Legal Department.

J. M. GLENN, Q. C., LL. B.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

Re Sturgeon Falls Electric Light and Power Co., and Town of Sturgeon Falls.

Judgment on application by the company to enforce an award. The reference was based upon an agr ement made in September, 1898, between the municipality and one Bremner, whereby the latter was empowered to establish an electric light plant and appliances in the streets of the town, and to operate same for ten years. It was provided that disputes arising under the agreement as to the working of the power should be referred to arbitration in the usual way, by each party choosing an arbitrator, and they two a third in case of dispute, and the award of a majority to be binding. Provided also, that the town might at any time during the ten years purchase the electric light plant at a valuation fixed by three arbitrators as before indicated, or by a majority of them On August 6, 1900, the town passed a resolution to purchase the plant and arbitrate as to the price, but meanwhile Bremner had assigned his rights and property in the plant to the Sturgeon Falls Electric Light and Power Co. On September 8, 1900, the municipality appointed Mr. Parker by by-law to be the town arbitrator, and on September 28, Mr. McKee was appointed by the company. Objection was made to Mr. McKee, as not being a disinterested referee, and Mr. Parker declined to proceed on that account, and also because he was notified by the town solicitor that the council declined to proceed further with the arbitration, and notice to that effect was served on the company's solicitor. This recession appeared to be the result of the changed policy of the town, who then sought to proceed under section 566, subsection 4, of the Municipal Act, empowering the construction of such works after fixing a price by by-law to offer for the works of the existing light company. With this intent a by-law was passed by the town on November 15, 1900, fixing the price at $3,436.16, of which no notice was taken by the company, and no action taken thereon. On November 12 the company served notice on the corporation that Dr. Bolster was appointed arbitrator on behalf of the company, and notified the corporation that after the expiry of seven days he would proceed to make his award in the event of the arbitrator for the corporation refusing to proceed. Early in 1901 Mr. Parker was elected mayor of the town of Sturgeon Falls. On January 31 the company served on the corporation a notice to appoint an arbitrator in the place of Mr. Parker. Nothing having been done or said by the corporation, the company, on February 15, (as was stated by affidavit,) appointed Dr. Bolster as sole arbitrator, but did not notify the corporation of the appointment. On February 20 Dr. Bolster gave notice to the corporation that he appointed February 25 for proceeding in the reference, and in case of failure to attend by the corporation he would proceed *ex parte*. No notice was taken of this by the town, and the award was made by Bolster alone, no cause being shown, on March 18, 1901, fixing the price of the plant at $10,998.60. By R. S. O., ch. 62, section 8, (b) there is power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator to act as sole arbitrator, and it is provided that the court or judge may set aside any such appointment. Held, that the corporation, not having been notified of the appointment of a sole arbitrator, were not called upon to move against it. But, if the Arbitration Act applied, section 8 did not apply. The last clause of the agreement did not suspend the choice of third arbitrator till there should be a dispute, but it imported, in conformity with the Municipal Act, that the three arbitrators should act from the outset. Re Employers' Liability Assurance Corporation and Excelsior Life Insurance Co., 2, O. L. R. 301, is not so much in point as Gumm vs. Hallett, L. R. 14, Eq. 556. If this proceeding was, as it seemed to be, under the Municipal Act, section 8, of the Arbitrations Act, was not applicable. R. S. O., ch. 223, section 467. Application dismissed with costs.

Minns vs. Village of Omemee.

Judgment in action tried at Lindsay, brought by a husband and wife to recover damages. The plaintiffs live in the village. The defendant Graham is a hotelkeeper on the corner of King and George Streets, and left open and unprotected a hole in the sidewalk on George street connecting with his cellar. The female plaintiff fell into the hole and injured herself. Held, that the driver Lamb and the ostler Charlie were acting within the scope of their employment and for the benefit of their master, the defendant Graham, when engaged in unloading and storing the cask of beer by means of opening the trap-door covering the hole, and that their negligence in leaving it unprotected and without a light is attributable to the master, who is liable: Whatman v. Pearson, L. R. 3 C. P. 422; see also Whitehead v. Reader, 1901, 2 Q. B. 48. Held, also as to the corporation that no act of negligence had been proved against it—the opening was not proved to have been used from time to time in such a way as to be dangerous, whereby notice might be attributed to the corporation; and as long as the trap-door was kept closed the street was in good condition and no possible danger existed. The construction of the area or opening in the sidewalk was an act legalized by the legislature, R. S. O. ch. 223, sec. 639, and no fault is alleged in its construction and maintenance: Homewood v. City of Hamilton, 1 O. L. R. 266 distinguished, but assuming even that that case is conclusive against the corporation, it can only be on the ground of omission, not commission. At the highest the blame is non repair—an act of non-feasance, not mis-feasance, and thus regarded the action is one which should be brought within three months after the damages have been sustained: Secs 606, 608. Here eight months have elapsed, and time is pleaded. Upon the question of mis-feasance and non-feasance see Lambert v. ——, (1901), 1 K. B. 500, explaining dicta in Sydney v. ——, (1895), A. C. 433. As to village, action dismissed with such costs as would be taxable had the objection been raised as a question of law presented to the court before the trial, under rule 373. Judgment against defendant Graham for $550 damages to female plaintiff, and $250 damages to male plaintiff.

Sheard vs. Menge.

Judgment in action tried at Toronto, brought for damages and to compel defendant to remove his drain from the plaintiff's premises, lot 7 (sheet number 522), on Manning avenue, Toronto and restrain him from discharging sewage, etc., on plaintiff's premises by said drain. The defendant alleged that he purchased his premises, lot 7 (No. 520), in 1884, from the Scottish, Ontario and Manitoba Loan Co., which was then the owner of both premises, and the drain was then and has since been used, and is necessary for the reasonable use of the premises. Held, that the drain in question, having been constructed in 1882, and forming the communion outlet for the houses on lots 1, 2, 3, 4, 5, 6, 7, 8, the mutual rights enjoyed for such a long period should not be litigated in one action, and then another brought to settle those between 7 and 6, and so on through the series. The rights in the drain, too, may have, according to the evidence from the registry office, arisen prior to the conveyance to the plaintiff's predecessor in title of his lot 8, so that there may be a right of drainage in the common sewer paramount to the plaintiff's title. Plaintiff may amend, as advised, so as to have all owners, using the drain that he desires to have stopped, brought before the court. Costs already incurred to be disposed of by the trial judge when the record is complete, and all issues before him to be disposed of. The learned chancellor suggests that it is for the interest of all parties to agree in making junction with the city sewer which is now available, and equitably adjust expenses, rather than proceed to ascertain strict legal rights which appear to be doubtful.