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HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. OCTOBER 13TH, 1911.

CRINKLEY v. MOONEY.

Discovery—Examination of Defendants—Order for Particulars—Delivery after Examination of Defendants before Defence Filed—Attempt to Re-examine after Particulars Delivered and Defence Filed—Practice.

Appeal by the defendants from an order of the Local Judge at Stratford dismissing a motion by the defendants to set aside appointments taken out by the plaintiff for the examination for discovery of the defendant Mooney and an officer of the defendant company.

Featherston Aylesworth, for the defendants.
R. T. Harding, for the plaintiff.

MIDDLETON, J.:—Upon a motion by the defendants for particulars, made before defence, on the 23rd December, 1910, an order was made "that the plaintiff be at liberty to examine the defendant William James Mooney and some officer of the defendants the Mooney Biscuit and Candy Company Limited, for discovery, the said examinations for discovery to take place within 25 days." This order then provides for delivery of certain particulars within one week after the completion of the examination.

This order is not well drawn, as the plaintiff had the right to examine for discovery, and did not need any order giving him liberty to do so. In substance, it is an order for particulars after discovery is had.

An appointment was taken out for the examination of Mooney "both personally and as an officer of the defendant company," for discovery, and the examination was ultimately had on the 30th May, 1911. Particulars were given on the same day, and

on the 1st June the statements of defence were filed. The order had not extended the time for filing the defence till particulars were delivered. Without any order permitting any further examination, the plaintiff now issues an appointment for the examination of an officer of the defendant company and of the defendant Mooney. On a motion to set this aside, the plaintiff contends that the examination had was not a general examination for discovery, but an examination under a special order, for the purpose of enabling him to give particulars. This view has been accepted by the learned Local Judge, and the motion dismissed.

Whatever may have been the intention when the order of the 23rd December was made, the rights of the parties depend upon the order as actually issued. Looking at it, as well as at the appointment for the examination in May, it is clear that this contention cannot prevail. The examination was an examination for discovery in the cause. The appointment must be set aside.

It may well be that Mr. Harding was under a misapprehension as to his rights, and did not examine generally, but confined himself to an examination upon the matters as to which particulars were ordered. This order will in no way prejudice any motion that may be made for a further examination. I merely determine that the first examination was an examination for discovery under Con. Rule 439, and therefore there was no right to further examination without an order having been obtained.

Appeal allowed and appointments set aside. Costs to the defendants in any event.

RIDDELL, J. OCTOBER 16TH, 1911.

RODGERS v. FISHER.

Vendor and Purchaser—Contract for Sale of Land—Misrepresentation as to Quantity—Specific Performance with Abatement in Price—Lot Fronting on River—Survey.

Action for specific performance of a contract to convey the whole of the north half of lot 16 in the township of Niagara, or for damages.

A. C. Kingstone, for the plaintiff.

J. S. Campbell, for the defendants.

RIDDELL, J.:—The defendants were the owners of certain land in Niagara township, one of the very few (two, I think) townships in which the lots are not numbered in concessions but consecutively. The east side of the township abuts on the Niagara river, which runs a course inconsistent with a straight eastern boundary. The survey of the township began at the west, as appears from a letter from the Department of Crown Lands, which was at the trial accepted by the defendants as setting out the facts truly. In consequence of the course of the Niagara river being a little to the west of north, there were at the south of the township what would be called, in concession-surveyed townships, broken front lots. These were not numbered, but were apparently thrown into the adjoining lots, making these lots (at the south of the township) more than 100 acres in extent. What would in other townships be the line of the east side of the first concession ran into the river at lot 16—upon the weight of evidence I find in the south half of lot 16.

A patent issued on the 30th September, 1796, to William Baker for land "commencing at a post within one chain of Niagara river on the limit between lots Nos. 15 and 16; thence west to within one chain of lot No. 62, 100 chains more or less; thence north 20 chains; thence east to within one chain of Niagara River; thence along the bank southerly at the distance of one chain from the river to the place of beginning; being the lots Nos. 16 and 31, with a very small quantity of broken front, containing 200 acres more or less, with an allowance for roads, for which 25 acres and chains are reserved as per general specification."

The fact that the quantity of broken front is "very small" is not without significance, and supports my conclusion as to the point at which the line already mentioned strikes the west bank of the river. In 1889 and before and thence hitherto there was and is a travelled road between two and three hundred feet west from the river; in 1889 the land between the road and the river was in part severed in ownership from the rest of lot 16—this in 1907 became the property of Mr. Marchmont, and is the "Marchmont lot" mentioned in the evidence. It is about one and one-fifth of an acre in extent, and runs from the north line of lot 16 to within about 200 feet from the line between the north and south halves of lot 16.

The defendants became the owners of the north half of lot 16 with the exception of this Marchmont lot.

The plaintiffs entered into negotiations for purchase from the defendants of their farm; during the course of the negotiations the defendants represented that the land they were selling

included the river front—the words "all the river front" were not used—but the plaintiffs understood and the defendants intended them to understand that the whole river front went with and as part of the land about the purchase of which they were negotiating.

Under these circumstances, if, as I think is the case, the Marchment lot is part of lot 16—and of the west half of lot 16—the defendants are not in a position to make title to the whole of the north half of lot 16; and the price must be abated. But, even if the Marchmont lot be not part of lot 16, the plaintiffs are entitled to damages for the deceit in representing that it was.

In either case the plaintiffs are entitled as against the defendants to a sum which will represent the difference in value of the farm as represented and as it exists.

There will be judgment that the plaintiffs are at liberty to set off against the purchase-money, and as a payment upon the mortgage given to secure part thereof, and as of the date of the said mortgage, the amount by which the farm is reduced in value by the fact that the Marchmont lot is not a part thereof. The defendants will pay the costs up to and including judgment—there will be a reference to the Master at St. Catherines to determine the said amount. Further directions and subsequent costs reserved.

In a consideration of this case the evidence of the plaintiffs is to be accepted (from seeing the witnesses give their evidence).

DIVISIONAL COURT. OCTOBER 16TH, 1911.

*VERRAL v. DOMINION AUTOMOBILE CO.

Motor Vehicles Act—Injury by Motor Vehicle on Highway—Excessive Speed—Liability of Owner—Vehicle Taken out by Servant for his own Purposes—Absence of Knowledge or Permission—Neglect of Precautions to Prevent Unauthorised Use of Vehicle—Provisions of Statute.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiff, after trial without a jury, in an action for damages for injury to a taxicab owned by the plaintiff, owing to a collision with a motor-car of the defendants taken out of the defendants' sale-rooms by a demon-

*To be reported in the Ontario Law Reports.

strator employed by them, without their knowledge or permission, and for his own purposes.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. W. Curry, K.C., for the defendants.

W. G. Thurston, K.C., for the plaintiff.

The judgment of the Court was delivered by BOYD, C.:—The defendants and their motor vehicle (which did the damage) are under and subject to the provisions of the Ontario statute 6 Edw. VII. ch. 46, and its amendments. Section 13 declares that the owner of a motor vehicle for which a permit is issued shall be held responsible for any violation of the statute law aforesaid. One of the provisions of the Act (which was violated in this case) is that no motor vehicle shall be run over any public highway within any city at a greater speed than ten miles an hour (sec. 6). In case of accident, where any loss or damage arises by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver shall be upon the owner or driver of the vehicle (sec. 18). Section 19*d* (added by 9 Edw. VII. ch. 81) provides that in the event of the employer of a person driving a motor vehicle for hire being present in the vehicle at the time of any offence against the Act being committed, the employer as well as the driver shall be liable to conviction for such offence. Read with sec. 13, the import seems to be that, though the owner may not be responsible in a penal aspect for a violation of the Act unless he is personally present, he does become personally responsible in damages where there has been a violation of the Act by his vehicle. There is in the latter case a quasi-liability in rem, which attaches to him as the owner of the mischief-working or law-breaking vehicle.

The Chief Justice finds in this case (on disputed statements in evidence) that the damage to the plaintiff's taxicab was caused by the direct impact of the defendants' automobile. He also finds that the defendants have failed to prove that this damage did not arise through the negligence or improper conduct of the driver. The Chief Justice also finds affirmatively that, as the defendants' motor was not one for hire or private use, but was, by the terms of the permit, held for sale only, there was an obligation to take care that it was not taken out by any servant for any unauthorised purpose, and that there was negligence in not effectively providing against such unauthorised user.

The evidence supports the findings of the Chief Justice; and it is manifest that no accident would have occurred had the motor been running within the statutory rate of speed. The accident was in the city of Toronto, at the junction of McCaul street with Queen street, and happened at two in the morning, when the demonstrator employed by the defendants was out with a party of friends on pleasure bent.

The provisions of the special legislation indicate pretty plainly that the mind of the Legislature was to abrogate to some extent the common law rule that the master of a vehicle is exempt from responsibility if his servant does an injury with the master's vehicle, when, outside of the duties of his master's employment, he is out at large on an errand or a frolic of his own. The Legislature has intended that this dangerous use of these licensed vehicles, when the statute has been violated, should be compensated for to those who suffer by the proprietor of the vehicle. As between him and the public who use the highways, he is the responsible party, and it behooves him to use all necessary safeguards to prevent this abuse. It is one of the requirements of the statute (sec. 14) that every motor shall be provided with a lock, key, or other device to prevent it being set in motion; and, though that is primarily intended to secure it when left in the street or other public place, it suggests an easy way by which it may be secured at night in the owner's own premises from being mishandled and misused by his own employees.

The Chief Justice rightly found that no precautions were taken in the care of this vehicle to keep it from being taken out at the whim of the driver or demonstrator who was in his service. As a machine capable of doing mischief in careless hands, the defendants should so regulate its custody as to secure its being used only for legitimate purpoess. The Legislature has seen fit, I think, to impose this restriction in the use of motors, and the permission to use them at all is subject to these salutary conditions. There must be no negligence in the care, custody, and user of these dangerous vehicles in the public streets.

I am of opinion that the defendants are liable in a dual aspect; first, they are responsible to answer the damages brought about by the use of their vehicle in contravention of the statutory rate of speed (secs. 6 and 13); and, secondly, because the vehicle was allowed to be handled recklessly by the demonstrator in his service, on the highway (sec. 18).

The judgment should be affirmed with costs.

SUTHERLAND, J. OCTOBER 17TH, 1911.

NORFOLK v. ROBERTS.

Municipal Corporations—Waterworks—Board of Water Commissioners—By-law—Alteration by Resolution—Invalidity—Water Rates—Discrimination—Evidence—Costs.

Action by a ratepayer of the town of Brampton, on behalf of himself and all ratepayers and consumers of water in the town, except the defendants, for a declaration that the resolutions, by-laws, and regulations of the Board of Water Commissioners in Brampton were invalid in law, and for a mandatory order to the Board to enforce payment of an equal rate from all consumers.

B. F. Justin, K.C., for the plaintiff.

E. D. Armour, K.C., for the defendants the trustees of the Dale estate.

T. J. Blain, for the remaining defendants, except Boulter.

The defendant Boulter in person.

SUTHERLAND, J. (after stating the nature of the action):—In or about the year 1881, the Corporation of the Town of Brampton established therein a system of waterworks, deriving their supply from a small lake about five miles from the town: see 41 Vict. ch. 26 (O.)

While the statute authorised and contemplated the election of commissioners to manage the waterworks system, no such commissioners were elected, but the waterworks system established was managed by a committee of the municipal council.

The committee apparently fixed a schedule of water rates to be charged and levied against users of water in the town. It does not, I think, appear very definitely in the evidence what these rates were before the 9th September, 1901. On that date, by-law No. 250 of the municipal council was passed, and contains the following sections:—

"1. That water be supplied for house, bath, and lawn for the sum of $12 per annum, payable quarter in advance.

"2. That all other by-laws inconsistent with this by-law be and the same are hereby repealed.

"3. This by-law shall take effect from and immediately after the passing thereof."

This by-law continued in force until the 30th September, 1903, when another by-law, No. 272, was passed and came into

effect. Attached to this by-law there is a schedule containing detailed rates to be charged for various services, and providing for a discount of 10 per cent. under certain conditions. . . .

It having apparently been decided that it was better to place the management of the waterworks system of the town under the charge of commissioners, by-law No. 373 was passed on the 17th January, 1910, for that purpose, and provides among other things, as follows: "1. From and after the final passing of this by-law and until the same is duly repealed the waterworks system of the said town of Brampton shall be managed and controlled by three commissioners, one of whom shall be the head of the council for the time being, and the remaining two of whom shall be chosen by the electors of the municipality," etc.

By an Act respecting the Town of Brampton, 10 Edw. VII. ch. 109, sec. 3 (O.), assented to on the 19th March, 1910, by-law No. 373 was confirmed and declared to be legal, valid, and binding, and the commissioners elected and to be elected pursuant thereto constituted a corporation under the Municipal Waterworks Act. The first commissioners elected in January, 1910, were J. G. Roberts and B. F. Justin, who, with the Mayor of the town, Thomas Thauburn, constituted the Board.

After the formation of the new Board, a by-law thereof was passed in similar terms to by-law No. 272 of the municipality, already referred to, with the exception of the number of the by-law, and the substitution of the name "Board of Waterworks" for "Municipal Council of the Town of Brampton," throughout. The schedule of rates attached to by-law No. 272 was also incorporated in and adopted as part of the by-law of the Board.

The original of this by-law of the Board is not now to be found, but it was established at the trial that it was handed to a printer in order that copies might be printed, and was in some way afterwards by him accidentally destroyed.

I have come to the conclusion, after some hesitation, that this by-law was formally passed by the Board of Water Commissioners at a meeting held on the 2nd February, 1911. The resolution covering the matter in the minutes of the Board is as follows: "That the Board adopt the existing by-laws, rates, and regulations of the town *pro tem.*, adapted in form where necessary. Carried. The secretary submitted the by-law with the necessary changes made, and the same was accordingly signed by the chairman and secretary."

It is not clear from this, or from the evidence otherwise, that the seal of the corporation was ever affixed to the by-law.

The Board, as constituted as aforesaid, did not appear to

work very harmoniously. One member of the Board, viz., B. F. Justin, seemed to think that the Board should undertake an investigation through a chartered accountant of the accounts of the committee of the council, and the council, in connection with the said waterworks system prior to the 1st January, 1910, and among other things of the water rates which had been charged against and paid by the Dale estate prior to that date.

The other members of the Board apparently thought that it was not incumbent upon them to enter upon such an investigation, or incur the expense incidental thereto. It is said that Justin offered to pay the expense of such an investigation, but the other members did not think that was a proper way for them to deal with the matter. It is also said that prior to the year 1910 two or three people came in and paid money on account of water rates who did not appear to have been charged for the same on the roll, and that in one case a man sent in $30 in an anonymous letter, apparently for water rates. Instead of entering upon a formal investigation, the Board apparently instructed its secretary to go over the list of users of water and investigate in order to ascertain what ratepayers were or ought to be assessed as users of water. The secretary apparently made such an investigation. He was also directed by the Board to make an inspection of the Dale estate premises, and did so, without making, apparently, any definite measurements. He procured figures, however, from the Dale estate. It appears that in the year 1909 the estate had been assessed for water rates on the books of the municipality at $200 a year, payable $50 a quarter, and marked "flat rate." The new Board, at the beginning of the year 1910, raised the assessment against the estate to a rating of $392.20, payable $98.05 a quarter for the first two quarters of the year. In reality the estate paid $100 a quarter. This assessment was increased for the second two quarters of the year 1910 to a rating of $559 a year or $125.77 for each of the last two quarters, or, deducting the 10 per cent. discount, to a rate of $125. The rating for 1910 for the first two quarters had been apparently established on the basis of the Dale estate having 352,700 square feet of glass (green-houses), but, after the investigation by the secretary, he reported that the estate had 439,297 square feet of glass, and, towards the close of the year 1910, the estate sent in a communication to the effect that they had made an addition to their houses under glass of 60,000 square feet, but suggesting that a fair rating for the coming year would be 501,000 square feet. The Board accordingly increased the rating of the Dale estate to such last-mentioned amount, and

charged the estate and collected from it for the first two quarters of 1911, $159 (net $143.10), or on the basis of $636 a year.

It appears that the estate has been almost every year increasing its buildings and operations, and that it is somewhat difficult to determine from time to time exactly the amount it has under glass. I do not think, under the circumstances disclosed in evidence, that the present commissioners could be called upon to make an investigation into the accounts between the municipal corporation and the Dale estate prior to the 1st January, 1910. In any event, I do not think this could be done in the absence of the municipal corporation as a party defendant. It appears to me that since the 1st January, 1910, the Board of Water Commissioners has made an honest and conscientious effort to keep pace in its rating of the Dale estate with the increases in the area of building under glass being made from time to time by the estate. It seems to me that the members of the Board in this matter have acted in perfect good faith, and, so far as I can see, in conformity with the terms of the by-law. I think the action must, therefore, be dismissed as against the Dale estate with costs.

This action was commenced by writ of summons issued on the 7th April, 1911, and in the statement of claim some sweeping and general allegations are made: "8..The plaintiff alleges that the fact is that many persons have had and now have various services for which no such consent has been obtained, and the defendants the Board of Water Commissioners of the Town of Brampton, and the defendants Roberts, Thauburn, and Boulter, as members thereof, have neglected and refused to enforce the rights of the public in respect thereof."

No evidence was offered at the trial in respect of the allegations contained in this paragraph.

"9. The plaintiff alleges and the fact is that the defendants Roberts and Thauburn now have, and for years past have had, and have used, certain services for which no such consent was obtained, and for which they have not paid and for which they neglect and refuse to pay."

No evidence at all as against the defendant Thauburn was given under this claim, and the only evidence as against the defendant Roberts was to the effect that, as to a small motor he was using in connection with his dentist office, as no provision had been made for a motor of that kind under the by-law of the municipal council, a rate had been fixed between the council and himself, after negotiation, upon which he had been paying

for some time. The same rate apparently has been continued since the Board of Water Commissioners was established. I do not think that the plaintiff can have any ground of complaint as to this motor, although it would perhaps now be better for the new Board to fix a general and definite rate for similar motors.

But more definite complaint is made on the part of the plaintiff as arising under a resolution passed by the new Board of Water Commissioners on the 8th June, 1910, to the following effect: "That a full service for a private residence shall be charged $13.40 and to include the following services: kitchen, bath, basin, closet, stationary washtubs, and lawn not exceeding 1,000 feet; other services to be additional."

This resolution was passed by the defendants Roberts and Thauburn against the opposition of the other member, Justin. In consequence the latter resigned from the Board as a protest. . .

A copy of what the Board had printed was put in as exhibit No. 9. It does not purport to be a copy of any by-law, but is called "Rules and Regulations for the Brampton Waterworks." It is not under seal. There is included with it a schedule of water rates for the town of Brampton, identical in all respects with the schedule attached to the by-law No. 272, except that the first two items under the heading "for private dwellings," instead of being as follows, "not exceeding 8 rooms, one faucet, $5.56, over 8 rooms, one faucet, $6.67," is as follows: "full house service not over 10 rooms and lawn not exceeding 1,000 square feet, $13.40, not exceeding 10 rooms, one faucet, $5.56." These alterations were made, no doubt, in conformity with the resolution already referred to.

The contention of the plaintiff is, first, that the resolution of the 8th June, 1910, has not been authorised by any by-law of the Board, and, second, that the result of such a resolution, when worked out, is, that there is a discrimination between the man who takes the full house service (not over 10 rooms and lawn not exceeding 1,000 square feet and pays therefor $13.40) and other users who take individual services, as, for example, one man a lawn service, another man a bath-room service, and another man a kitchen service. It is said that the man who takes the full service at $13.40 pays net, after the allowance of the 10 per cent. discount, about $12, while three men separately taking the other three services indicated pay $5, $7, and $5 net, respectively. The plaintiff says that this is a discrimination. He says that it is unreasonable to give a full house service, which ought to be $17, for $12, and that it works a discrimination as

indicated. Roberts, one of the defendants, was called and testified that the change from $17 to $12 was the result of discussion among the members of the Board and of interviewing people on the question and a ventilation of the matter at a public meeting in the town before the resolution was passed. He also calls attention to the fact that formerly, under by-law No. 250, already in part recited, water was "supplied for house, bath, and lawn for the sum of $12 per annum, payable quarterly in advance," and says that the resolution of the 8th June, 1910, was a practical recurrence to the rates under that by-law. He says that the majority of the Board passed the resolution in good faith and because they thought it was right. They considered that it was reasonable to encourage water-users to take the whole service if possible, that there was no discrimination, that everyone had a right to take advantage of the same regulation. In his opinion, the man who was having the $5 kitchen service was, if anything, getting the cheapest service, under the conditions in which it was used. He denies that they were allowing any greater discount to one user than another. In a word, he thought that the Board was doing what was right and reasonable in making the change. Upon such evidence as was offered at the trial, I came to the conclusion that the action of the Board in passing the resolution was taken in good faith and was a matter of administration and discretion with which I had no right to interfere, provided that such action could be taken by resolution and not by by-law.

I cannot see either that there is any discrimination between one class of ratepayers and another, such, for example, as was shewn in the case of City of Hamilton v. Hamilton Brewing Association, 38 S.C.R. 239. Every ratepayer is at liberty to take the full service for a private residence on the same terms, and every ratepayer is in like manner on an equality as to rates in taking any less service than a full one. The question of the adjusting of the rates from time to time is a matter which is within the discretion of the Board, so long as there is no unjust discrimination. The Board has been created by the Act of 1910 a corporation.

Before the resolution of the 8th June, 1910, the Board had passed its by-law fixing the water rates. I do not think that that by-law could be validly altered or amended, as is attempted, by a bare resolution of the Board. If the resolution after having been passed had been duly signed and sealed, it might possibly have had the virtue and effect of a by-law, but this is not shewn to have been done. This might have been done at any time, or a

by-law might have been passed amending the by-law passed by the Board on the 2nd February, 1911.

I think that, under the circumstances, the reasonable thing to do is to make a declaration that the Board is not further to act under the terms of the said resolution: Pringle v. City of Stratford, 20 O.L.R. 246. All other claims mentioned in the plaintiff's statement of claim are dismissed.

The plaintiff failed to shew at the trial that he was in any way injured as a result of the passing of the resolution. While he has partly succeeded on a technical question as to the validity of the resolution, he has failed in other respects as against the individual defendants—and that, too, after making somewhat reckless and damaging statements as against them.

The defendant Boulter, one of the Board of Water Commissioners elected in January last, in his defence says that he is "opposed to the reduction of water rates charging only $12 for a full house service," and by his defence appears to be in sympathy with the action that has been taken by the plaintiff herein. Considering that the questions involved are largely matters of administration, and that the action partakes somewhat of the nature of a meddlesome one, I think that the costs may well be disposed of as follows. The Dale estate will have its costs as against the plaintiff. As between the defendants, other than the defendant Boulter, and the plaintiff, I make no order as to costs. The defendant Boulter, who was not represented by counsel at the trial, but appeared in person and by his pleading submitted his rights to the Court, will have such costs as he has incurred paid by the plaintiff.

MIDDLETON, J., IN CHAMBERS. OCTOBER 17TH, 1911.

RE TOWN OF SARNIA AND SARNIA GAS AND ELECTRIC LIGHT CO.

Arbitration and Award—Municipal Act—Alleged Disqualification of Arbitrator—Motion to Remove—Practice—Membership in School Board—Bias.

Summary motion by the company for an order declaring that Mr. Archibald Weir is disqualified from acting as arbitrator for the Town of Sarnia upon an arbitration between the town and the company under the Municipal Act.

Frank McCarthy, for the applicants.
Featherston Aylesworth, for the town corporation.

MIDDLETON, J.:—I can find no authority for such a motion, even regarding it as a motion to remove Mr. Weir from the position of arbitrator.

Section 13 of the Arbitration Act, 9 Edw. VII. ch. 35, gives the Court power to remove an arbitrator who "has misconducted himself." An award may be set aside not only for misconduct of the arbitrator, but also for bias, but bias does not furnish a ground for removal under the statute. The only thing alleged as constituting disqualification is the fact that Mr. Weir is a school trustee.

Section 457 of the Municipal Act provides for the statutory disqualification of any "member, officer or person in the employment of any corporation which is concerned or interested in any arbitration." A ratepayer is by a proviso declared not to be thereby disqualified.

I do not think a member of the school board is a member or officer of the corporation. He is elected by the vote of the public school supporters to administer the affairs of the public schools, but takes no part in the affairs of the corporation. The school board has no interest in the finances of the town; it can require the municipal corporation to levy for it the money it requires; but this cannot create any bias.

In either aspect the motion fails, and is dismissed with costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 17TH, 1911.

RE CUNNINGHAM AND CANADIAN HOME CIRCLES.

Life Insurance—Designation in Favour of Wife Indorsed on Policy—Request to Issue Policy in Favour of Wife—Trust Created under Insurance Act—Incomplete Instrument—Expression of Intention.

Motion by the widow of the assured for payment out of Court of the proceeds of a policy upon the life of the assured.

C. Elliott, for the applicant.
J. R. Meredith, for the infants.

MIDDLETON, J.:—Contrary to the view formed at the close of the argument, I have come to the conclusion that the widow is entitled to this money. The intention of the insured to give this money to his wife is plain. No doubt, he intended the company to issue another policy in his favour; but, so far as he was concerned, he had done all he intended to do, and all that was necessary to make her the beneficiary.

Under the statute, as soon as an instrument is indorsed upon the policy, a trust is created. It is not necessary to communicate the appointment to the company or the beneficiary. When an appointment is made, the insurance is brought under the operation of the Act and the trust cannot be revoked.

The situation, in another aspect, is analogous to a will of personal estate before the Wills Act. Incomplete instruments were admitted to probate. The cases are discussed in Jarman, 6th ed., p. 126, where it is pointed out that when the testator's design of perfecting the paper is frustrated by causes beyond his control and the testamentary intention is disclosed, the document, notwithstanding its defect, is accepted as the will of the deceased.

Here in a written document, which complies with the statute, in that it is indorsed on the policy, the testator has expressed his desire that the insurance money shall be payable to his wife—true, he thought this necessitated a new policy in which she would be named as beneficiary, and he desired the company to issue such a policy, but the failure of the company to issue the policy is just such an involuntary preventing clause as should not be permitted to frustrate the adequately expressed intention.

The order will go for payment to the wife. Costs out of the fund.

SUTHERLAND, J. OCTOBER 17TH, 1911.

GIBBONS v. DOUGLAS.

Fraud and Misrepresentation—Exchange of Lands—Collusion—Rescission—Reconveyance—Damages—Costs

The plaintiff sought in this action a reconveyance of land formerly owned by him and conveyed, as the result of a real estate sale and exchange, to the father of the defendant Douglas (who was not a party to the action) and a release from a covenant in a deed to him (the plaintiff) of another parcel of land

from the defendant Douglas, to whom it had been conveyed by the defendant Bumstead, and which covenant applied to the assumption by the plaintiff and payment of a mortgage on the last mentioned land, previously given thereon by the defendant Douglas to his father.

W. H. Wright and J. A. Horning, for the plaintiff.
Wallace, for the defendant Douglas.
I. B. Lucas, K.C., for the defendant Bumstead.

SUTHERLAND, J.:—At the trial I came to the conclusion that there had been misrepresentation in writing by the defendant Douglas as to the character of the last-mentioned property when he was negotiating for its sale to the plaintiff, and by the defendant Bumstead, when, at the request and acting for the defendant Douglas, he shewed the plaintiff over the property in the winter when it was covered with snow. I thought then, and find now, that the defendants were in collusion in effecting a sale of the lands to the plaintiff at a price which, upon the evidence, I also find was greatly in excess of its value, to their knowledge. They misrepresented both the character and value of the property. At the conclusion of the argument, therefore, I expressed myself as follows:—

"My intimation is that the transaction can hardly stand. I am not committing myself definitely to that; I am not sure that, if I determined that finally, the plaintiff is entitled to very much consideration on the question of damages if he is reinstated; because, while he may have been misled, people have to pay a little attention to common sense about these things and not come into Court as children; so that, if that view were to be finally given effect to by me, it would be more a question of how the parties would be reinstated, and my determining whether the plaintiff should get any damages, and, if so, what comparatively small sum for damages. As to the question of costs; if it is worth while, I will leave that open for three or four days, as I shall be away for a week or ten days. I would suggest to all the counsel to try and work that out if it can be accomplished. I tell them that so that their clients may know that I think it is a very desirable and proper thing to do under the circumstances, without determining the matter finally."

Since the trial, the defendants have arranged to have the first-mentioned property reconveyed to the plaintiff. This has simplified matters, as, in the absence from the record of the father of the defendant Douglas, who is to make such recon-

veyance, it might otherwise have been impossible to have made a decree to that effect.

I now dispose of the case as follows:—

The defendants will procure and deliver to the plaintiff from the father of the defendant Douglas, as they have intimated to me they can, a reconveyance of the lands mentioned in paragraph 4 of the statement of claim. The plaintiff will reconvey to the defendant Douglas the lands referred to in paragraph 2 of the statement of claim. The defendant Douglas will release the plaintiff from and indemnify him against his covenant with respect to the mortgage mentioned in paragraph 4. The plaintiff will have judgment against both defendants for damages in the sum of $100 and his costs of suit, inclusive of the examinations for discovery.

REX v. ROSSI—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—OCT. 16.

Liquor License Act—Conviction for Selling without License—Motion to Quash—Finding of Magistrate.]—Motion by the defendant to quash a magistrate's conviction for selling intoxicating liquor without a license. The Chief Justice said that, as the magistrate had found as a fact that the defendant sold liquor, the Court could not interfere. Williamson v. Norris (1829), 1 Q.B. 7, is under a different statute and upon a different state of facts. Motion dismissed with costs. J. Haverson, K.C., for the defendant. J. R. Cartwright, K.C., for the Crown.

KIPPEN v. BALDWIN—MASTER IN CHAMBERS—OCT. 19.

Discovery—Medical Examination of Plaintiff—Action for Damages for Personal Injuries—Admission of Liability—Case Set down for Assessment of Damages only—Con. Rules 442, 462.]—Motion by the defendant for an order for the examination of the plaintiff by a surgeon, pursuant to Con. Rule 462. The plaintiff was struck and injured by the defendant's automobile. The defendant admitted liability, and the case was set down for assessment of damages only. It was contended that in such a case there could not be discovery under Con. Rule 442, and that, as the medical examination was in the nature of discovery, it could not be granted. The Master said that the answer to this seemed to be, that there is a trial pending, the parties being at

issue as to the amount of damages recoverable. The medical examination was certainly pertinent to that issue, and should, therefore, on principle, be allowed. The Master did not recollect this point having been raised on any previous occasion. The usual order was made for the examination by Dr. A. Primrose. Costs in the cause. The Master added that it was stated on the argument that there had been negotiations for a settlement; and said that the result of an independent medical examination might well be that the parties would agree on the amount of damages and save any further costs. J. M. Ferguson, for the defendant. S. G. Crowell, for the plaintiff.