RECENT DECISIONS.

1. Dominion of Canada.

Supreme Court of Canada.

On Appeal from the Appellate Division of the Supreme Court of Ontario.

Judges present:—Sir Louis Davies, Chief Justice, and Idington, Duff, and Mignault, JJ.

WESTERN ASSURANCE COMPANY v. *CAPLAN.*

April 22nd, 1924.

Automobile insurance—Fire and theft—Insurance Act, R. S. O. [1914] ch. 183—Application of secs. 194 and 195—Special condition in policy—Representation—Material to risk.

Section 194 of the Ontario Insurance Act, notwithstanding its position among a group of sections under the heading "Contracts of Fire Insurance," applies to all kinds of insurance and requires the statutory conditions to be printed on every policy insuring against fire and other causes of loss.

Quœre: Should they be printed on a policy that does not insure against loss by fire?

In an action on a policy insuring, on payment of a single premium, an automobile against loss by fire or theft, in which action loss by theft was alleged, the insurer cannot invoke breach of a special condition restricting the use of the automobile when such condition is not printed in the form required by sec. 195 of the Act. If the insured, in applying for the insurance, in answer to a question asked by the company's agent, stated that the car was paid for when he had given a promissory note for part of the price which was paid at maturity, he is not guilty of omitting to disclose a circumstance material to the risk which would avoid the policy.

Appeal dismissed with costs.

On Appeal from the Exchequer Court of Canada.

Judges present:—Sir Louis Davies, C.J., and Idington, Duff, Mignault, and Malouin, JJ.

WARNER-QUINLAN ASPHALT CO. v. *THE KING.*

April 22nd, 1924.

Shipping—Charter party—Demise—War Measures Act, 5 Geo. V. ch. 2 (D.)—Appropriation by Crown of ship—Compensation—Indirect injury.

Though some provisions of a charter party and expressions used therein may indicate an intention to demise the ship to the charterers,

if other provisions and the purview of the whole document shew a contrary intention, the shipowners do not lose possession.

By sec. 7 of the War Measures Act, "Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act . . . and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court or to a Superior or County Court of the Province within which the claim arises, or to a judge of any such court."

Held, affirming the judgment of the Exchequer Court, ([1923] Ex C. R. 195) that the charterer of a ship which is not demised, is not entitled to compensation under this section for loss of his rights and profits under the charter party.

Per Mignault, J., section 7 of the War Measures Act does not create a liability, but only provides a mode of ascertaining the amount of compensation when the right to receive it is admitted.

Held, per Idington, J., that the court or judge to which a claim is referred is *curia designata* whose decision is final.

Appeal dismissed with costs.

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2. Province of Ontario.

Supreme Court of Ontario.

HOWE v. *NIAGARA ST. CATHARINES AND TORONTO RAILWAY CO.*

Wright, J. March 27th, 1924.

Negligence—Railway—Putting plaintiff off train for refusal to produce ticket or pay fare — Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68, sec. 354—"Usual stopping place"—Plaintiff, being drunk, getting upon track and being run over by train — Rules of railway company Action for damages—Absence of evidence of negligence—Nonsuit—Findings of jury—Motion for judgment on.

The plaintiff was injured on the defendant's railroad after leaving the train at the request of the conductor because he refused, when asked, to pay his fare or produce a ticket. He was in a somewhat intoxicated condition when he boarded the train, but he got off without assistance and without injury, not as the learned Judge found at a regular station, but at a "usual stopping place" within the meaning of section 354 of the Dominion Railway Act: See *Habeck* v. *Chicago and North-Western Railroad Co.* (1911), 146 Wis. 645. The plaintiff left the train at about 7.15 p.m. and was found at about 8.30 p.m. under a car on the defendants' railway a considerable distance from where he alighted. The plaintiff said he did not remember what happened after he left the train, and he brought this action against the defendant for injuries sustained, as he alleged, by reason of the defendants' negligence. The jury found that the plaintiff's injury was caused by the negligence of the defendant, which consisted in the defendant's lack of judgment in putting the plaintiff off the car while in an intoxicated condition and in not properly conducting him from its property. The jury referred to clause 41 of the general rules and instructions which provides that no passenger is to be ejected from a car for mere intoxication, unless be becomes dangerous or offensive,

when he must be ejected with great care, and must be guided until off the company's premises. The jury said that the injury was due to plaintiff being put off the car. They also found that the conductor demanded the plaintiff's fare before he was put off the train.

The learned judge, in granting defendants' motion for a nonsuit, pointed out that the plaintiff got onto and off the car without assistance, that it was established that he refused to produce his ticket or pay his fare, and that he was expelled from the train on account of such refusal. He referred to section 354 of the Dominion Railway Act, and to the defendant's general rules and instructions, approved by the Railway Board, and therefore having the force of a statute.

Rule 35 is as follows:—"Should a person be found upon a train without a ticket . . . he must be required to pay fare, and in case he refuses to do so he should be ejected from the train, only such force being used as is sufficient for his removal, and in no case with unnecessary violence . . . or while the train is in motion. The ejectment must be made in a reasonable manner and at a proper place. It should not be in such a place, in such weather, or at such unreasonable hour of the night as might easily endanger the life or safety of the person ejected. The person ejected must not be . . . a person in such feeble or helpless condition as to be unable to take care of himself at the point of ejection."

The plaintiff was not expelled for drunkenness and could probably not invoke the provisions of Rule 41, but if that rule applied, it did not help the plaintiff, as he got off the defendants' premises without injury to himself and the failure to guide him off the premises was not the cause of his injury. The learned judge found that the plaintiff re-entered upon the railway track after having safely reached the highway and proceeded along the track until he met with his injury. He was a trespasser on the track at his own risk: *Barnett* v. *Grand Trunk Railway Co.*, [1919] A. C. 361. The facts more nearly resemble *Delehanty* v. *Michigan Central Railroad Co.* (1905), 10 O. L. R. 388, than those in *Dunn* v. *Dominion Atlantic Railway Co.* (1920), 60 S. C. R. 310. See also *Edgerly* v. *Union Street R. R. Co.* (1892), 67 N. H. 312. There was no possible connection between the acts of negligence as found by the jury and the injury; it was questionable whether lack of judgment could be treated as negligence and the finding that "the accident was due to his being put off the car at that time" was too uncertain to have any weight given to it.

The learned judge grants defendants' motion for a nonsuit and said that if necessary the defendant must also have judgment on the findings of the jury: *F. W. Jeffrey and Sons Ltd.* v. *Copeland Flour Mills Ltd.*, [1921] 3 K. B. 560; *Cammack* v. *New Brunswick Power Co.* (1922), 70 D. L. R. 697.

ROBINS v. *NATIONAL TRUST CO.*

MIDDLETON, J.A., IN CHAMBERS. March 25th, 1924.

Practice—Particulars of undue influence alleged—Limited to the names of the persons charged with undue influence.

This was an appeal in an action by the plaintiff, a legatee under an earlier will, to revoke the probate of a later will under which plaintiff did not benefit.

The plaintiff appealed from an order of the Master requiring him to give particulars as to what, where, how, and by whom the undue influence alleged in the statement of claim was exercised, giving names and addresses.

Middleton, J.A., said in giving judgment allowing plaintiff's appeal, that it was evident from the examination of the plaintiff for discovery that he himself knew little of the circumstances surrounding the making of the will which he was attacking. The settled practice in England until 1901, when a new Rule (Order XIX, Rule 25A) was made was to limit the particulars ordered to the names of the persons charged with undue influence: see *Salisbury* v. *Nugent* (1883), 9 P. D. 23, and *In re Estate of Shrewsbury*, [1922] P. 112. In the absence of such a rule in Ontario, the well-established practice should be followed. The learned Judge was opposed to any change in the practice as to particulars which would fetter the Trial Judge and interfere with the circumstances surrounding the making of the will being fully investigated by the cross-examination of witnesses at the trial. The order made by the Master is a violation of the express provision of the rules, compelling, as it does, a plaintiff to disclose the evidence on which he relies in his pleadings: see *Wallace* v. *McDowell* (1920), 2 Ir. R. 194.

The plaintiff was directed within 4 days to give particulars of the names of the persons against whom he alleges undue influence so far as the same are unknown to him, and he was directed to attend for further examination for discovery if the defendants so desire.

The costs of the appeal were directed to be paid by the defendants in any event, and the costs of the motion before the Master were directed to be costs in the cause.

BENN v. *HAWTHORNE.*

ORDE, J. March 29th, 1924.

Will—Mutual wills made by father and son—Agreement of son to purchase property from father upon terms favourable to father—Made in consideration of father's agreement not to revoke will—Agreement of purchase completed by conveyance—New will made by father revoking former will—Establishment against executors of father of agreement not to revoke—Proof of agreement—Extrinsic evidence—Corroboration—Enforceability—Specific performance — Declaration of trust by executors for son—Statute of Frauds—Costs.

The plaintiff made an agreement with his father, the deceased testator, in 1921, that the plaintiff was to purchase certain property of his father in consideration of his agreeing not to revoke or alter a will made by him in favour of the plaintiff in 1919. On 24th November, 1919, the father and son had each executed a will by which, with the exception of certain pecuniary legacies, each left his whole estate to the other. When the agreement was made in 1921 both wills were in the father's possession, and the plaintiff signed the agreement to purchase his father's property after his father had threatened to make a new will and leave nothing to the plaintiff if he refused to sign. The purchase was duly carried out by proper conveyances. Plaintiff's evidence was corroborated by other witnesses

and the judge found the agreement proved. The father made a subsequent will in 1922, which was duly proved by the executors and the plaintiff asked for specific performance of the agreement not to revoke the will of 1919. The learned judge pointed out that the Court had no power to revoke the will of 1922 and substitute for it the will of 1919, a will being by its very nature revocable. If a will is revoked by a subsequent will in breach of a covenant not to revoke it, the new will, if otherwise valid, necessarily stands as the last will of the testator: *Stone* v. *Hoskins*, [1905] P. 194; *In the Estate of Heys*, [1914] P. 192, 197.

The proper remedy for the breach of the agreement not to revoke is to declare that the executors of the last will are trustees for the plaintiff of the property which would have passed to him under the revoked will, and also to order those who as volunteers have derived title to property from the testator to restore it. The defendants pleaded the Statute of Frauds and contended that the plaintiff could not enforce the parol agreement so far as the realty was concerned. But the learned Judge said that in this case there was no agreement to devise land or an interest in land such as was in question in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467. The plaintiff entered into the agreement on the express condition that the father would not revoke or alter his will. There was nothing in the stipulation at variance with the written contract of purchase. The promise not to revoke was a contract collateral to the agreement to purchase which might be proved by extrinsic evidence: *Morgan* v. *Griffith* (1871), L. R. 6 Ex. 70; *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756, and *Long* v. *Smith* (1911), 23 O. L. R. 121. Judgment was given for the plaintiff declaring that except as to the combined amount of the pecuniary legacies in the 1919 will the defendant executors held the whole of the father's estate in trust for the plaintiff subject to the debts and funeral and testamentary expenses. The learned judge said that the executors must distribute what was left in their hands, so far as it would extend, among the beneficiaries named in the will of 1922, which of course revoked the pecuniary legacies given by the earlier will. He also pointed out that the plaintiff, asserting his right, as he was dehors the 1922 will, was excluded from any share in the amount left to the executors to distribute.

THE TALE OF THE TEA-HOUSE CAT.[1]

(*Clinton* v. *J. Lyons & Co.*, 81 L. J. K. B. D., 923.)

I.

A London lady of some charms,
Encompassing within her arms
A dog of pedigree and grace—
Of ancient Pomeranian race—
Intending to indulge her bent,
Into defendants' tea shop went
Accompanied by her husband true
To indulge in that delicious brew.

[1] Reprinted from 48 *Can. Law Jour.*, p. 668.