1946 *Present :* **Cannon and de Silva JJ.**

URBAN COUNCIL, KURUNEGALA, Appellant, *and* BANDA, Respondent.

59—D. C. Kurunegala, 2,017.

Tort—Action against Urban Council for damages caused by lorry employed on scavenging work—Notice of action necessary—Time limit for institution of action—Urban Councils Ordinance, No. 61 of 1939, ss. 131, 231 (1) and (2).

Where an Urban Council was sued for damages for injury caused by the negligent driving of a lorry driver employed by the Council and it was established that the lorry was employed on scavenging work at the time of the accident—

Held, that the plaintiff should have, under section 231 (1) and (2) of the Urban Councils Ordinance, given one month's notice to the Council of intention to sue them and that he should have instituted the action within six months next after the accrual of the cause of action.

APPEAL from a judgment of the District Judge of Kurunegala.

E. B. Wikramanayake, for the defendant, appellant.

E. A. P. Wijeyeratne (with him *G. T. Samarawickreme*), for the plaintiff, respondent.

Cur. adv. vult.

March 8, 1946. CANNON J.—

This was an action against the Kurunegala Urban Council for damages for injury caused by the negligent driving of a lorry driver employed by the Council. A preliminary objection was taken that the plaintiff had not complied with the Urban Councils Ordinance of 1939, s. 231 (1) and (2), which requires notice to be given to the Council of intention to sue them and imposes a time limit for the commencement of the action of six months from the date of the cause of action. It was admitted that no such notice was given to the Council and that the time limit had been exceeded. The District Judge did not uphold the objection, apparently on the ground that s. 231 had no application to cases of negligent driving. The appeal is against that decision.

The requirements of s. 231 apply to any action against the Council " for anything done or intended to be done under the powers conferred by this Ordinance ". Section 131 of the Ordinance makes it the duty of the Council to take all measures necessary for scavenging ; and it was admitted for the plaintiff that the lorry was employed on scavenging work at the time of the accident.

But while conceding that the driver was acting within the scope of his employment, Mr. Wijeratne contended that the accident happened while he was doing something collateral to the act intended to be done. *Whatman v. Pearson* [1] was cited for this proposition. That case was relied upon in *Edward v. Vestry of St. Mary, Islington* [2], in which the plaintiff was a driver employed by contractors, who had contracted with the Vestry to provide them with horses and drivers for their carts

[1] *L. R. (1868) 3 C. P. 422.* [2] *(1889) 22 Q. B. D. 338.*

used in watering the streets under statutory powers. The defendant Vestry negligently supplied a cart with a defective axle, in consequence of which the plaintiff, while driving the cart to water the streets was thrown off and injured. In an action for damages sustained through the defendant's negligence, the Judge left to the Jury the question whether the defendants were guilty of such negligence as would entitle the plaintiff to recover. The Jury found a verdict for the plaintiff, damages £ 100. The Judge entered judgment for the defendants on the ground that no notice of action had been given to them, nor had the action been commenced within six months next after the accrual of the cause of action, so as to satisfy the requirements of s. 106 of 25 and 26 Vict., c. 102. This section makes provision for notice and a time limit similar to s. 231 in the Ceylon Ordinance above mentioned as regards any action against a Vestry "for anything done or intended to be done under the powers", &c. On appeal the Court of Appeal held that the defendants were entitled to notice of action under 25 and 26 Vict., c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing "done or intended to be done" under the powers of the Vestry under the Act empowering them to water the streets. Bowen L.J. at page 342, referring to *Whatman v. Pearson* (*supra*) said :—

> "That case is entirely distinguishable. The action was against the contractor, not against the Board. The negligence was the negligence of one of the servants employed by the contractor to cart away the soil. Contrary to his instructions, the servant went home, taking his horse with him and leaving it in the street outside his house whilst he had dinner. The horse ran away and damaged the plaintiff's railings. The Jury found and the Court upheld the finding, that the servant was acting within the scope of his employment by the contractor. The contractor, therefore, in order to escape liability, had to prove that what was done was under the powers of the Board under the Statute. The Court held that he was not so acting, but that what he did was wholly collateral and not within the scope of any authority conferred by the statute".

In the present case the question is whether this accident which, but for the provisions of s. 231 with regard to notice and time limit would give an ordinary right of action to the plaintiff, happened in consequence of something done or intended to be done under the powers of the Council. In order to collect refuse the Council must obviously supply vehicles, and in my opinion this action must be treated as one founded on the breach of a duty by the Council to supply carefully-driven vehicles for the scavenging duties and powers which s. 131 imposes on them. Notice was therefore required under s. 231 and the time limit also applied.

I allow the appeal and set aside the order of the District Judge and dismiss the plaintiff's action. In the special circumstances, however there will be no order as to costs.

DE SILVA J.—I agree.

Appeal allowed.