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MACLENNAN, J.A. OCTOBER 2ND, 1902.

C.A.—CHAMBERS.

## CENTAUR CYCLE CO. v. HILL.

*Court of Appeal—Joint Appeal of Two Parties—Security Furnished by One—Payment into Court—Abandonment of Appeal—Motion for Payment out—Costs—Set-off—Increased Security—Limitation of Amount—Rule 830.*

Motion by defendant Love to have paid out to him $200 paid into Court as security for the costs of the appeal to the Court of Appeal by both defendants.

W. E. Raney, for defendant Love.

W. H. Blake, K.C., for defendant Hill.

W. E. Middleton, for plaintiffs.

MACLENNAN, J.A.—It appears that defendant Love has abandoned his appeal, having effected a settlement with plaintiffs (respondents) of the matters in dispute. The respondents do not object to the payment out, if, as between the appellants themselves, Love is entitled to have the money paid out to him. The objection that the motion for payment out ought to be made to a Judge of the High Court was waived, the parties agreeing to accept the decision of the learned Judge of Appeal, quantum valeat.

On the argument I decided that defendant Love was not entitled to succeed on his motion, defendant Hill desiring and intending to avail himself of the deposit and to proceed with the appeal. It appeared that, while the deposit was made by Love with his own money, the notice of appeal was a joint one, and the deposit was made in the name of both and for the joint benefit. It was, in effect, a loan or advance made by Love to or for the benefit of his co-defendant, which could not be recalled by undoing the purpose which it was intended to serve and to which it was applied. I, therefore, dismissed the motion with costs, but reserved the question of set-off.

By paragraphs 17 and 18 of the judgment appealed against, Love is entitled to be indemnified by Hill against all

amounts payable by him, Love, under the judgment, and to recover from Hill any amount so paid, and his costs of the action and the appeal from the Master's report. I, therefore, direct that the costs of Love's motion be set off against anything he may already have paid, or may ultimately have to pay, under those paragraphs of the judgment, as the result of the appeal.

Motion by plaintiffs for an order for increased security, on the ground that the appeal will be more than usually expensive.

W. E. Middleton, for plaintiffs.

C. W. Kerr, for defendant Hill.

MACLENNAN, J.A.:—As to the motion for increased security for costs, I think, having regard to the nature of the case and the proceedings before the Master and on the appeals from his report, the appeal will be more expensive than usual, and the security should be increased. But, upon the true construction of Rule 830, sub-secs. 1, 4, and 8, the sum paid into Court cannot be increased to more than $400.

Order made for payment into Court of an additional sum of $200. Costs of the motion to be costs in the appeal.

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MACMAHON, J. OCTOBER 3RD, 1902.

TRIAL.

## STOKES v. CONTINENTAL LIFE INS. CO.

*Fraud and Misrepresentation—Contract to Take Shares—Fraud of Agent—Notice to Company—Right to Recover Money Paid.*

The defendant company employed defendant Nesbitt as their agent to solicit subscriptions for the shares of the company. They supplied him with application forms for stock, and with blank receipts for the moneys he might obtain from those who paid the first instalment on the stock. Nesbitt and one Acheson went to plaintiff and asked him to become a shareholder. Plaintiff was not a business man, but a retired farmer. He at first absolutely declined to become a shareholder. A good deal of persuasion was used by Nesbitt and Acheson, and at last plaintiff signed, in pencil, an application for 50 shares, Nesbitt agreeing that he would not use the application in any way and would not shew it, and would return it in three or four days, if required. That application was cancelled. On a subsequent occasion Nesbitt visited plaintiff alone, and plaintiff then signed, in ink, a second application for 50 shares, Nesbitt saying: "If you sign this application, I will give you an agreement executed by myself and Mr. Acheson by which we will be bound to take these shares off

your hands if you are, within three months, dissatisfied with your bargain, and we will sell them and pay your money back." After the application was signed, Nesbitt told plaintiff to meet him at a bank, and when plaintiff paid the money, Nesbitt would give him the agreement signed by himself and Acheson. Plaintiff paid the money, but never received the agreement. This action was brought against the company and Nesbitt to recover back the money so paid, the plaintiff alleging false and fraudulent representations by Nesbitt.

The action was tried at Stratford without a jury.

J. P. Mabee, K.C., for plaintiff.

E. Coatsworth, for defendant company.

R. S. Robertson, Stratford, for defendant Nesbitt.

MacMahon, J.:—I find that Stokes was induced to part with his money on the promise that the agreement would be given to him at the bank when the money was paid; and he went there for the purpose of concluding the transaction on the basis of the agreement being executed by both Stokes and Acheson. . . . Nesbitt did not impress me favourably, and I could not, in the face of Acheson's denial of his having consented to sign any agreement, find that a promise was ever made by Acheson to Nesbitt to sign such an agreement. Nesbitt having got the plaintiff's money under the circumstances stated, I think he deliberately planned a fraud upon Stokes, whose money he obtained.

Before any allotment of stock was made to Stokes, he wrote to the company that the agreement had been promised him, and that Acheson repudiated having made any promise to Nesbitt to sign the agreement. So that, in fact, before there was any allotment of stock made or any stock certificate issued, the defendant company was aware of the alleged fraud of their agent.

Mr. Coatsworth contended that the agreement which Nesbitt promised to give Stokes was an independent collateral agreement of the agent acting on his own behalf, and not within the scope of his authority as agent for the company. The giving of the agreement referred to led up to and formed part of the very contract into which plaintiff consented to enter. On the strength of the agent's representation that Acheson had promised to execute the agreement, Stokes parted with his money, which was immediately forwarded by the agent to the defendant company. Nesbitt had no authority to make the fraudulent representation to Stokes which induced him to part with his money, but, as I have already said, that fraudulent representation formed part of the contract of which the company got the benefit.

[Barwick v. English Joint Stock Bank, L. R. 2 Ex. at p. 265, Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394-411, Ranger v. Great Western R. W. Co., 5 H. L. C. 86, and Adie v. Western Bank of Scotland, L. R. 1 H. L. Sc. 145, referred to as justifying the conclusion that the defendant company were affected by the agent's fraud. Nasmith v. Manning, 5 A. R. 126, distinguished.]

The defendant Nesbitt was a proper party to the suit, and the plaintiff was not bound to elect against which party he would take judgment. See Addison on Torts, 6th ed., p. 748.

There will be judgment for plaintiff against both defendants for the sum of $650, with interest from 12th December, 1899, together with costs of suit.

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BELL, HORNE, MACWATT, CO. C.JJ. SEPTEMBER 1ST, 1902.

ASSESSMENT APPEAL.

## RE UNITED GAS AND OIL CO. OF ONTARIO AND TOWNSHIP OF COLCHESTER SOUTH.

*Assessment and Taxes—Valuation of Property—Gas Pipes—Natural Gas Company.*

An appeal by the company from the decision of the Court of Revision for the township of Colchester South confirming an assessment.

J. H. Coburn, Walkerville, for the appellants.

J. H. Rodd, Windsor, for the township corporation.

The judgment of the Board of County Court Judges was delivered by

BELL, CO. J.—The appellants were assessed in this township for the year 1902 for 44,626 feet of 8-inch pipe, all of which, with the exception of 594 feet, is on private property.

The Court of Revision confirmed the assessment.

All of the above pipe was, when the assessment was made, in actual use for conveying natural gas from the wells in an adjacent township to Windsor, Walkerville, and other places, where it was used for supplying heat.

It appears from the evidence that for a number of years prior to and including the first part of the year 1901, there was a large supply of gas, and the business of the company was carried on at a profit. It further appears that in 1901 there was a great falling off in the supply of gas, continued up to the present time, and that the income of the company was practically expended in the expenses connected with the carrying it on, notwithstanding an increase of 20 per cent. in the selling price of the gas.

Up to the passing of 2 Edw. VII. ch. 31 the company was liable to assessment for the cash value of the pipes "estimated as if appraised in payment of a just debt from a solvent debtor." On this basis the evidence is that 8-inch pipe should be assessed at 10 cents per foot, but only pipe on public property is assessable under the Act.

The statute passed at the last session has entirely changed the basis of assessment, and, when this assessment was made, the law was that "the pipes, conduits, etc., shall, when and so long as in actual use, be assessed at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises in and from the municipality, and subject to similar conditions and burdens, regard being had to all circumstances adversely affecting their value, including the non-user of such property."

The evidence herein shews that, owing to the failure in the supply of gas, there is practically no profit in carrying on the business, or that the profit is very small; that, notwithstanding continuous efforts to obtain a further supply by sinking new wells, no further supply has been obtained. Under these circumstances, what would be the actual cash value of the pipes, etc., "as the same would be appraised upon a sale to another company," etc.? The evidence, in our opinion, warrants the conclusion that as a going concern they could not be appraised as having any cash value. We are also of opinion that the pipes, etc., might properly be appraised upon a sale to another company at the price that they would bring in the market. We find that the cash value of the taxable pipe on public property is 594 feet of 8-inch pipe at 10c. per foot, making a total of $59.40.

We are of opinion that the assessment should be reduced to this last mentioned amount.

The appellants are entitled to their costs.

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WINCHESTER, Master. SEPTEMBER 29TH, 1902.

CHAMBERS.

## PARRAMORE v. BOSTON MFG. CO.

*Patent for Invention—Action for Infringement —Motion to Stay—Proposal to Proceed in Exchequer Court to Avoid Patent.*

Motion by defendants to postpone trial of this action in order to enable them to bring an action in the Exchequer Court of Canada to set aside plaintiff's patent of invention. This action was brought to restrain defendants from infringing plaintiff's patent. The defendants delivered a defence

setting up prior user, want of novelty, that the patent was not a valid and subsisting patent, and also that plaintiff had imported the patented invention or caused it to be imported, contrary to the provisions of sec. 37 (*b*) of the Patent Act, and other defences. The defendants now sought, after issue joined, to have the trial postponed until they should have proceeded in the Exchequer Court to have the patent set aside on the ground of the contravention of sec. 37 (*b*).

G. H. Kilmer, for defendants.

J. W. Bain, for plaintiff.

THE MASTER.—Had the defendants brought their action for the purpose indicated, they would have been in a better position to support this application. It may be that their other defences to the action will be successful, and that there need be no further litigation between the parties. It would not be fair to stop plaintiff's proceedings, properly instituted, to enable defendants to defend themselves in another Court, while they have a sufficient defence in this Court. The trial Judge will, no doubt, if applied to at the trial, and if he consider it in the interests of justice, stay any judgment to enable defendants to prosecute their rights in another Court, if they have no right to do so before him.

Motion referred to the trial Judge.

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MEREDITH, C.J. SEPTEMBER 29TH, 1902.

CHAMBERS.

## METALLIC ROOFING CO. v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

*Parties—Unincorporated Voluntary Association—Motion to Strike out Name—Injunction—Trial.*

Appeal by defendant association from order of Master in Chambers (ante 573) dismissing their application for an order striking their name out of the style of cause.

J. G. O'Donoghue, for appellants.

W. N. Tilley, for plaintiffs.

MEREDITH, C.J., affirmed the order, but added to it a declaration that the dismissal of the appellants' motion is to be without prejudice to their raising any questions as to their status or liabilities on the pleadings, and varied it as to costs by making the costs of the application costs in the cause. Costs of appeal to be costs in the cause also.