. 16, that the provisions of this latter statute can more properly, in my opinion, be said to come within the exception contained in the words "except so far as the same are altered by or inconsistent with the terms of this act" in the 84th section of 34 Vic. ch. 11; for the repairing of roads by statute labour as provided by 25 Vic. ch. 16 is wholly inconsistent with the other clauses of 34 Vic. ch. 11, whereby the repairing of the streets, side-walks, &c., in the town of Portland is otherwise provided for. How section 84 came to be inserted in the act at all is, to my mind, inconceivable unless it was hastily and inconsiderately and unobservantly inserted while the bill was passing through the legislature.

The argument addressed to us on behalf of the appellants assumed that this action, if it lay at all, did so under and by force of this 84th section, and further, for which no authority was cited, that an action of this nature would have been, under the circumstances appearing here, against commissioners of highways before the incorporation of the town, and that therefore the appellants were entitled to notice of action which was a privilege conferred upon commissioners of highways by 31 Vic. ch. 19. Whether a commissioner of highways would or would not be at all liable in an action of the nature of, and under the circumstances of, the present one we need not determine, for the liability of the appellants depends not at all, in my opinion, upon this 84th section, but upon other sec-

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tions of their act of incorporation which places all the streets, side-walks, &c., in the town under their absolute control, and gives them power to provide the funds to make them and keep them in repair. I am of opinion that no notice of action was necessary, and that the appeal must be dismissed with costs.

PATTERSON J.—I agree to the appeal being dismissed on the grounds stated by Mr. Justice Gwynne.

Appeal dismissed with costs.

Solicitor for appellants : *I. Allen Jack.*

Solicitor for respondent : *Mont. McDonald.*
