RECENT DECISIONS.

1.—Supreme Court of Canada.

WORKMEN'S COMPENSATION BOARD v. *THE BATHURST COMPANY.*

On appeal from the Appeal Division of the Supreme Court of New Brunswick.

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

March 21st, 1924.

Statute—Construction—Workmen's Compensation Act, 8 Geo. V. c. 37, ss. 48, 57(2), and 61 (N.B.)—Industry under Part I.—Failure to furnish statements to Board—Transfer to operation of Part II.—Continuance of default—Operation of s. 48.

By section 48 of the Workmen's Compensation Act of New Brunswick every employer shall, on or before the first of January in each year, furnish the Workmen's Compensation Board with a statement giving an estimate of the payroll for that year of each of its industries within the scope of Part I., and by sec. 57(1) the Board may levy upon each employer a provisional amount based upon such estimate and other information obtained and collect the same, the money thus obtained to furnish a fund out of which compensation may be paid to any employee injured by negligence of his employer, or in consequence of a defective system. If an industry falls only under the operation of Part II. of the Act, the compensation must be paid by the employer. Sec. 57 also provides (s.s. 2), that if the estimate required by sec. 48 is not furnished, the Board may itself estimate the amount due from the employer and collect same, and sec. 48(2) prescribes a penalty for such default. Then sec. 61 provides that "(1) Any industry in respect of which the employer neglects or refuses to furnish any estimate . . . shall, during the continuance of such default, be deemed to be an industry within Part II. . . . and except as provided in sub-section (3), no compensation shall be payable under Part I. during the continuance of such default; (2) notwithstanding sub-section (1), such employer shall be liable to pay to the Board the full amount or capital value of any compensation to which any workman would be entitled under Part I. . . . (3) if, and to the extent that such employer shall pay to the Board such amount or capital value, he shall cease to be liable under sub-section (1), and such workman shall be entitled to compensation under Part I." Sub-section (4) provides for relief where the default is excusable.

Held, that sec. 61 does not, in case of default, place the employer permanently under the operation of Part II.; nor does it give him a right

of election as to which Part he will be subject. Notwithstanding the terms of this section, the Board may proceed to assess the employer as provided in sec. 57(2).

Appeal dismissed with costs.

On appeal from the Court of Appeal for British Columbia.

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

March 21st, 1924.

THE KING v. *CALEDONIAN INSURANCE COMPANY.*

Probate—Succession duty—Surety bond of executor—Lien of Crown.

When, under the "Succession Duty Act" of British Columbia, as a condition of granting probate, a surety bond in favour of the Crown for payment of the succession duty has been obtained by the executor and accepted by the Crown, the executor *virtute officii* is clothed with authority to distribute the estate and to receive and give a good discharge for moneys payable to it, and the estate is thus freed from any claim for a lien by the Crown in respect of succession duty.

Judgment of the Court of Appeal ([1923] 3 W. W. R. 925) affirmed.

Appeal dismissed with costs.

2.—EXCHEQUER COURT OF CANADA.

Coram THE PRESIDENT. April 8th, 1924.

(Toronto Admiralty District.)

THE "ROBERT L. FRYER" AND THE "WESTMOUNT."

Shipping—Collision—Harbour—Narrow channel—Negligence.

This was an appeal from the Toronto Admiralty District (1923, Ex. C. R. 155), which dismissed the action of the appellants herein. His Lordship found that on the 17th November, a little after 5.40 p.m., a collision occurred between the *W.* and the *F.*, in Port Arthur harbour, at the entrance to a slip, 1,100 feet long and 175 feet wide, which is narrowed on the south side of the entrance by 20 feet, due to a wreck. In the south wall of the slip there are two recesses, and in one was the said wreck and in the other, the *J.*, a steamer, 48 feet beam, lay at the north wall (Government Dock), 450 feet from its end. Directly outward, 2,400 feet, is a breakwater forming the harbour between it and the shore. From the harbour proper is a slip channel leading into the slip.

The *W.*, a steel steamer, 550 feet long and 58 feet beam, lay on the south side of the slip, and when the *F.*, a wooden steamer, 280 feet long,

was not more than 300 feet from the end of the north wall, to which she was destined, the *W.* commenced to move, swinging stern first across the slip, with considerable speed, intending to work along the north wall. The *F.*, unable to make her berth, signalled she was going to port, and in so attempting, the collision occurred. The visibility was low and the *W.*'s lights were out; she knew of the *F.*'s approach and gave no signal that she was to leave her dock.

Held (reversing the judgment appealed from), that no fault should be attributed to the *F.* for not pursuing her efforts to make her dock; nor because she had got in too far into the slip channel to make a passage to port; that the *W.* by failing to signal her intention to leave dock, by having no lights on, by her speed in swinging across channel and her general manœuvring was guilty of negligence, which was the proximate cause of the collision, and the *W.* was wholly to blame.

Coram THE PRESIDENT. April 8th, 1924.

(Toronto Admiralty District.)

THE "HAMONIC" AND THE "ROBERT L. FRYER."

Shipping—Collision—Harbour—Narrow channel—Negligence—Regulations.

The *H.* was in dock on the west bank of the K. river, intending later to proceed down river to Port Arthur, when the *F.* entered the K. river from Port Arthur, intending to lay at the same dock, which instructions were changed. The channel is 450 feet average in width from this dock to the point of collision, a distance of about 2,000 feet. Another river joins the K. on its easterly bank, nearly 1,900 feet below the dock, which river is 820 feet at its mouth, gradually narrowing up to the railway bridge over same, 850 feet up stream, constituting the McK. basin, which under the harbour regulations was a turning basin, turning in channel being forbidden. The *H.* proceeded down stream stern foremost to the basin, assisted by a tug, lashed to her port bow, there to turn and go down stream while the *F.* was coming up on her starboard side of channel at 3 miles an hour. When about 2,800 feet away the *F.* saw the *H.* leaving her dock. A westerly wind was blowing, and the *F.* straightened up from time to time to keep steerage way. When the *H.* had put her stern into the M. river, and lay across the K. close to the lower bank of the M., about to turn, but without indication of whether to port or starboard, both ships were close together, and a collision was imminent. The *H.* then gave a danger signal and when 75 feet away gave a two blast signal, for the tug. The *F.*'s engines were put astern, and the *H.* influenced by wind and tide was not well under command, and the ships collided.

Held (varying the judgment appealed from), that the *H.* going astern in such manner as to occupy considerable space of the stream, with better knowledge than the other ship of the probable degree of success with which her turning movement was being executed, and knowing the degree

of command under which she was, and with knowledge of the up-going ship, should have used the danger signal in ample time and with such frequency as the situation and prudence would indicate, and not wait until the collision was imminent or inevitable, and that she was not navigated with proper regard to the other ship, but that the *F.* was also navigated in an unseamanlike manner and without regard to the *H.*, that she should have held the starboard side of the river, therefore both ships were to blame.

2. That regulations are not merely made for the purpose of preventing collisions, but also to prevent a risk of collision.

3. That the *F.* was not entitled to any consideration by reason of the structural peculiarities she possessed, rendering it difficult to exercise due and prompt command over her. Her captain knowing her peculiarities should have used corresponding care. That one ship should not be expected to know the navigating disabilities of another and base her own conduct thereon.

NOTE.—The absence of specific regulations in the way of signals applicable to turning ships in narrow channels, which exist elsewhere, noticed and commented upon.

3.—PROVINCE OF MANITOBA.

KING'S BENCH. GALT, J.

NEWTON v. *NEWTON.*

Husband and Wife — Judicial separation — Legal cruelty — Definition— Modern modification.

Proceedings taken by husband to have his wife placed in a psychopathic ward of a hospital, and acts by which he caused the removal of their child so that his wife could not see the child and was kept in ignorance as to its whereabouts, were held, in the wife's suit for judicial separation, to constitute, in each case, under the circumstances in question, legal cruelty, even within the narrow construction thereof adopted in *Russell* v. *Russell* (1897) A. C. 395.

The rules to be applied in defining legal cruelty in any particular circumstances discussed and authorities reviewed. The Court expressed the opinion that the legal meaning of cruelty has been gradually modified since 1857 (the date of the passing of The Divorce and Matrimonial Causes Act, and still more since 1897 (the date of the decision in *Russell* v. *Russell*) and that the element of danger, which was considered a necessary ingredient, is no longer so. The decision in *Dorsett* v. *Dorsett*, (1921) 1 W. W. W. 708, not approved.

A husband's conduct may amount to desertion even though his wife, by reason of such conduct, is the one who leaves and remains away from the matrimonial home.

4.—PROVINCE OF BRITISH COLUMBIA.

Court of Appeal.

IN RE THE SUCCESSION DUTY ACT.

Lee Sheck Yew (Plaintiff) Appellant v. Attorney-General for British Columbia (Defendant) Respondent.

Succession duty—Conflict of laws—Marriage in country where polygamy lawful—Legacies to wives of property in British Columbia.

If a person domiciled in a country whose laws permit polygamous marriages (e.g., China) is, in accordance with its laws, married there to two wives, citizens of that country, and dies while still domiciled there though temporarily residing in British Columbia, the status of the said wives as wives of the deceased will be recognized by the Courts of British Columbia for the purpose of fixing the succession duty payable on property of the deceased in British Columbia going under the deceased's will to each of the wives.

The property in question consisted of "movables"—a fact emphasized in the judgment of McPhillips, J.A.

Judgment of McDonald, J., (1923) 1 W. W. R. 867, reversed.

Note.—Comments upon this case in the court of first instance will be found in the CANADIAN BAR REVIEW, Vol. 1, at p. 360.

County Court of Vancouver.

REX v. *ALBERTS.*

Criminal law—Prisoner before magistrate—Jurisdiction over offence.

Where an accused person is before a magistrate who has jurisdiction over the offence, the magistrate need not enquire how he came there, but may proceed to try the case, notwithstanding objection by the accused that he was wrongfully arrested without warrant. *Reg.* v. *Hughes*, 4 Q. B. D. 614 followed.

5.—PROVINCE OF ALBERTA.

Supreme Court, Appellate Division.

Gibbons et al. (Plaintiffs) Respondents v. Harris (Defendant) Appellant.

Medicine and surgery — Chiropractors — Failure correctly to diagnose ailment—Wrong method of treatment—Liability in damages—Opinion evidence.

Defendant, a chiropractor, was held liable in damages for failure correctly to diagnose the ailment from which a child taken to him was

suffering, and for applying his method of treatment in the case in question.

1. It was held (per Scott, C.J., Stuart and Clarke, JJ.A.) that, under the law as it stood at the times in question, a person who held himself out as a chiropractor held himself out as having a reasonable degree of knowledge and skill to diagnose disease; that in view of the law (and, in the case in question in view of the measure of skill which defendant held himself out as possessing) it was not open to him to claim that he did not pretend to diagnose disease; and that defendant's failure correctly to diagnose the ailment was due to the absence of, or failure to exercise, a reasonable degree of skill and care.

Hyndman, J.A. went on the ground that the defendant should not have applied his treatment without having and exercising the knowledge and skill to diagnose the case.

Judgment of Walsh, J., (1923) 3 W. W. R. 159, in its result affirmed as to liability (Beck, J.A. dissenting) but damages reduced.

2. In an action for damages for malpractice, physicians of a school different from that of defendant are competent to testify on a question of diagnosis.

6.—PROVINCE OF SASKATCHEWAN.

Court of Appeal.

Barsi (Plaintiff) Respondent v. Farcas (Defendant) Appellant.

Garnishment—Moneys attachable—Balance payable on future date under agreement for sale of land.

Under The Attachment of Debts Act, Sask., a garnishee summons binds only a "debt due or accruing due." To constitute an attachable debt there must be an existing obligation, payable either presently or at a future date. It must also be a perfected debt and not a conditional one. The balance, payable on a future date, under an agreement for sale of land is not an attachable debt where the liability to pay the purchase money is conditional upon the vendor's ability to show a good title and a willingness on his part to convey. Especially will this rule be given effect to where, at the time of the service of the garnishee summons, the title to the land is (for the purpose of security for moneys advanced) in a person other than the vendor.

In this regard there is a clear distinction between moneys due or accruing under a mortgage and those under an agreement of sale. Under a mortgage the debt becomes an unconditional liability at the time fixed for payment. Under an agreement of sale the debt at the time fixed for payment is conditional upon the vendor being able to make title, and where he has no title the purchase money never becomes payable.

Judgment of Brown, C J.K.B., (1923) 3 W. W. R. 839, reversed.