ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1927 Sept. 27.
1928 Jan. 23.

THE SHIP *CATALA* (DEFENDANT) ....APPELLANT;

AND

MARTHA DAGSLAND (PLAINTIFF).....RESPONDENT.

Shipping and seamen—Exchequer Court—Jurisdiction—Workmen's Compensation Act, B.C.—Maritime Conventions Act, 1914—Right of Action—Election of tribunal.

Plaintiff's husband was killed in a collision between the *C.* and a boat in which he, with another man, was engaged in fishing. Following his death plaintiff applied to the Board, under the Workmen's Compensation Act (B.C.) for compensation under the Act. Payments were made to her, from the date of her husband's death until about the time of the trial of this action, which she accepted. After judgment the Board ceased making payments pending the final result of this action.

Upon application of the owners of the *C.* under sec. 12 (3), the Board "adjudicated and determined" that the owners were employers within the scope of part 1 of the Act; that the deceased was a workman in an industry covered by and within the scope thereof; that the accident arose out of and in the course of the employment; that plaintiff was one entitled to compensation under the Act, and that the action was one concerning which the right to bring was taken away by part 1 of the Act. After the application aforesaid, plaintiff took action *in rem* in the Exchequer Court in Admiralty to recover damages arising out of the death of her husband as above mentioned.

Held (reversing the judgment appealed from) that the Exchequer Court had no jurisdiction to hear and determine the present action.

(*The Camosun,* (1909) A.C. 598 and *The Vera Cruz* (1884-5) A.C. 59 referred to.)

2. That the Maritime Conventions Act, 1914, did not so enlarge the jurisdiction of the Exchequer Court in Admiralty, as existing under the Admiralty Court Act, 1861, as to give jurisdiction in actions like the present.

3. That even if this court had jurisdiction, the plaintiff, having elected to claim compensation under the Workmen's Compensation Act (B.C.), and having accepted it, could not thereafter renounce it and resort to an alternative remedy once open to her.

APPEAL from the decision of the Honourable Mr. Justice Martin, L.J.A.[1]

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Vancouver.

E. P. Davis, K.C., J. K. Macrae for appellant.

W. E. Shannon for respondent.

(1) For text of the judgment of Martin L.J.A. see at end of this report.

1928
THE SHIP *Catala* v. DAGSLAND.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (December 23, 1928) delivered judgment:—

This is an appeal from a decision of Honourable Mr. Justice Martin, Local Judge in Admiralty for British Columbia, in an action for damages against the ship *Catala* of the Port of Vancouver, brought by Martha Dagsland on behalf of herself and two infant children, the widow and children respectively of Erik Dagsland, who lost his life in a collision between the *Catala* and a boat in which the deceased with another were engaged in fishing operations, at the mouth of the Skeena River, B.C., and within the territorial waters of Canada. The learned trial Judge found that the death of Dagsland was due to the negligence of the ship *Catala,* and he awarded damages against that ship in the sum of $20,000. As was said by Mr. Mayers of counsel for the Respondent, upon the trial, the case is one of importance and not free from difficulties.

The respondent issued a writ addressed to the owners and parties interested in the ship *Catala,* and endorsed as follows:—

> The plaintiff as the widow of Erik Dagsland deceased, brings this action on behalf of herself and the children of the said Erik Dagsland deceased, to recover damages sustained by reason of the negligent navigation of the ship *Catala,* by the defendants or their servants, in or about the month of July, 1925, whereby the said ship came into collision with a fishing boat off the mouth of the Skeena river, and in consequence thereof the said Erik Dagsland lost his life, and for costs.

The *Catala* was arrested but was subsequently released on a sufficient bail bond being given.

Preliminary acts were filed on behalf of the respondent and the *Catala,* but no other pleadings were delivered or filed. From the endorsement to be found in the writ, it might appear as if the action was originally intended to be brought under the Families' Compensation Act 1911, R.S.B.C., cap. 85, which I might say is textually the same as the English statute known as Lord Campbell's Act, but apparently any contemplated action based upon the Families Compensation Act was abandoned, and the cause was professedly tried and disposed of by the learned trial judge as an action for damages *in rem* against the defendant

ship, under the provisions of the Admiralty Court Act 1861, and the Maritime Conventions Act, 1914 (4-5 Geo. V, c. 13).

Two important defences in law were raised upon the trial and on this appeal. One was, that there was no jurisdiction in the Exchequer Court of Canada, on its Admiralty side, to entertain an action for damages for loss of life; and that any right of action for damages in the circumstances obtaining here could only be maintained by virtue of the Families' Compensation Act, 1914, which action this Court was without jurisdiction to entertain.

The second point I shall refer to later. The learned trial judge was of the opinion, that the Admiralty Court Act, 1861, which by s. 7 gives a Court of Admiralty jurisdiction over "any claim for damages done by any ship," and s. 6 of the Maritime Conventions Act, 1914, gave jurisdiction to this Court, and also a cause of action in respect of damages for loss of life or personal injury. Sec. 6 of the Maritime Conventions Act is as follows:—

> Any enactment which confers on any Court of Admiralty jurisdiction in respect of damages shall have effect as though reference to such damages included references to damage for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in persona*.

The learned trial judge, reading together s. 7 of the Admiralty Court Act 1861, and s. 6 of the Maritime Conventions Act, 1914, held that those enactments gave jurisdiction to this Court to entertain an action *in rem* for damages for loss of life, and also constituted a new cause of action, and such jurisdiction and cause of action being created by Imperial and Federal statutes, the same could not be disturbed by any provincial law, such as the Workmen's Compensation Act.

A brief reference to the jurisdiction of the Exchequer Court of Canada, on the Admiralty side is perhaps appropriate. It is certainly not greater than the Admiralty jurisdiction of the High Court in England. It has no general common law jurisdiction, apart from its Admiralty jurisdiction. See *Bow, McLachlan & Co.* v. *The Camosun* (1). The Admiralty side of the High Court in England, is presided over by a Judge of the High Court, who exer-

(1) (1909) A.C. 597, at p. 608.

1928
THE SHIP *Catala* *v.* DAGSLAND.
Maclean J.

cises by virtue of the Judicature Acts of 1873, and 1875, what is frequently referred to as a double jurisdiction, in consequence of which litigants may invoke their common law remedies, in the Court of Admiralty. The Judicature Act 1873 amalgamated the English Courts, and transferred to the High Court all the jurisdiction which had been previously exercised by the different courts, but these changes conferred no new Admiralty Jurisdiction upon the High Court, and the expression "Admiralty Jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court, before its incorporation into the High Court, or which might be conferred by statute giving new Admiralty jurisdiction. A judge of the High Court sitting on the Admiralty Division thereof may, as a judge of the High Court, exercise any jurisdiction which is possessed by a judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction, *The Camosun* (*supra*). The jurisdiction of the Exchequer Court of Canada, on the Admiralty side, with certain limitations, is the same as the Admiralty jurisdiction of the High Court in England, but it is limited to that; it however cannot entertain common law actions in the exercise of its Admiralty jurisdiction. I refer to this solely because it affords an explanation of the reason why certain actions are sometimes entertained by judges in the Admiralty Division of the High Court, in England.

Dealing now with the legal defence mentioned, I have reached the conclusion that I am bound by the authorities, to hold that this contention of the appellant is correct, ,and that this Court is without jurisdiction in an action of this kind. There are many decisions upon the point, but perhaps the most important one is that of *The Vera Cruz* (1), in which the House of Lords held, affirming the decision of the Court of Appeal, that the Admiralty Court Act 1861, which by s. 7 gave the Court of Admiralty jurisdiction over "any claim for damage done by any ship," did not give jurisdiction in claims for damages for loss of life under Lord Campbell's Act, and that the Admiralty

(1) (1884-5) 10 A.C. 59; 9 P. 88.

Court as such, could not entertain an action *in rem* for damages for loss of life under Lord Campbell's Act. If therefore the cause now under consideration, had been taken under the Families' Compensation Act, then it is already established I think, that this Court could not entertain an action *in rem* for damages for loss of life. It will of course remain to be considered whether the Maritime Conventions Act 1914, so extends the jurisdiction granted by the Admiralty Court Act 1861, as to give jurisdiction or a new right of action, in the facts of this case. In the case of *The Vera Cruz* (*ubi supra*) the action was against its owner and *in rem,* claiming damages for loss of life resulting from a collision between two ships. The judgment of the House of Lords was delivered by Lord Selborne L.C., and Blackburn and Watson L.J.J., and I might usefully quote from the opinions of their Lordships. The Lord Chancellor in his speech said:—

* * * Inasmuch as there can be no right of action whatever unless it comes within the terms of Lord Campbell's Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on the 7th section of the Act of 1861, which statute turns the action into an action *in rem* at the option of the plaintiff. Now what are the words? "Whensoever the death of a person shall be caused by wrongful act, neglect, or default"—all words plainly applicable only to a person doing an act or guilty of a neglect or default, and not to an inanimate instrument or thing like a ship—" and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." "To maintain an action and recover damages" plainly points to a common law action—" then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." Well it is to my mind, as plainly as possible, a personal action given for personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts, if the death had not ensued. Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *actio personalis moritur cum persona,* because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under the circumstances which if he had been living would have given him for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in

1928

THE SHIP *Catala* v. DAGSLAND.

Maclean J.

various other ways. Every word of that legislation being as it appears to me legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem.*

Blackburn L.J., said:—

But the question raised here being exclusively whether the liability of a ship owner as a person, under Lord Campbell's Act, to make good damages for negligence of his servants, who happens to be the master of the ship, comes within the words "damage done by any ship." I decidedly say that I do not think it does. The legislature in using such general words as those cannot have had in contemplation all the numerous and important subjects which, had they been considering Lord Campbell's Act, they would have had.

Bowen L.J. in the Court of Appeal (1), in the same case said:—

I am confident that there is no right of action under Lord Campbell's Act in the Admiralty Division, and I agree with the judgments of Lord Bramwell and the Master of the Rolls delivered in the *Franconia.* Shortly the question is whether this is a claim for damages done by a ship and I think that the history of the law on this point proves that it is not.

The reasoning supporting the conclusions reached in *The Vera Cruz* case by both the Court of Appeal and the House of Lords, is that in the case of loss of life, any right of action dies with the deceased, and no cause of action in consequence of the loss of life exists except under Lord Campbell's Act, and that any right of action which existed under that Act was not a claim "for damage done by any ship," but was an entirely new and different cause of action. As was stated in *The Vera Cruz* case by Blackburn L.J.:—

Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the first section of that Act and had died, the maxim *actio personalis moritur cum persona* applied, he could not sue for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him, resulting in death. That Lord Campbell, or rather the legislature at the instance of Lord Campbell, thought fit to alter; and I think that when that Act is looked at, it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym* v. *Great Northern Railway Co.* is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death.

(1) 9 P. at p. 100.

The same point was considered in 1916, in the case of *The Amerika*,[1] by the House of Lords. It is not necessary to state the facts in this case, but their Lordships upheld the principle long ago established by the rule expressed by Lord Ellenborough in *Baker* vs. *Bolton*,[2] that in a civil court the death of a human being cannot be complained of as an injury, and that the only modification of that common law principle was brought about by Lord Campbell Act, which first introduced into the law of England a remedy in case of injury attended with loss of life, the law up to the time of the passing of that Act being, that in case of death resulting from injury the remedy for the injury died with the person, and that Act provided a new cause of action and did not merely regulate or enlarge an old one. Therefore one may safely conclude that under the Admiralty Court Act, 1861, a Court of Admiralty, did not possess jurisdiction to entertain a claim for damage for loss of life under Lord Campbell's Act because that was not a claim, "for damage done by any ship."

Turning now to an inquiry whether s. 6 of the Maritime Conventions Act enlarges the jurisdiction of the Admiralty Court, or by itself gives a new right of action, in such a case as the one under consideration, I might observe that s. 6 of the Maritime Conventions Act (Canada) is an exact reproduction of s. 5 of the Maritime Conventions Act enacted in England. The language of s. 6 of the Canadian Act gives rise to some doubt, and it is difficult to understand exactly what was in the mind of the legislature when enacting this provision. It is not clear in what manner it has changed the case law on the subject. If the words "damage done by any ship," in the Act of 1861, did not give jurisdiction in an action under Lord Campbell's Act, it is a little difficult to perceive how s. 6 of the Canadian Act of 1914 does, because the words, "damage done by any ship" still remain as they were. The act of 1861 s. 7 relates expressly to damage done by ships; or as was said by Lord Selborne in The *Vera Cruz* case, maritime damage by ships is the subject of that legislation. The Maritime Conventions Act, s. 6 in providing

(1) (1917) A.C. 38.

(2) (1808) 1 Campbell's R. 493.

1928
THE SHIP *Catala* v. DAGSLAND.
Maclean J.

that any enactment conferring on the Admiralty Court any jurisdiction in respect of damages, shall have effect as though references to such damages included references to damages for loss of life or personal injuries, does not qualify in any way the active instrument of damage "any ship." That is to say, that even if it more specifically enlarges the scope of damages recoverable so as to include damages for loss of life or personal injury, still under any construction it seems to me, the right of action still relates to "damage done by any ship," and by binding authority it has been held, that this does not give a right of action for damages for loss of life against a ship, in a Court of Admiralty. There is not I understand any other enactment except s. 7 of the Act of 1861, to which s. 6 of the Act of 1914 can relate, when it refers to "any enactment" which confers on any Court of Admiralty jurisdiction in respect of damages.

This enactment has been judicially considered. In the case of *The Moliere* (1), Roche J. held that no change was made by the statute of 1911, that is the Maritime Conventions Act of England, and he reached the conclusion that the law remained as it was before the Maritime Conventions Act. It may be true that the exact point for determination in this case is distinguishable from the facts of the case under consideration, but nevertheless Roche J. expressed the view I have just stated, and I think he could not well avoid expressing an opinion one way or the other upon that particular point, because it was urged upon him by counsel, that the Maritime Conventions Act (England) and the prevalence of Workmen's Compensation Acts, or its equivalent, in most countries of the world, had changed the law, and that any sum paid to dependents as a consequence of loss of life following a collision between two ships, under a Swedish statute in that case, was as much an item of damage as the amount of the injury to the ship, and was damages within the meaning of the Maritime Conventions Act. Then there is the case of *The Kwasind*[2]. This was an action *in rem* for damages brought by the dependents of a deceased person against the ship *Kwasind.* The defendant's solicitors having ac-

(1) (1925) P. 27.

(2) (1915) 84 L.J. Adm. 102.

cepted the service of the writ and undertaken to put in bail, subsequently filed an admission of liability. The plaintiffs thereupon asked for leave to enter up interlocutory judgment, for damages to be assessed. The President of the court in the end directed that the action should be tried by the judge, assisted by a common jury in the Admiralty division of the High Court of Justice, from which an appeal was taken, Counsel for the appellants contended that the damages should be assessed by the Registrar of the Admiralty Division rather than by a jury, and that an action *in rem* to recover damages in respect of loss of life caused by collision could now be brought in the Admiralty Division by virtue of s. 5 of the Maritime Conventions Act 1911, and s. 7 of the Admiralty Act of 1861, but the Court of Appeal was of a different opinion. This was an instance I think where a judge presiding in the Admiralty Division of the High Court was exercising his common law jurisdiction. Buckley L.J. delivering the judgment of the Appeal Court said:

> This is an action for damages brought by the dependents of a deceased person. It is brought *in rem* against the ship. The President has directed that the action be tried by "The Judge assisted by a common jury in this" (that is to say, the Admiralty) "Division of the High Court of Justice." Counsel for the defendants has addressed an argument to us for the purpose of shewing that this is not an action under Lord Campbell's Act. He suggests that section 7 of the Admiralty Court Act, 1861, and section 5 of the Maritime Conventions Act, 1911, have created a liability for damages for loss of life, and that an action can now be brought to recover such damages, not under Lord Campbell's Act, but under the provisions of these other Acts. It appears to us that that is not so. Lord Campbell's Act is the only Act which creates this sort of liability for the death of persons to their widows or dependents, a limited class. No liability was created under the Admiralty Court Act, 1861, or the Maritime Conventions Act, 1911. This, then, is an action under Lord Campbell's Act. Now, in the Court of Admiralty, it is said, and said with truth, where the only question is the assessment of damages, it is usual to refer that to the Registrar and Merchants. What has happened in this case is that the ship has delivered an admission of liability, so that there is nothing to try except damages, and it is contended that according to the practice, not only is it usual for that to go to the Registrar and Merchants, but it must,—or perhaps it is not put quite so high as that—but it ought to go to the Registrar and Merchants. To my mind, the question is one of discretion for the judge. That he can sit with a jury is beyond dispute, and he has directed that the assessment should be made not by the ordinary subordinate officer, but by himself sitting with a jury. I think that is an order within his discretion, one which it was competent for him to make, and one which we ought not to review.

1928
THE SHIP *Catala* v. DAGSLAND.
Maclean J.

If it was intended by the Canadian Maritime Conventions Act, 1914, to give to the Admiralty Court, jurisdiction in the case of damages for loss of life, under such provincial enactments as the British Columbia Families' Compensation Act, or by virtue of it or in addition to it, it is unfortunate that this was not made clear. If such an important departure from the law as existing and known in this country prior to 1914 were in contemplation, one would think it would have been dealt with by the legislature in very exact terms, and express or specific words indicating such a change is certainly not to be found in the legislation. In the *Vera Cruz* case, Lord Selborne said it was impossible not to see, and the proposition was too clear to admit of dispute, that if the 7th section of the Act of 1861 had the effect of transferring that action to the Court of Admiralty to be brought under the Admiralty rules and system, to be tried without a jury, to be enforced *in rem* and not *in personam,* without making any person individually a defendant on the record, and so on, the Act of 1861 had materially varied the effect of Lord Campbell's Act, which gave the right of action. He further said that if anything were certain it was this, that where there are general words in a later Act capable of reasonable and simple application without extending them to subjects specificially dealt with by earlier legislation, you are not to hold that earlier and specific legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. See also *McColl* v. *Canadian Pacific Railway Co.*[1]

The second point relied upon by the appellant is, that if there was jurisdiction in this court to hear this action, it could be maintained only by virtue of the Families' Compensation Act, and in that case the appellant's submission is, that the right of action has been taken away by the operation of the Workmen's Compensation Act of British Columbia. This Act applies to certain enumerated industries such as the fisheries, shipping, transportation, etc. The Act makes provision for a fund maintained by contributions, from which compensation is to be paid to work-

(1) (1923) A.C. 126, at p. 128.

men injured by accident, arising out of and in the course of their employment, and to their dependents where such injury results in death; and it creates a Board, known as the Workmen's Compensation Board, for its administration. By s. 11 (1) it is enacted that when an accident happens to a workman in the course of his employment in such circumstances as entitles him or his dependents to an action against some person, other than the employer, the workmen or his dependents are entitled to compensation under Part 1 of the Act. That is to say they "may claim such compensation or may bring such action." An important qualification of s. 11 (1) is introduced by s. 11 (4). it is as follows:—

S. 11 (4) In any case within the provisions of subsection (1) neither the workmen nor his dependents nor the employer of such workmen shall have any right of action in respect of such accident against an employer in any industry within the scope of this Part; and in any such case where it appears to the satisfaction of the Board that a workman of an employer in any class is injured owing to the negligence of an employer or of the workman of an employer in another class within the scope of this Part, the Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.

S. 11 (3) provides that if the workman or dependent makes an application to the Board claiming compensation under Part 1 of the Act, the Board shall be subrogated to the rights of the workmen or dependent, etc.

By s. 12 (3) it is provided:—

Where an action in respect of an injury is brought against an employer by a workman of a dependent, the Board shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive; and if the Board determines that the action is one the right to bring which is taken away by this Part the action shall be forever stayed.

The Board is given exclusive jurisdiction by s. 74 to inquire into, hear and determine all matters of fact and law arising under Part 1 of the Act, and provides that the decision of the Board shall be final and not open to review. The section adds:—

And without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:—

among other questions:—

(1) Whether or not any workman in any industry within the scope of this Part is within the scope of this Part and entitled to compensation thereunder;

1928
THE SHIP *Catala* v. DAGSLAND.
Maclean J.

(*j*) Whether or not any person, firm or body corporate is an employer within the scope of this Part.

In due course the respondent applied to the Board for compensation, and payments were made from the date of the death of her husband, until about the time of the trial of this action, or for substantially a year. It appears that the Board ceased making payments after judgment by the learned trial judge, and pending the final result of these proceedings. The Board, on November 22, 1926, upon the application of the owners of the *Catala* under the provisions of s. 12 (3); "adjudicated and determined" that the said owners were employers in an industry within the scope of Part 1 of the Act; that the deceased was a workman in an industry covered by or within the scope of the Act, and that the accident arose out of and in the course of his employment; that the death of the deceased was one in respect of which the respondent, on behalf of herself and the infant children of the deceased, had a right of compensation under the Act; and that the action was one which the right to bring was taken away by Part 1 of the Workmen's Compensation Act.

The learned trial judge in his reasons for judgment said it must be conceded that if the Board had the power to make the adjudication mentioned, this Court could not exercise any further consideration in the action because, it is not only "forever stayed" but the "right to bring" the action itself is taken away by the Workmen's Compensation Act. Even if it could be said that the Maritime Conventions Act, and the Admiralty Court Act, 1861, together give jurisdiction to entertain an action, under the provisions of the Families' Compensation Act, then in that view, I think the issue is concluded by *Peter* v. *Yorkshire Estate Co., Ltd.* (1), and the right of action if existent at all, is taken away. In that case the Judicial Committee of the Privy Council held that the decision of the Workmen's Compensation Board, that an employee who had brought an action was a workman to whom the British Columbia Workmen's Compensation Act applied, and that the defendant was an employer within the scope of the Act so as to fall within the provisions of s. 12 (3), which

(1) (1926) 2 W.W. Rep. 545.

took away the right of action, was final and not open to review. In the judgment of their Lordships delivered by the Lord Chancellor, the matter of the construction of the Workmen's Compensation Act (British Columbia) s. 12 (3) is discussed as follows:—

> There remains the third question, as to the construction of sec. 12, subsec. (3). It is argued on behalf of the appellant that the words "an employer" contained in that subsection refer only to the employer of the workman there mentioned and not to a third person, that is to say, to another employer, although that other employer falls within the definition of an "employer" within the meaning of the Act. It might have been an answer to that contention that the Board have jurisdiction to decide questions of law as well as questions of fact; but it appeared to their Lordships more satisfactory to come to a conclusion themselves upon the point of law, and they are of opinion that the contention cannot prevail. Throughout secs. 11 and 12 of the Act a distinction is drawn between "the employer" of a workman, who is from time to time referred to, and "an employer" within the meaning of the Act. It has been pointed out that in three expressions contained in the two sections "the employer" of the workman is clearly pointed to, and that in three other instances the word "employer" is used with reference to any employer under the Act. The seventh instance which occurs in the Act is the one in sec. 12, subsec. (3), which has to be dealt with. Upon the whole their Lordships are of opinion that the words "an employer" there occurring include any employer who falls within the purview of the Act. That view is supported by the circumstances that the Board is by the same subsection authorized to determine whether an action is one the right to bring which is taken away "by this part," that is to say, by any section of this Part of the Act, including sec. 11, subsec. (4). That is the view which was taken by the Court of Appeal of British Columbia, and their Lordships do not see their way to differ from the conclusion of the Court. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty to that effect.

Upon the hypothesis that this court has jurisdiction to entertain this action under the Families' Compensation Act, then I think it is reasonably clear that such right of action has been taken away by the adjudication of the Board under the Workmen's Compensation Act.

While it is not necessary to the decision of this appeal, the point has been raised and it is therefore proper for me to say, that under the provisions of the Workmen's Compensation Act of British Columbia, and the principles of common law, it would appear that the respondent is bound by her election to claim compensation under that Act. The Act itself is remedial legislation and as such must receive such a beneficient interpretation by the courts as will enable the intention of the legislation to be effectively attained, and I do not think it was the intention of

1928
THE SHIP *Catala* v. DAGSLAND.
Maclean J.

the legislature that a dependent could elect to apply for and receive compensation under the Act, and at the same time pursue a common law remedy. The remedies are alternative and not cumulative. The dependent I think is burdened with a duty of making an election, between the remedy provided in the Workmen's Compensation Act, and his or her common law remedy, and the respondent in this case having elected to claim compensation under that Act and accepted it, cannot now renounce it and resort to an alternative remedy, which once was open to her. There is the consideration inhering in the common law rule "*Interest rei publicae ut sit finis litium,*" i.e., it is the interest of the State that there should be an end of litigation. In the early history of the Common Law it will be found that the minds of judges and lawyers were impressed with the desirability of adhering to the rule that a man should not be vexed twice for the same cause of action. This is the doctrine of the maxim, *nemo debit bis vexari si constat curiae quod sit pro una et eadem causa,* and in *Sparry's case* (1), it is regarded as a fundamental principle of the common law. This doctrine may be paraphrased as follows: If there has been a final decision of a competent court there should be no further proceedings allowed in another court, between the same parties for the same cause of action. See Broom's Legal Maxims 9th ed., p. 228; Elliott on Workmen's Compensation Act (9th ed.), p. 400-413; *Black Lake Asbestos and Chrome Co.* v. *Marquis* (2); *Bonham* v. *The Sarnor* (3).

Resting my views on that point on what has been said above, I may say here that it is conceivable that a distinction might be drawn between a statute which imposes upon a litigant the obligation of making a choice—an election or option as the books say—between two remedies, and a statute which ousts the jurisdiction formerly vested in one tribunal, by providing a new and exclusive jurisdiction in another. In other words, to prevent a litigant who undertakes to pursue his remedy in one tribunal from seeking relief in another for the same cause, does not necessarily disturb the jurisdiction of one or the other of the two

(1) (1826) 3 Coke's Rep. 123. (2) (1922) Q.O.R. 33, K.B. 390.
(3) (1922) 21 Ex. C.R. 183.

tribunals. It is perhaps a matter affecting the litigant personally, and not the tribunals. However, as I have already mentioned, it is not necessary for me to make this point, a ground of my decision to allow this appeal.

With great respect, therefore, I am of the opinion for reasons given that the appeal must be allowed with costs.

Judgment accordingly.

Judgment of Martin L.J.A. delivered May 27, 1927.

This is an action for damages against the SS. *Catala* by the widow and two infant children of Erik Dagsland, whose death was brought about by a collision between that vessel and a fishing boat in which were the deceased working as a boat puller and one Albert Carlson (the licensee and person in authority thereof) on the 31st July, 1925, in Middle Passage near the mouth of the Skeena river in the territorial waters of Canada on the Pacific Ocean.

With respect to the cause of the death of Dagsland I find that it was due to the negligence of the ship and I award damages against her to the amount of twenty thousand dollars, bearing in mind the increased cost of living and consequent reduction in the pre-war value of money as pointed out in *Wand v. Mainland Transfer Co.* (1).

Apart from the questions of fact the following objections in law were taken to the jurisdiction of this Court, and otherwise, viz.,

First: It was submitted that the pending proceedings in this action could not be further entertained because of an "adjudication and determination" made after their inception by the Workmen's Compensation Board on the 22nd of November last in the exercise of its supposed powers under sec. 12 (3) of the Workmen's Compensation Act of this province, being cap. 278, R.S.B.C., said section being: (See text in foregoing judgment, p. 93.)

The said adjudication was made upon the application of the Union Steamships Limited purporting to be the owners of the defendant ship herein, and after reciting the proceedings the adjudication thus concludes:

"And this Board does further find and declare that the said action is one the right to bring which is taken away by Part 1 of the said Workmen's Compensation Act."

It must be conceded that if the Board had the power to make that adjudication this Court cannot exercise any further jurisdiction in this action because it is not only "for ever stayed" but the "right to bring" the action itself is "taken away" by the Provincial Act. I am, however, of opinion that the submission of the plaintiff that the Provincial Board has no jurisdiction over rights of action or proceedings in this Court is correct, and therefore the adjudication is, speaking with all respect, wholly null and void with the principles and authorities cited in *The Leonor* (2).

(1) (1919) 27 B.C. 340 and 345.

(2) (1916) 3 Brit. and Col. Prize Cases, 91; (Grant.); (1917) 3 W.W.R. 861.

1928

THE SHIP *Catala* *v.* DAGSLAND.

Martin L.J.A.

There was much learned and instructive argument upon this interesting and important question but I may summarize my conclusion thereupon by saying that as the jurisdiction exercised and remedies afforded by this Court (through the Vice-Admiralty Court the lineal descendant of the Court of the Lord High Admiral and of the High Court of Admiralty) (1), pursuant to Imperial and Federal legislation, are in no way based upon common law rights but exist "to deal with matters arising at sea outside the purview of other Courts" (Anson on the Constitution, 3rd ed. 283), the invocation of principles founded upon the common law does not advance this matter, and just as it is impossible for this Court to expand its jurisdiction by provincial laws so it is impossible for such laws to curtail its jurisdiction in any degree, any more than they could that of another tribunal established by Federal legislation, i.e., the Supreme Court of Canada. *Crown Grain Co. Ltd.* v. *Day* (2), wherein the Privy Council said (there being an attempt by the Province of Manitoba to deprive the Supreme Court of Canada of jurisdiction), p. 507:

"But further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail."

By sec. 6 of the Maritime Conventions Act, cap. 13, Stat. Can. 1914, it is enacted:

"Any enactment which confers on any court Admiralty jurisdiction in respect of damages shall have effect as though references to such damages included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought in rem or personam."

The new Federal right thus conferred would, in my opinion, continue to exist throughout Canada (save as excepted by sec. 10) if the Provincial Families' Compensation Act, cap. 85, R.S.B.C., conferring certain causes of action for death occasioned by tortious acts, or similar acts in other provinces were repealed, and the only limitation upon it is that the action must be commenced within two years unless the time is extended by the court having jurisdiction—sec. 9. In coming to this conclusion I have not overlooked the decision of the English Courts in *The Kwasind* (3) and *The Moliere* (4), which are based upon very different circumstances in the constitution of the Admiralty Court as a division of the High Court of Justice which exercises all ordinary civil jurisdictions, and on the existence of one British Legislature only with undivided and complete jurisdiction over all subject-matters. Furthermore, I do not, with respect follow the grounds or the object of the reasoning of Buckley L.J., in the former case respecting Lord Campbell's Act, because the decision really turned

(1) *Note.*—"The jurisdiction of the Lord Admirall is verie antient and long before the reign of Edward the third, as some have supposed, as may appear by the laws of Oleron (so-called) for that they were made by King Richard the first when he was there) that there had been an admirall time out of minde, and by many other antient records in the reignes of Henrie the third, Edward the first, and Edward the second, is most manifest. No. 2 Co. Litt. 260 b./ A.M.

(2) (1908) A.C. 504.

(3) (1915) 84 L.J. Adm. 102.

(4) (1925) P. 27.

1928

THE SHIP *Catala* v. DAGSLAND.

Martin L.J.A.

upon the proper exercise of judicial discretion in ordering the assessment of damages by a jury instead of assessors under English High Court Rule 2 of Order XXIV —1, giving the judge power to order the trial of the cause, matter or issue to be had with a jury, or assessors, or referee as therein directed, whereas by our Admiralty Rule 124 the most that the judge can do is to "refer the assessment of damages and the taking of any account to the registrar either alone or assisted by one or more merchants as assessors." In the note upon the decision in Roscoe's Admiralty Practice, 4th ed. 1920, p. 356, it is said that the order for a jury thereby authorized was "never acted upon as the case was subsequently settled by agreement." I can only regard the decision as obiter and inapplicable to the said radically different conditions in Canada both curial and legislative. To place them on a parity as regards the case at bar, there should at least be a general Federal Act in Canada similar to Lord Campbell's in England and one Court entertaining all actions for damages for personal injuries founded upon the common law or special statute. As to *The Moliere,* the same observations as to different conditions apply, and moreover, it does not touch the exact point raised here. I cannot bring myself to the conclusion, in the absence of express authority upon the point, that said Federal sec. 6 has conferred no additional Federal rights or benefits upon litigants of this class in Canada unless there happens to be a statute of the nature of Lord Campbell's Act in existence in the province wherein the damage was suffered.

Since this Court had already under sec. 7 of the Imperial Admiralty Act, 1861, cap. 10, "jurisdiction over any claim for damage done by any ship" I regard the effect of said sec. 6 of 1914 as now conferring in a clear, simple and full way one and the same maritime lien and remedy for damage to the person or property "done by any ship" and the two jurisdictional sections should now be read together in their amplitude, speaking and operating as though originally so enacted, and hence it is just as impossible to deprive a litigant in this Court of the later as of the earlier right he has become entitled to: in other words, as applicable to this case, sec. 7 of 1861 is, by sec. 6 of 1914, simply rewritten and re-enacted to include "jurisdiction in respect of damages . . . for loss of life or personal injury"; the decision of the Privy Council in *McColl* v. *Can. Pac. Ry.* (1), though relied upon by the defendant really supports the plaintiff, and is in accord with *Grain Co.* v. *Day, supra.*

It follows that the objection to the jurisdiction of this Court is over-ruled.

Then, second, it is submitted that the plaintiff has barred her right of recovery because she has accepted benefits under the said Workmen's Compensation Act, the result of which is that she has "elected," under sec. 10 thereof, to resort to that act for relief, and further, that the effect of such acceptance is to deprive her, apart from the act, of a right to recover more than one sort of compensation, and reliance is placed upon the cases of *Scarf* v. *Jardine* (2); *Wright* v. *London General Omnibus Co.* (3); and *McClenaghan* v. *Edmonton* (4); to which I add *Birmingham Corporation* v. *S. Allsopp & Sons Ltd.* (5), which is an exact application of the principle

(1) (1923) A.C. 126.
(2) (1882) 7 A.C. 360.
(3) (1876) 2 Q.B.D. 271.
(4) (1926) 1 W.W.R. 449.
(5) (1919) 88 L.J., K.B. 549.

1928
THE SHIP *Catala* v. DAGSLAND.
Martin L.J.A.

of the *Wright* case, and the *McClenaghan* case is likewise based thereupon and on *Scarf* v. *Jardine* (an action by a creditor of a partnership), the general principle of which is thus laid down by Lord Blackburn, pp. 360-1:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one or two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

If I am right in my view that the Workmen's Compensation Act does not apply to the right the plaintiff is seeking to establish, its provisions do not bar her, and otherwise the evidence does not bring the plaintiff within Lord Blackburn's principle, nor does, I think, the *Wright* case support the defendant. That decision was based upon a statute which provided that where a cab-driver was convicted of "wanton or furious driving," etc. . . . he should be fined three pounds and, in addition—

"Where any such hurt or damage shall have been caused the justice upon hearing of the complaint, may adjudge as and for compensation to any party aggrieved as aforesaid a sum not exceeding ten pounds."

The cab-driver was prosecuted by the police and convicted, and the magistrate awarded the plaintiff, who was a witness at the hearing, the sum of £10 for compensation to his cab which the plaintiff received though stating it was an inadequate sum. The view taken by the Court of the statute and its effect is best stated by Mellor J., p. 275, thus:

"The provision appears to me to be a very advantageous one with regard to the cases it was intended to meet, though in the present case the plaintiff seems to have availed himself of it in ignorance of the legal effect of what he was doing. It is intended to give to the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before the magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the county court or compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became res judicata and cannot be re-opened."

I am unable to see how a maritime lien upon, and a right *in rem* against a ship in a Court of Admiralty can be compared to the special statutory circumstances upon which that decision was based.

In the latest edition of MacLachlan on Shipping (1923), pp. 238-9, it is said, after noting the said section of the Maritime Conventions Act, and the leading cases on the point:

"In addition to the jurisdiction *in rem* possessed by the Admiralty Court for damage done or received by a ship, which was correlative with a maritime lien over the vessel which was the instrument of mischief, the Legislature has given certain powers for the detention of vessels in any part of the territorial waters of the United Kingdom. . . . A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and notwithstanding any change of possession,, travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached. . . . Before the Maritime Conventions Act, 1911, the lien remained inchoate for an indefinite period, provided proceedings were taken with reasonable diligence and followed up in good faith. The Maritime Conventions Act has altered the law in this respect, in that it has set up a period of limitation within which actions for damage must be brought."

But fortunately there is a clear authority upon both the principle and the practice of this Court in cases of maritime liens arising out of wages and damage by collision: I refer to the two decisions of Dr. Lushington in *The Bengal* and *The John and Mary* (1), the former being a joint report from which I quote the judgment in the latter case, p. 1086, though both reports should be considered:

"With respect to *The John and Mary*, the only difference between it and the *Bengal* is, that that is a suit for wages and this is a cause of damage. In this case an action was brought at common law, but the parties could not realize the fruits of their judgment. It quite comes within the decision of the case in Douglas' Reports (*Burnell* v. *Martin* (1780) 2 Doug. 417). Where a party suffers damage by collision, he is entitled to recover at common law, or to avail himself of the lien he has, for the loss he has sustained. If there had been a *lis pendens*, it would have been a different thing; for I certainly would not allow, where an action was pending at common law, a suit to be promoted in this court to a precisely similar effect. I would not allow both suits to go on at the same time, because, in the action originally commenced there might be full and complete indemnity for the injuries suffered; but if it so happened that in the court of common law the party could by no means obtain full compensation, I would then allow him to proceed against the ship in this court. I see no substantial difference between this and the case of The Bengal; and therefore my judgment must be to allow the parties to proceed in this case as in the other, and I give them their costs."

The judgment in the former case points out, citing *The Bold Buccleugh* (2), that:

"We have already explained, that in our judgment a proceeding *in rem* differs from one *in personam;* and it follows that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."

In the former case the master had recovered a personal judgment in the Court of Exchequer against the owner for his wages but could not

(1) (1859) 5 Jur., N.S. 1085; Swabey, 468, 471.

(2) (1851) 7 Moore P.C., 267, 286.

realize it because of the defendant's bankruptcy though he had filed a proper claim with the assignee against the bankrupt's estate based on his judgment; in the latter the plaintiff had recovered in the same court a personal judgment against the owners of the ship for damages for collision but further proceedings arising therefrom were pending in that Court respecting the ownership of the vessel, and the same question of barring a remedy by " election " was raised by counsel (Swab. p. 472) as is raised here.

It follows from these cases that unless the actions are to a " precisely similar effect " and " full and complete indemnity " can be recovered in the other tribunal this Court will not refuse the appropriate, distinct and complete remedy it can afford. In the case at bar the amount awarded by the Workmen's Compensation Board is in any event so inadequate that it cannot be regarded, in my opinion, as anything approaching that " full compensation " contemplated by the learned Doctor Lushington, but as plaintiff's counsel has very properly offered to accept a reduction of all sums already received by her from the said Board from my said award of $20,000, judgment will be entered for that reduced amount after ascertainment by the Registrar if not agreed upon.

To the Admiralty decisions already cited I add an instructive later one in the Court of Common Pleas, *Nelson* v. *Couch* (1), wherein they were unanimously approved and applied in principle by permitting proceedisgs to be taken at common law for damages for collision after those in Admiralty had proved insufficient to satisfy the injured party—as Willes J., puts it, p. 48, the plaintiff is entitled to recover at law *in personam* " the excess of damage which the ship is insufficient to satisfy "; and he concludes:

> " It is clear from the case of *The John and Mary* that a proceeding *in rem* in the Admiralty Court may follow proceedings against the owners in a court of law."

And cf. *The Chieftain* (2).

These above reasons being sufficient, in my opinion, to support this action I do not deem it necessary to consider the other answers advanced by the plaintiff to the said objections, but will content myself by citing the decision of the Court of Appeal in *The Burns* (3), on general statutes of limitation of action not barring "actions" in Admiralty *in rem;* and in particular the observations of Lord Collins M.R. on pp. 146-7 which support the submission of plaintiff's counsel on the meaning of " action " in secs. 11 and 12 of said Workmen's Compensation Act.

Judgment accordingly.

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(1) (1863) 33 L.J. C.P. 46.
(2) (1863) Br. & Lush. 212.
(3) (1907) P. 137.