ELIZABETH J. MONAGHAN. .....APPELLANT; 1881

AND *Dec. 10.

SARAH HORN.....RESPONDENT. 1882

*June 22.

IN RE "THE GARLAND."

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Maritime Court of Ontario, jurisdiction of—Rev. Stats. Ont. ch. 128.—Collision.—Negligence, causing death.—Action in rem by mother of deceased child.—Master and servant.

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them—"The Garland."

Petition against "The Garland"—libelled under the Maritime Court Act at the port of *Windsor*—on behalf of the appellant claiming $2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of said "Garland." The respondent intervened, and

*PRESENT—Sir Wm. J. Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, JJ.

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demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court.

Held, (*Fournier* and *Taschereau*, JJ., dissenting), that the Maritime Court of *Ontario* has no jurisdiction apart from R. S. O. ch. 128 (re-enacting in that Province Lord *Campbell's* Act 9 and 10 *Vic.*, ch. 93), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought her action as the personal representative of the child.

Per *Fournier*, *Taschereau*, *Henry* and *Gwynne*, JJ., (reversing the judgment of the Maritime Court of *Ontario*), that Vice-Admiralty courts in British possessions and the Maritime Court of *Ontario*, have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property."

Per *Fournier* and *Taschereau*, JJ., dissenting, that apart from and independently of ch. 128 Rev. Stats. *Ont.* the Maritime Court of *Ontario* has jurisdiction in a proceeding *in rem* against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant.

APPEAL to the Supreme Court of *Canada* from a judgment of His Honor Judge *Leggatt*, the surrogate judge of the Maritime Court of *Ontario*, at *Sandwich* and *Windsor*, allowing a demurrer to and dismissing the petition of the appellant against the steamboat "Garland," libelled under the Maritime Court Act at the port of *Windsor*.

The petition of the appellant of *Detroit* in the *United States* of *America*, in a cause of damages for death from collision, sets out: That the steamboat "The Garland," belonging to the port of *Detroit*, in the State of *Michigan*, then lying in the port of *Windsor*, was and is engaged in navigating the inland waters, of which the whole or part is in the province of *Ontario*.

That plaintiff, at the time when the cause of action arose, was the mother of *Joseph Monaghan*, who, on the night of July 22nd, 1880, was a passenger upon the

steam yacht "Mamie," of twenty tons burthen, used in inland navigation, on the *Detroit* river and adjacent waters.

That on the 22nd day of July, A.D., 1880, the said steam yacht "Mamie," being then and also at the time of the collision, tight, staunch, strong, and in every respect well manned, tackled, apparelled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts, upon the lookout for the protection and safety of said vessel, and with all her lights in their proper places and brightly burning, was bound up the *Detroit* river from the city of *Monroe* to the city of *Detroit*, returning from a pleasure excursion, and when said steam yacht had reached a point about abreast of *Mammy Judy* light, the evening being clear and bright moonlight, and it being about ten o'clock in the evening of said day, she sighted the steamer "Garland" coming down the river, also on a pleasure excursion from *Detroit* down the *Detroit* river and back, and overloaded with about twelve hundred excursionists on board, which steamer was then between one and two miles away, and showing her green and white lights; that the said "Mamie" continued in her proper course until said "Garland," when between half a mile and a mile from the "Mamie," changed her course, by porting her wheel and showing all three of her lights, and steering directly for the "Mamie," and down the river; that the "Mamie" thereupon blew one blast of her whistle and put her wheel to port so as to pass the said steamer "Garland" upon her port hand, and the said steamer "Garland" responded to said signal by blowing one whistle; but by the gross carelessness and negligence of the officers and crew of the said steamer "Garland," failed to port her wheel as she ought to have done, but, on the contrary, continued on her course, and swung over to the other side of the

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channel, across the course which the "Mamie" was properly pursuing, and struck said steam yacht "Mamie" upon the port side, aft of the pilot house, crushing her and breaking her down to the water's edge, so that within five minutes said "Mamie" sank.

The petition alleges insufficiency and incompetency of master and pilot, and particularly of boats and crew, &c., and that by reason of the collision aforesaid, and the sinking of said steam yacht "Mamie," and by the carelessness and negligence of the steamer "Garland," her officers and crew, and the failure to keep a proper lookout on board of said steamer, and to employ proper persons for officers, and to provide a sufficient and competent crew, and to keep the life boats and other boats of said "Garland" in a proper and fit condition for use, said *Joseph Monaghan,* son of said plaintiff, came to his death by drowning, and his said death was the direct result of the negligence of said steamer "Garland" in causing said collision, and fifteen other persons, passengers on the said steam yacht "Mamie," were drowned at the same time.

That plaintiff, by reason of the premises, was wrongfully deprived of the earnings, services and society of her said minor son.

That said son was of the age of thirteen and one-third years at his death. That your plaintiff was put to a large expense in searching for, and recovering the body of her said son, and in and about the funeral and burial of said body, to wit, $100 or thereabouts, and plaintiff claimed $2,000 and to have a lien on vessel, enforceable in the court.

Sarah Horn, the owner of the *Garland,* having intervened, demurred to the petition, and showed for cause of demurrer.

"1. That the said petition does not contain any matter wherein this court can ground any decree or give to the

plaintiff any relief against the said steamboat *Garland*, or against the owner thereof, intervening.

"Wherefore, and for divers other good causes of demurrer appearing in the said petition, the defendant demurs thereto, and prays judgment whether she ought to be compelled to make further or other answer to the said petition, and she prays to be hence dismissed with her costs.

"Statement in margin of demurrer of matters of law intended to be argued.

"1. The said petition does not allege or aver the death of the father of the said *Joseph Monaghan*, or that he has abandoned said child.

"2. The plaintiff as mother is not entitled, and has no remedy to recover damages for the loss of the child alleged in said petition as against the steamboat "Garland" or her owner.

"3. Even if the mother has a remedy for the loss of the child she is not authorized to pursue the remedy in her own name if she is suing under the statute in that behalf, that statute provides who must be the plaintiff.

"4. That the plaintiff by her said petition does not show that the collision which caused the death for which damage is claimed took place within the Province of *Ontario*.

"5. There was no obligation on the part of the mother to search for and recover the body of her said son, or to incur expense on account thereof, or for the funeral or burial of said body.

"6. That the plaintiff in and by the said petition does not set forth a cause of action against the said steamboat "Garland" within the jurisdiction of this court."

The petition having been amended by the introduction of the following averment: — "That *Joseph Patrick Monaghan*, the father of the

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said *Joseph Monaghan* departed this life on the third day of July, 1869, intestate, and at the time of his death was a resident of the said city of *Detroit*," the first matter alleged was disposed of. The Maritime Court of *Ontario* held the demurrer good and allowed the same with costs.

Mr. *Scott* for appellant :—

The question raised by the demurrer, and on this appeal is: 1st, whether the appellant could sue for the death of her son and consequent loss of service independently of Lord *Campbell's* Act; and 2nd, if she had a right to sue, whether the Maritime Court of *Ontario* has jurisdiction to entertain a claim of this nature?

As to the first point, I submit that even if such an action would not lie at common law, the admiralty court, which acts upon different principles will entertain the action. There is no decision in *England*, binding upon this court, holding that such an action would not lie at common law. The only decision, except at *nisi prius*, is *Osborne* v. *Gillett* (1), and although in that case the court decided, by a majority of one, that it would not lie, the weight of reasoning is, to my mind, strongly in favor of the view taken by *Bramwell*, B. The common law rule is not a rule which prevails in any other system of jurisprudence. The rules upon which they proceed in admiralty courts are the rules of the civil law; that court, independently of statute, would entertain the action brought by the mother for the death of her son and consequent loss of service. On this point I will refer the court to the 12th Central Law Journal (2), where the English authorities on this point are reviewed. See also *Thompson* on Negligence (3);

(1) L. R. 8 Ex. 88.

(2) P. 464.

(3) P. 1274.

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Plummer v. *Webb* (1); "*The Sea Gull*," (2); "*The Highland Light*" (3); "*The Towanda*," (4); "*The Charles Morgan*," (5); *Holmes* v. *The O. & C. R. W. Co.*, (6); *Dow* v. *Brown & Co.* (7).

It is admitted a wrongful act has been done, and that another person has suffered in consequence of that wrongful act. Now, on what principle can it be successfully contended that you can bring an action if your servant is injured, and that you have no remedy, if killed?

The decision of *Osborne* v. *Gillett* (8) is not binding upon this court, and was decided after the English law had been introduced in *Upper Canada*.

Then, if appellant has a claim against the wrongdoer, the next question is whether our Maritime Court of *Ontario* has jurisdiction to entertain it?

The judgment of the learned judge in the court below is based upon the difference between the Admiralty Court Act of 1861 (9), relying chiefly upon the absence in the Vice-Admiralty Court Act of the word "any" before the word "claims." The absence of this word is immaterial. In all the discussions upon the construction of the clause in the Admiralty Court Act, the question agitated was the extent of the meaning of the word "damage," and whether it included personal injury. No mention has anywhere been made of the word "any" as affecting the matter, and it is impossible for that word to have enlarged the meaning of the word "damage," or for its absence to narrow the sense in which that word is used.

By the Admiralty Court Act of 1861 (10), it is enacted

(1) 1 Ware 75.
(2) Chase's Decisions 145.
(3) Chase's Decisions 150.
(4) 23 Int. Rev. Rec. 384.
(5) 27 Law Reg. 624.
(6) 5 Federal Reporter 75; Pritchard's Admiralty Dig. 203.
(7) 6 D. 534, 16 Jur. 248 (Scotch.)
(8) L. R. 8 Ex. 88.
(9) 24 Vic. ch. 10, s. 7 and 26 Vic., ch. 24 (Imp.)
(10) 24 Vic., ch. 10, s. 7.

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that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Whether this enactment comprises a claim for damage such as the one sought to be enforced in this case, has been the subject of much judicial discussion in the cases of "*The Sylph*" (1); "*The Guldfaxe*" (2); "*The Explorer*" (3); "*The Beta*" (4); *Smith* v. *Brown* (5); *James* v. *London and South-Western Railway Co.* (6); *Simpson* v. *Blues* (7); and "*The Franconia*," (8). The result of these cases may be shortly stated as being that the English Admiralty Court has held that this claim does come within the section, and that opinion has been upheld in "*The Beta*" by the unanimous judgment of the judicial committee of the Privy Council; but, on the other hand, the Court of Queen's Bench (Lord *Blackburn* doubting) has held that it does not, and that opinion has been concurred in by the Courts of Common Pleas and Exchequer. The Court of Appeal, in the case of "*The Franconia*," was equally divided.

In this state of the English authorities, the law must be considered, as far as this Province is concerned, as settled by the decision in the case of "*The Beta*," the Judicial Committee of the Privy Council being our court of final resort, and that unless a clear distinction can be shown between the jurisdiction conferred by the Acts upon the High Court of Admiralty and the Vice-Admiralty Courts, the appellant is entitled to succeed.

Under the maritime law, a tort arising out of a collision, gives a lien on the ship doing the damage, and follows the ship, and when the ship comes within the jurisdiction of the admiralty, the only question for the court is whether a lien was created. See 7 *Moore's* P. C. 284; *Anne Joehanne* in *Stuart's* Vice Admiralty

(1) L. R. 2 A. & E. 24.
(2) L. R. 2 A. & E. 325.
(3) L. R. 3 A. & E. 289.
(4) L. R. 2 P. C. 447.
(5) L. R. 6 Q. B. 729.
(6) L. R. 7 Ex. 187.
(7) L. R. 7 C. P. 290.
(8) L. R. 2 P. D. 163.

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Reports, (1) ; and I submit, therefore, that we had a perfect right to file this petition in the Maritime Court of *Ontario* for a lien upon the steamboat "Garland," libelled at port *Windsor*, in the province of *Ontario*, and that the respondent's demurrer should have been dismissed.

Mr. *McCarthy*, Q.C. :—

The appellant was a foreigner, the vessel was a foreign ship, and the collision took place upon foreign waters. It is under these extraordinary circumstances that a suit is brought against a foreign vessel in the Maritime Court of *Ontario* by the parent of the child killed.

The jurisdiction of the Admiralty Court is conferred by the first section of the act creating the court, 40 *Vic.* cap 21, and it confers the same rights and remedies arising out of or connected with navigation, &c., "as such persons would have had in any then existing British Vice-Admiralty Court if the jurisdiction of such court extended to the province of *Ontario*." By reference to the act defining the jurisdiction of the Vice Admiralty Court, 26 and 27 *Vic.* (Imperial) chap. 241, sec. 10, ss. 6, and comparing that with the 13th section of the Imperial Act 24 *Vic.*, cap. 10, s. s. 7 and 13, conferring jurisdiction upon the High Court of Admiralty, it will be seen that, whereas the jurisdiction is given to the High Court of Admiralty over any claim for damage done by any ship, the jurisdiction conferred upon the Vice Admiralty Court is over "claims for damage done by any ship," the word "any" before "claims for damage" being omitted.

Chap. 128 of R. S. O. does not give any remedy *in rem* such as is sought in the Maritime Court in this petition, but merely a right of action *in personam*, and the act conferring jurisdiction on the Vice Admiralty

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(1) 2 Vol. P. 43

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Courts, which defines and limits the extent of the jurisdiction of the Maritime Court of *Ontario*, does not purport to give a right of lien where none existed before; and the natural interpretation of the words "claim for damages" does not mean damages to person but to property. See the reasoning in the case of "*The Sylph*" (1). Nor had the Vice Admiralty Courts, by virtue of Lord *Campbell's* Act or otherwise, jurisdiction over matters of the kind sought to be entertained here.

Unless the appellant shows that he had a lien upon the ship, this court has no jurisdiction.

I will now refer to the English cases to show that it is upon the words of the act respecting the jurisdiction of the High Court of Admiralty, which are quoted, that jurisdiction over claims of this nature is said to exist. The first case is that of "*The Sylph*" (2); then "*The Guldfaxe*" (3). This case disposes of the argument that the court would have jurisdiction independent of Lord *Campbell's* Act. "*The Explorer*" (4); "*The Franconia*" (5); S. C. on appeal (6); also *Smith* v. *Brown* (7), in which the jurisdiction in the High Court of Admiralty was denied by the Court of Queen's Bench.

It is a mistake to say that the Maritime Court is governed entirely by the principles of the Roman or civil law (8).

The learned counsel also referred to the following cases:

"*The Leon*" (9); "*The Moxam*" (10); "*The Saxonia.*" (11).

(1) L. R. 2 Ad. & Ec. 24.
(2) L. R. 2 Ad. & Ec. 24.
(3) L. R. 2 Ad. & Ec. 324.
(4) L. R. 3 Ad. & Ec. 289.
(5) L. R. 2 P. D. 163.
(6) L. R. 2 P. D. 170.
(7) L. R 6 Q. B. 728.
(8) 4 C. Rob. Adm. Rep. p. 73.
(9) 44 L. T. N. S. 613.
(10) 1 Prob. Div. 107.
(11) L. T. N. S. p. 6.

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If, however, it should be determined that the court had jurisdiction over such a claim, I will now contend that, having sued as parent of the child, independent of Lord *Campbell's* Act, she cannot recover. The common law of England has been declared to be the law of *Ontario*.

No such action could be maintained or was maintainable at common law. The cause of action died with the person injured, and it was only under the Statute Law (Lord *Campbell's* Act, as the original act is known) ch. 128 R. S. O. in that province that an action for the loss of a person's life could be maintained, and by section three of that statute it is affirmatively enacted that such action should be brought in the name of the executor or administrator of the person deceased. The action can therefore only be brought in the name of the personal representative, which the petitioner in this case does not pretend she is. In support of the proposition that an action could not be maintained at common law for the death of another or for any negligence causing the death of another, I refer to *Osborne* v. *Gillett* (1). The rule is the same in the Admiralty Courts. See "*Hall's* Admiralty Practice" 21, "*Dunlop's* Admiralty Practice" 87, "*Benedict's* Admiralty Practice" 185, and "*Parson's* Ship and Admiralty" 350. Then the child in this case was under the age of fourteen years, and it is a presumption that a child under fourteen is incapable of earning anything or of being a servant. The mother therefore, if otherwise entitled to sue, could not maintain an action against a person whose wrongful act had caused the death of the child, because the child was not old enough to be capable of rendering any act of service, or to be treated by the law as a servant, in other words because it would be a presumption of law that the mother could not have sustained any such

(1) 2 L. R. 8 Ex. 88;

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injury as, under Lord *Campbell's* Act, would entitle her to damages See "*Macpherson* on Infants," *Evans* v. *Walton* (1); *Grinell* v. *Wells* (2); *Hall* v. *Hollander* (3). Then again the question does not disclose facts upon which my learned friend could be allowed to argue that there is a ground of action for loss of a servant's services. There is no allegation of the value of these services. The allegation in the petition of the expenditure of money by the mother in searching for and recovering the body of her son, is not such damages as would entitle her to maintain a suit. See *Pim* v. *The G. N. Railway Co.* (4); and *Dalton* v. *The South Eastern Railway Co.* (5), and if the proceeding is sought to be maintained on the ground that the deceased being the petitioner's servant she is entitled to damage on account of the loss of services, it is clear that there is no right arising when death happens instanter as there would be in the case of a servant being injured, and so incapacitated from performing the services he had undertaken to render, but had not been killed. See *Baker* v. *Bolton* (6); *Osborne* v. *Gillett* (7); *Hyatt* v. *Adams* (8).

Mr. *Scott* in reply:

If the allegation in the petition as to damages resulting to plaintiff from the loss of the services of her son as servant is not sufficient, I pray for leave to amend the petition accordingly.

RITCHIE, C.J.:—

No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord *Campbell's* Act, 9 and

(1) 2 C. P. 615.
(2) 7 M. & G. 1033.
(3) 4 B. & C. 660.
(4) 2 B. & S. 759.
(5) 4 C. B. N. S. 296.
(6) 1 Camp. 493.
(7) L. R. 8 Ex. 88.
(8) 16 Mich. 180.

10 *Vic.*, c. 93, there was in *England* no right of action for the recovery of damages in respect of an injury causing death nor until R. Stats. c. 128 in *Ontario*.

Kelly, C. B., in *Osborne* v *Gillett* (1), an action by a father against defendant for negligently causing death of plaintiff's daughter, whereby plaintiff lost the services of his daughter and the benefits which would otherwise have accrued to him from such services, and for expenses in conveying to his house the body of his daughter and her burial expenses, says :—

No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority, that such an action is maintainable. All the authority that exists is against it.

And Lord *Campbell's* Act expressly recites that

No action at law is now maintainable against a person, who by his wrongful act, neglect or default, may have caused the death of another person.

And

That it is oftentimes right and expedient that the wrong-doer in such cases shall be answerable in damages for the injury so caused by him.

And in *Ins. Co.* v. *Browne* (3) *Hunt*, J., delivering the judgment of the court, says :—

The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts, and in many of the State courts, and no deliberate well considered decision to the contrary is to be found.

In *Hilliard* on Torts (4) the rule is thus laid down :—

Upon a similar ground it has been held that at common law the death of a human being, though clearly involving a pecuniary loss, is not the ground of an action for damages.

Shearman and *Redfield* on Negligence, (5) says :—

(1) L. R. 8 Ex. 88.
(2) P. 99.
(3) 5 Otto 756.
(4) P. 87 sec 10
(5) Sec. 290.

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The common law allowed of no remedy, by way of a civil action, for the death of a human being. [A private criminal action was allowed in cases of murder. The last instance of the kind was the famous case of *Ashford* v. *Thornton*, 1 B. & Ald. 405, in which defendant insisted upon his right to trial by battle. The right of action was soon after taken away by statute.] Obviously, the deceased person never would have had a cause of action for his own death; therefore none could survive to his legal representatives, even if the law had allowed, as in fact it did not allow, a cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant, therefore, worked no injury to the master of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. Whatever may be said of the logic of these arguments, it is certain that the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife or child, or in any other right or capacity whatsoever, could maintain an action for damages on account of the death of a human being. The earliest reported decision upon this point was in an action for the battery of the plaintiff's wife, "whereby she died." It was held that the right of action was merged in the felony, *Higgins* v. *Butcher*, Yelv. 89, 1 Bro. & Gold., 205. The first reported case of negligence in which the question arose was before Lord *Ellenborough* (*Baker* v. *Bolton*, 1 Camp. 493) who instructed the jury that the plaintiff, who sued for the loss of his wife's services, could only recover for his loss during her lifetime, although her death was caused by the defendant's negligence. All the decisions in cases where an executor or administrator sought to maintain the action have been one way. But an attempt was made to distinguish between this claim and the claim for loss of service, which seems to have been successful in two instances, one an action brought by a father for the loss of his son, and the other brought by a husband for the loss of his wife. But in these cases the legal question does not appear to have been argued; and in well-considered cases it has been uniformly and unanimously adjudged that a husband cannot sue for the death of his wife, nor a wife for the loss of her husband, nor a master for the death of his servant. Neither can any one maintain an action for any indirect loss which he sustains by the death of another person; such, for example, as the loss which an insurer of the life sustains by that event.

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If an action such as this ought to be maintainable at common law, as *Bramwell*, B., so strongly urges in his dissenting judgment in *Osborne* v. *Gillett* (1), the long established principle that the death of any human being cannot be complained of as an actionable injury must be changed by the legislature, and the provisions of the *Ontario* Revised Statutes, ch. 128, founded on the principle of Lord *Campbell's* Act (2), must be extended by the legislature, and not by the courts, to meet a case of this kind.

I do not think it necessary to discuss or determine the question, on which such a contrariety of judicial opinion exists in *England*, as to whether the admiralty has jurisdiction *in rem* in a case in which the right of action is under the 9th and 10th *Vic.*, ch. 93; but, assuming that an action given by the 9th and 10th *Vic.*, ch. 93, is within the words and meaning of the Admiralty Court Act, 1861, and that the action given by the Rev. Stats. *Ont.* (3), is within the words and meaning of the *Ontario* Maritime Court Act (4), this action cannot be maintained, because it is not brought under that act; the mother here does not sue as the personal representative of her deceased son. No action is given by the statute, but to the personal representative. The words of the statute (5) are as follows:

Sec. 2.—Action given to recover damages for the death of any person caused by any wrongful act, neglect or default.

Sec. 3.—Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

Sec. 5.—Not more than one action shall lie for and in respect of the same subject-matter of complaint.

But it has been argued that though this may be so

(1) Ch. 128.
(2) 9 & 10 Vic., ch. 93.
(3) Ch. 128.
(4) 40 Vic., ch. 21, s. 2.
(5) Rev. Stat. ch. 128.

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at common law, and though the *Ontario* statute cannot be applied to this case, nevertheless that the Court of Admiralty has jurisdiction, in a cause of damage for loss of life happening by a collision instituted against a ship; but I think this cannot be sustained. Whatever may be the rule in the *United States* with respect to a remedy in the admiralty, independent of statute, for a wrong or injury incurred by the death of a person, as by a parent in a proceeding *in rem* against the vessel, which by collision caused the death of the child, there is no such remedy, independent of statute, in the admiralty of *England*, and consequently none in the Maritime Court of *Ontario*. In *The Guldfaxe* (1), a suit to recover damages by the personal representative of a person killed in a collision between two vessels, Sir *Robert Phillimore* says:—

> Though it has been suggested, and is possible, that this court (Admiralty Court) may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the court, or from other sources, to warrant me in pronouncing in favor of the jurisdiction of the court upon this ground. If the court be competent to entertain this suit, it must have derived such competence from statute law. The counsel for the plaintiff have mainly—I might almost say exclusively—relied upon certain recent statutes as having conferred this jurisdiction upon the court.

The learned Judge then proceeds to examine "Lord *Campbell's* Act," and of it says:—

> The effect of this statute then was to give a new right previously unknown to the common law; according to which all suits founded on a personal injury or tort died with the person. * * * This statute though it effected the material alteration in the common law which I have mentioned, conferred no jurisdiction upon the Admiralty Court.

He then considers the Merchant Shipping Act, 1854, and the Admiralty Court Act, 1861, and finally concludes, although not without doubt, that the court had

(1) L. R. 2 Ad. & Ec, 325.

jurisdiction, under Lord *Campbell's* Act and the Admiralty Court Act, 1861, to entertain the suit.

I think this appeal must be dismissed with costs.

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FOURNIER, J.:

L'appelante *E J. Monaghan* réclame contre le steamboat "Garland" $2,000 de dommages pour la mort de son fils, *Joseph Monaghan*, arrivée dans une collision qui a eu lieu dans la rivière *Détroit*, entre le "Garland" et le yacht à vapeur "Mamie." Il est allégué que cette collision a été causée par la faute et négligence du commandant et de l'équipage du "Garland."

Sarah Horn, l'intimée, propriétaire du yacht "Mamie," a soulevé par défense en droit (demurrer) en réponse à cette réclamation la question de savoir si la Cour Maritime d'*Ontario* a juridiction pour adjuger sur une réclamation de cette nature. L'honorable juge, qui présidait la Cour Maritime a décidé que cette cour n'avait pas juridiction en pareille matière, et c'est de ce jugement qu'il y a maintenant appel.

En vertu de la sec 2 du ch. 21, 40 Vict., la juridiction de la Cour Maritime d'*Ontario* est précisément la même que celle de la Cour de Vice-Amirauté d'*Angleterre.* La juridiction de cette dernière par l'acte impérial (1863), 26 Vict., ch. 24, s'étend aux réclamations pour dommage causé par tout bâtiment—"claims for damage done by any ship," sec. 10, ss. 6. Ces termes sont-ils suffisants pour donner jurisdiction dans le cas dont il s'agit? La 24e Vict., ch. 10, sec. 7, (1861) avait déjà confié à la Haute Cour d'Amirauté la même juridiction dans des termes un peu différents, mais comportant absolument le même sens. Le texte est ainsi: "The High Court of Admiralty shall have jurisdiction "over any claim for damage done by any ship." La question de savoir si ces termes sont suffisants pour conférer le pouvoir à la Haute Cour d'Amirauté d'entre-

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tenir une demande de dommages, résultant de la mort accidentelle causée par la négligence ou la faute de ceux qui ont le commandement d'un vaisseau, a été beaucoup discutée en *Angleterre*. Elle y a donné lieu à un conflit de décisions entre la Haute Cour d'Amirauté d'un côté, qui a maintenu sa juridiction, et la Cour du Banc de la Reine, de l'autre, présidée par le Lord Chief Justice *Cockburn*, décidant le contraire. Les décisions citées dans le factum de l'appelant, sont discutées dans la cause du "*Franconia*." (1) Sir *Robert Phillimore* les passe en revue en ces termes :

In the case of "*The Sylph*" (2), decided in 1867, I ruled, and allowing the opinion of Dr. *Lushington*, that the Court of Admiralty had jurisdiction under the Admiralty Court Act, 1861, to entertain a cause for personal damage done by a ship, and I stated my reasons. This judgment was not appealed from. In the following year, 1868, I again had occasion to consider the question, and stated my reasons at length for considering that the same Court had jurisdiction to entertain a suit for the recovery of damages by the personal representative of a person killed in a collision between two vessels.

In 1869, in the case of "The *Beta*" (3), I again held that this Court had jurisdiction in a cause of damage instituted against a ship for personal damage. From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council in 1869, and that Court consisting of Lord *Romilly*, Sir *W. Erle*, Sir *James Colville* and Sir *Joseph Napier*, said: "The words of the 7th section of the "Admiralty Court Jurisdiction Act, 1861, which had been referred to, "clearly include every possible kind of damage. Personal injuries are "undoubtedly within the words "damage done by any ship." The "case of "*The Sylph*" which has been referred to, and in which it was "so held, has not been appealed from." In 1870, in the case of "The *Explorer*" (4) I entertained a suit brought against a foreign ship by the personal representative of persons killed in a collision. There was, I believe, an appeal to the Privy Council, but it was never prosecuted; and if the cases on this subject ended here, I should have no difficulty in reaffirming the principle laid down by Dr. *Lushington*, myself and the Judicial Committee of the Privy Council. But in the case of "*The Black Swan*," in 1871, where injury and death had been

(1) 2 Pro. Div. 163.
(2). L. R. 2 Ad. & E. 24.
(3). L.R. 2 P. C. 447.
(4). L.R. 3 Ad. & E. 289.

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caused by a collision at sea and the suit had been entertained by this Court, an application was made to the Court of Queen's Bench for a prohibition, which was g anted: *Smith v. Brown* (1). I need not say that to such a Court, it is my inclination, as well as my duty, to pay the highest possible respect; but the unfortunate conflict between the judgment pronounced when the prohibition was granted and the judgment of the Judicial Committee of the Privy Council in the case of "*The Beta*," compels me to consider the circumstances attending the proceedings before the learned judges of the Court of Queen's Bench and the grounds upon which their decision was founded. The case was heard before Lord Chief Justice *Cockburn*, Mr. Justice *Hannen* and Mr. Justice *Blackburn*. The latter learned judge said: "I have entertained doubts in this case, not altogether "removed, but which are not strong enough to make me dissent from "this judgment, or even to make me require further time for consi- "deration." The Lord Chief Justice and Mr. Justice *Hannen* consi- dered the question "one of considerable difficulty," but decided in favour of the prohibition.

It appears to me that the main ground, I will not say the *ratio decidendi* of the Lord Chief Justice's judgment, was that the word "damage" was used as applicable to mischief done to property, and not to injuries done to the person; and his Lordship said: "And "that this distinction is not a matter of mere verbal criticism, but is "of a substantial character and necessary to be attended to is appa- "rent from the fact that the legislature in two recent acts in *pari* "*materiâ* both having reference to the liability of ship-owners in "respect of injury or damage, namely, the Merchant Shipping Act, "1854 (2) and the Merchant Shipping Act Amendment Act, 1862 (3), "has, in a series of sections, carefully observed this distinctive phra- "seology, speaking in distinct terms, in the same section, of loss of "life and personal injury on the one hand, and loss and damage done "to ship's goods or other property on the other. In those acts the "t rm "damage" is nowhere used as applicable to injuries done to "the person; it is applied only to property and inanimate things. "We see no reason to suppose that the Legislature, in using the term "in the enactment we are considering, had lost sight of the distinc- "tion uniformly observed in the preceding statutes."

Tel est actuellement l'état de la jurisprudence en *Angleterre* sur cette importante question. Comme on le voit par la citation ci-dessus, Lord Chief Justice

(1). L.R. 6 Q. B. 729. (2). 17 & 18 Vict. c. 104, part. IX,
(3). 25 & 26 Vict., c. 63, § 54.

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Cockburn se range à l'opinion contraire en donnant pour raison que le mot *damage* ne s'applique qu'aux dommages faits à la propriété et non à ceux faits à la personne. Toutefois, cette signification limitée n'a pas été admise par le Conseil privé.

La position prise sur cette question par la Haute Cour d'Amirauté, confirmée par la décision égale de la Cour d'Appel, a été approuvée par le jugement unanime du comité judiciaire du Conseil privé, dans la cause du *Beta* (1). La Cour du Banc de la Reine, comme on l'a vu dans la citation donnée plus haut, avait décidé le contraire. Le principal motif de sa décision fut que la juridiction de la Cour d'Amirauté ne s'étend pas aux dommages faits à la personne "*does not extend to personal injuries*"—que le terme "dommage" employé dans la section 7 n'a rapport qu'au dommage causé à la propriété. Cette interprétation ne fut pas admise par l'honorable Conseil Privé. L'appel était d'un jugement de la Haute Cour d'Amirauté déclarant qu'elle avait juridiction dans une poursuite intentée contre un bâtiment pour dommages causés à la personne. Lord *Romilly* en prononçant le jugement au nom de la Cour s'exprima ainsi (2):

Their Lordships are of opinion that the order appealed from ought to be affirmed. The words of the 7th section of the *Admiralty Court Jurisdiction Act*, which had been referred to, clearly include every possible kind of "*damage done by any ship.*" The case of "*The Sylph,*" which has been referred to, and in which it was so held, has not been appealed from. There was every reason for the legislature enacting that which the judment of the Court below holds to have been enacted. Their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court below with costs.

Puisqu'il y a conflit d'opinion dans les plus hautes cours en *Angleterre* sur cette question, le jugement de l'honorable Conseil Privé, qui est la cour de dernier ressort pour notre pays, doit dans ce cas faire la loi

(1). L.R. 2 P.C. 447. (2). L.R. 2 P.C. 447.

pour nous. C'est par ce haut tribunal que notre décision dans cette cause serait susceptible d'être reformée, si les parties en appelaient, et non à aucune autre cour d'Angleterre, quelque digne de respect que soit d'ailleurs ses décisions.

L'honorable juge qui a décidé en première instance a rejeté toute prétention admise par le Conseil privé. Il a cru voir entre les deux textes donnant juridiction sur cette matière à la Haute-Cour et à la cour de Vice-Amirauté une différence suffisante pour faire admettre cette juridiction dans la première et la rejeter dans la seconde. Il attache une grande importance au mot *any*, (*any claim*), qui précède le mot *claim* dans l'acte de 1861 et qui ne se rencontre pas dans celui de 1863, concernant la cour de Vice-Amirauté. Ce dernier acte dit au lieu de "*any claim*" "*claims for damage done by any ship.*" L'omission du mot *any* dans cette phrase est absolument sans importance. Les deux phrases signifient exactement la même chose,—toutes deux disent d'une manière générale, et sans restriction aucune, que les réclamations pour dommages seront de la juridiction des deux cours d'amirauté. Dans toute la discussion qui a eu lieu sur la question qui nous occupe, on ne voit nulle part qu'il ait été attaché la moindre importance à la différence de rédaction des deux actes. Ce qui a divisé les tribunaux, c'est l'étendue de la signification à donner au mot "dommage." Lord Chief Justice *Cockburn*, avec la majorité de la Cour du Banc de la Reine, a été d'avis qu'il ne devait s'appliquer qu'aux dommages causés à la propriété et non à la personne. La cour d'Amirauté et la Cour d'Appel divisée également et l'hon. Conseil Privé ont au contraire maintenu que le mot "dommage" était assez général pour comprendre aussi bien les dommages à la propriété que ceux faits à la personne. Dans la cause du "*Beta*," il est vrai que l'accident n'avait pas causé la mort, mais

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je crois que s'il se fût agi de dommages résultant de la mort, l'honorable Conseil Privé aurait encore fait, avec plus de raison, le même argument au sujet de l'interprétation du mot dommage. N'admettant aucune différence dans les deux textes dont il s'agit, je pense que l'on doit en conclure que ce qui a été décidé, au sujet de la compétence de la Haute-Cour d'Amirauté, l'aurait été également par rapport à la Cour de Vice-Amirauté, car dans l'un et l'autre cas il ne se serait agi que de la signification à donner au mot " dommage." La Cour Maritime d'*Ontario* ayant la même juridiction que la Cour de Vice-Amirauté d'*Angleterre*, j'en conclus qu'elle a, comme cette dernière, juridiction pour décider sur la réclamation dont il s'agit.

Une autre objection faite à la présente demande, c'est que l'appelante aurait dû poursuivre en vertu de l'acte de Lord *Campbell* (9 et 10 Vict., ch. 93, 1846) comme administratrice de la succession de son fils et non comme sa mère, seule qualité qu'elle a prise dans la procédure. L'honorable juge qui a décidé en première instance n'a pas exprimé d'opinion sur ce point. Etant d'avis que la cour n'avait pas juridiction pour juger la question principale, il était tout-à-fait inutile pour lui de se prononcer sur cette question. Mais étant d'une opinion contraire à la sienne sur la juridiction de la Cour Maritime, et pensant que les conclusions de la demande devraient être accordées, si elles sont plus tard justifiées par la preuve, il devient important de savoir si l'appelante a qualité pour porter sa présente demande.

Je dois d'abord dire en réponse à cette objection que l'on ne peut tirer contre l'appelante aucun argument de l'acte de Lord *Campbell*. La procédure n'est pas fondée sur cet acte, mais bien seulement sur l'acte donnant, comme il a été démontré ci-dessus, juridiction à la Cour de Vice-Amirauté en pareille matière. La

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juridiction qu'elle a sur ce sujet ne lui vient pas de l'acte de Lord *Campbell*. Ceci est évident par les dispositions de cet acte, qui donne au jury le pouvoir de répartir le montant des dommages entre les diverses parties intéressées dans la poursuite en dommage dans le cas de mort causée par faute ou négligence. La Cour de Vice-Amirauté n'aurait pu faire cette répartition, parce qu'alors elle n'avait pas le pouvoir, qui lui a été conféré depuis, de référer à un jury certaines questions de fait. Conséquemment une action en vertu de l'acte de Lord *Campbell* n'y pouvait pas être portée. C'est, sans doute, pour remédier à cette omission, que plus tard la juridiction lui a été conférée d'une manière générale comme on l'a vu plus haut. Comme il n'était pas nécessaire de poursuivre en vertu de l'acte de Lord *Campbell*, il n'était donc pas nécessaire de le faire dans la forme indiquée par cet acte, c'est-à-dire au nom de l'administrateur de la succession du défunt. Mais faut-il au moins que l'appelante ait une qualité légale pour représenter la succession de son fils. Celle de mère du défunt qu'elle a prise est-elle suffisante en loi ? Je me dispenserai de discuter cette question si importante qu'elle soit, car je trouve sur ce sujet une dissertation dans le 12me vol. du "*Central Law Journal*" (1), qu'il suffit de citer. L'article dont le titre est ainsi: "Was death by wrongful act, default or negligence "actionable at common law ? If so, by whom could the "action be brought," discute deux questions: celle de savoir si l'action existait d'après la loi commune,—et qui avait qualité pour la porter. C'est à la partie traitant cette dernière question que je réfère particulièrement. La question y est discutée d'une manière très savante, et la conclusion à laquelle en arrive l'auteur est fondée sur les plus hautes autorités légales. Je n'en citerai que la conclusion:—

(1) P. 464.

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Death by wrongful act, or negligence, was actionable at common law, as the law stood in the year 1758, when *Blackstone* delivered his lectures, and the right of action was in favor of the wife and heir at law, or any others having an interest in the life of the person killed.

Fournier, J.

Je dois ajouter que je donne mon entière approbation aux vues exprimées par mon honorable collègue, le juge *Taschereau*, dans la savante dissertation qu'il a faite sur cette même question. Je crois aussi qu'il a établi de la manière la plus certaine l'existence du droit d'action du maître pour réclamer des dommages contre celui qui, par sa faute ou négligence, a causé la mort de son serviteur. La réclamation en cette cause, il est vrai, n'est pas faite par la Demanderesse en qualité de maîtresse pour recouvrer la valeur des services de son enfant comme serviteur; mais comme en pareil cas les actions sont ordinairement portées dans cette forme, la déclaration en cette cause pourrait être amendée de manière à soulever la question de responsabilité dans cette forme.

Pour ces raisons, je suis d'avis que la Cour Maritime d'*Ontario* a juridiction pour entretenir la présente réclamation et que l'Appelante a qualité légale pour porter la dite demande.

HENRY, J.:

To some extent I am reluctantly compelled to arrive at the conclusion that the appellant here is not entitled to the process of the Admiralty Court in the mode adopted. I have satisfied myself that the court has not jurisdiction in the matter, and that the plaintiff was precluded from bringing an action for personal damages. The powers conferred on the Vice-Admiralty Court are by the statute conferred upon the Maritime Court of *Ontario*. I think the appellant would have been entitled to our judgment had the suit been brought so as to have brought the plaintiff within the position

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pointed to in the *Ontario* Statues (1), which is a copy of Lord *Campbell's* act, giving the representatives of the deceased party the right to bring an action for damages. I think the court has jurisdiction over the subject-matter, but I fail to see, nor have I been able to find, any authority for sustaining the action in the Vice-Admiralty Court on the part of a mere friend or relation of the party who was killed. Under these circumstances, I am of opinion, that the appeal should be dismissed.

TASCHEREAU, J.:

I can see no difference between the Admiralty Act of 1861 and the Vice-Admiralty Act of 1863, and, in my opinion, if the High Court of Admiralty has jurisdiction over all claims in respect of damage done by any ship, whether to person or to property, the Vice-Admiralty Courts, and consequently the Maritime Court of *Ontario*, have the same jurisdiction. I concur fully in what my brother *Gwynne* says on this part of the case.

Now, has the Admiralty Court such jurisdiction? Upon this point I consider myself bound by the decision of the Privy Council in the "*Beta*" case (2). Independently of that decision, were I called to interpret for the first time the Admiralty Act of 1861, or the Vice Admiralty Act of 1863, I would read them both as giving jurisdiction over "claims for" any "damage done by any ship," whatever may be the nature of the damage, and whether to person or to property.

One of the reasons given by Lord Chief Justice *Cockburn* in *Smith* v. *Brown* (3), why no action at all for personal injuries should be entertained by the Admiralty Courts, is, that as in the Merchant Shipping Act of 1854 and the Merchant Shipping Act amendment

(1) R. S. O. c. 128.

(2) L. R. 2 P. C. 447.

(3) L. R. 6 Q. B. 729.

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act of 1862, the term "damage" is nowhere used as applicable to injuries done to the person, it must be presumed that, in the Admiralty Court Act, the same term "damage" is used in the same sense, and likewise applies only to mischief done to property, and not to injuries done to the person.

Sir *Robert Phillimore* in the "*Franconia*" case (1) has fully answered that objection. I will merely observe that the Admiralty Court Act in question was passed in 1861, so that the Merchant Shipping Act amendment act of 1862 did not precede it. Then as to the Merchant Shipping Act of 1854 (2), it plainly, as I read it, provides for the case where the owner of a ship may be answerable in damage for loss of life or personal injury. It enacts that no owner of any sea-going ship shall be answerable in damages to an extent beyond the value of his ship, in case where any loss of life or personal injury is, by reason of the improper navigation of such ship, caused to any person carried in any other ship, without the actual fault and privity of such owner. Does not this enactment recognize that damages for loss of life and personal injuries may, in certain cases, be recoverable from the owner? So that, in this enactment, the word "damages" clearly applying to loss of life and personal injury, the same word must receive the same application in the interpretation of the Admiralty Court Act of 1861, and consequently of the Vice-Admiralty Court Act of 1863, if comparision between these acts is to be considered as a criterion on the interpretation of the said word "damage."

On this question, whether the admiralty courts have jurisdiction over actions for personal injuries, I observe that one of Mr. Justice *Bramwell's* grounds of reasoning in "*The Franconia*" case, against the jurisdiction of the said court, in actions under Lord *Campbell's* Act, is that

(1) 2 P. D. 163. (2) 17 & 18 Vic., c. 104, s. 504 Imp.

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as under Lord *Campbell's* Act the damages are to be necessarily assessed by a jury, and as a jury cannot be had in the admiralty court, it is evident that the admiralty court cannot entertain such cases. A word will suffice to show that this argument cannot any how be invoked in *Ontario*, and it is this: Ch. 128 of the Revised Statutes (*Ontario*) distinctly enacts that, in such actions, the damages are to be assessed by the jury or by the judge. It is clear, then, that whatever force that argument may have had in "*The Franconia*" case, it could not avail in *Ontario*. Then, another reason why it cannot apply to the present case, is that the present action is not brought under our re-enactment of Lord *Campbell's* Act. I have a further observation to make as to this "*Franconia*" case. The Admiralty Court there held, in first instance, that it had jurisdiction in an action for personal injuries under Lord *Campbell's* Act. In the Appeal Court the judges being equally divided, the decision of the Admiralty Court was affirmed. *In re The Attorney General* v. *Dean of Windsor* (1), it was held by Lord *Campbell*, that when there is an equal division of opinion among the Lords, and in consequence the judgment of the court below stands, the result is the same, as to the authority, as if the Lords had been unanimous in their judgment. On this principle, the holding of the Admiralty Court in "*The Franconia*" case, that it has jurisdiction in an action *in rem* for personal injuries, should, be considered as to authority, as unanimously affirmed by the Court of Appeal. This principle may, however, not be applicable to the Court of Appeal, but I do not deem it necessary for me to consider this point here, or to dwell any longer on this part of the case, as I think myself bound, as I have already stated, by the decision of the Privy Council on this question in the "*Beta*" case.

(1) 8 H. L. Cases 367.

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I will merely add that, to shut the door of the Admiralty Court to those who are personally injured by any ship, is obviously to deny them the right of proceeding *in rem* against such ship. Now, it must be evident that this, in a great many cases, is virtually to deprive the sufferers of all remedy or redress whatsoever. It seems to me that this consideration gathers special weight for us from the circumstances of the geographical position of our country. Divided territorially as we are, for hundreds of miles, from the *United States*, by a now imaginary line across the water, it is evident that, as by moving a very short distance only, ships on our inland waters can go from this country to the *United States*, and from the *United States* to this country, the owners, if their ships are not subject to proceedings *in rem* are in a position, in the event of their causing loss of life or personal injury, to easily rid themselves, in a great many cases, of the consequences of their wrong doings.

The other and most important question in this case, and one which, I need not say, causes me the greatest embarrassment, and which I approach with great diffidence, is whether, according to the common law of *England*—for the present suit is not under any statute similar to Lord *Campbell's* Act—an action lies, at the suit of the mother of a child killed by negligence, to recover damages against the party whose negligence caused the death, in the character of mistress for the loss of her servant; this being, it is admitted, the form of action allowed and usually resorted to by a parent, to recover damages in such cases (1), and the plaintiff's declaration to be amended, if necessary, to fully cover this ground.

It is a matter of special regret for me, I need hardly remark, that, as this case comes before us, not only are we deprived of the advantage of having, on a question

(1) Smith, Master and servant, p. 96.

of this importance, and to me, so difficult of solution, the most valuable aid of the always so well-considered judgments of the learned judges of the superior courts of *Ontario*, but that even the Maritime Court itself, from which this appeal is brought directly to this court, has not examined and determined the question it is now my duty to consider, having disposed of the case on other grounds. The assistance that is afforded by the discussion of the same point in *Osborne* v. *Gillett* (1) by learned and eminent judges in *England*, is, under these circumstances, of an obviously increased value to me. The majority of the court in that case held, Baron *Bramwell* dissenting, that a master cannot maintain an action for the immediate death of his servant. If this decision was binding upon this court, I would, of course, have to follow it, and the discussion would be at an end But as it is clearly not so, and the matter is for us *res integra*, I must say that, in my opinion, the weight of reasoning and logic is entirely with Baron *Bramwell*, the dissenting judge in that case.

I will not venture to try and add anything to what that learned judge has said as to *Baker* v. *Bolton* (2), and the other cases relied upon by the majority of the court in that case of *Osborne* v. *Gillett*. It would be presumptuous on my part to do so. Neither do I think it necessary to notice the cases cited, *inter alia*, by the defendant, of "*The Halley*" (3), and the "M. *Moxham*" (4), wherein questions as to the application of foreign law, in certain cases, have been raised and determined, more than to say, that they have here no application, as no such questions of foreign law have to be considered in the present case, the only point in controversy and argued before us being whether or not, under our own law, the plaintiff's action lies.

(1) L. R. 8 Exch. 88.
(2) 1 Camp. 493.
(3) L. R. 2 P. C. 193.
(4) 1 Prob. Div. 107.

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As to *Glaholm* v. *Barker* (1) and some cases from the Admiralty Court, cited by the defendant, and, I believe, relied upon by my brother *Gwynne*, they certainly contain various *obiter dicta* to the effect that no action lies at common law for damages arising from the wrongful killing of any one, but it is evident that these cases are not directly in point. In every one of them, that no such action lies is taken for granted, but not decided. The same may be said of the judgments in "*The Franconia*" case, I have already referred to. In none of these cases was the point, as between master and servant, directly in issue, or necessarily determined for the solution of the litigation between the parties.

I may also remark that Mr. Justice *Bramwell*, in the "*Franconia*" case, did not, in any way, as contended before us, show any tendency to recede from the position he had taken upon this question, in *Osborn* v. *Gillett*. In the "*Franconia*" case, he was of opinion that the Admiralty Court has no jurisdiction *in rem* in a cause for damages under Lord *Campbell's* Act; in *Osborne* v. *Gillett* he held that a master can maintain an action against the wrong-doer before the ordinary civil courts for damages resulting from wrongful killing of his servant, even when the death of the servant is immediate. There is no conflict in these two opinions of the learned judge. *Baggally* and *James*, L. JJ., in this "*Franconia*" case, answer fully the objection taken in *Smith* v. *Brown* (2) against the right of action in the Admiralty Court, on the difference between the common law rule and the admiralty rule on contributory negligence. I may add that in the "*George*" and "*Richard*" (3) it was admitted by counsel on both sides, and accepted as law by the court, that the rule of the common law must supersede the admiralty rule, even in the admiralty

(1) L. R. 1 Ch. App. 223. (2) L. R. 6 Q. B. 729.
(3) L. R. 3 Ad. & Ec. 466.

courts, in actions for loss of life under Lord *Campbell's* Act. In cases of collision the admiralty rule, since the Judicature Act of 1873 is, it is true, in *England*, followed in the common law as well as in the admiralty courts (1), and this is now so, for us, in virtue of 43 *Vic.*, ch. 29, sec. 8 (D), but this probably would not apply to actions under Lord *Campbell's* or similar acts, or to any actions whatsoever for loss of life or for personal injury.

It is argued that Lord *Campbell's* Act and our corresponding statutes contain a legislative declaration that, according to the common law of *England* or of this country, no action is maintainable against a person, who, by his wrongful acts, may have caused the death of another person. Mr. Justice *Bramwell* answers that argument in *Osborne* v. *Gillett*. It seems clear by the titles, recitals and the context of Lord *Campbell's* Act, and our Canadian re-enactment of it, 10 & 11 *Vic.*, ch. 6, consolidated by ch. 78, C. S. C., and for *Ontario* now contained in ch. 128 Rev. Stat., that the legislature, by these statutes, intended nothing else than to provide for the families of persons killed by negligence, and to legislate only as to the damages suffered by their families The relation of master and servant cannot, it seems to me, be affected by these acts, or the declaration they contain as to the previous state of the law, even if those of father and child, &c., were so affected by this declaration. Moreover, if our Act 10 & 11 *Vic*, ch. 6, was held to declare that previous to its enactment no action was given in any case for the death of any one, it would be holding it to declare what would have been, and would be, a most flagrant untruth, as to *Lower Canada* at least, to which this statute applied as well as to *Upper Canada*; for under the French civil law an action unquestionably

(1) Marsden on Collisions p. 61. A.

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lies, and always did lie, by a parent for the wrongful killing of his child) or by the child for the wrongful killing of his parent.

Then, if this declaration in Lord *Campbell's* act and our re-enactment of it, could at all be relied upon in support of the defendant's contention, an argument of the same nature, against it, can be based on a declaration contained in another of our statutes. By the 43 *Vic.* ch. 29 (D) sec. 13 (a re-enactment of 31 *Vic.* ch. 58, sec. 12 (D), in force at the time of the collision in question, it is enacted that the owners of any ship shall not, where any loss of life occurs through the negligence of those in charge of such ship, or by reason of the improper navigation of such ship, without the actual fault or privity of the said owners, be answerable in damages for such loss of life to an amount exceeding $38.92 for each ton of the ship's tonnage. This act applies whether the collision occurs in British or foreign waters, or on the high seas (1). The liability in damages, for loss of life, of the owner of a ship is thus, in this enactment, clearly recognized. Now, this said enactment extends to all the Dominion, and to every province thereof. In those of the provinces, like *Ontario* and *Quebec*, where statutes similar to Lord *Campbell's* act are in force, this recognition of liability for loss of life, it may fairly be argued, must be construed as applying simply to actions brought under these statutes. But in those of the provinces where there are no statutes similar to Lord *Campbell's* Act (in *Nova Scotia* for instance), and for which, as well as for the other provinces, this Dominion statute provides for the case of damages due by the owner of a ship for loss of life caused by his negligence or the negligence of those in charge of his said ship, is not this provision of the said statute equivalent to a declaration by the legislative

(1) 1 Moo. P. C. C. N. S. 471.

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authority, that, at common law, an action does lie for loss of life in certain cases?—this declaration to be necessarily construed as applying only to the subject of navigation and shipping over which the Dominion parliament has jurisdiction? Otherwise, causing loss of life by improper navigation would be actionable in *Ontario* and *Quebec*, and not actionable in *Nova Scotia*, though the Dominion statute was passed to render the rule in this respect uniform all through the Dominion. However, as this point has not been taken at the argument, I will not dwell any longer upon it.

I now come to the consideration of the main ground, upon which is based the contention that an action by the master, for the wrongful killing of his servant, is not maintainable where the death of the servant was immediate.

Actio personalis moritur cum personâ, it is argued, and consequently the master's action for damages in such a case is gone. This, in my opinion, is entirely a misapplication of the maxim.

What action dies with the person? Clearly the action of the one who dies. Well the one who died never had an action for being killed. The action that, according to the maxim, died with the deceased is the action he, the deceased, had for the injuries, if any, he suffered in his lifetime. But the present plaintiff's action is not at all for injuries and damages caused to her deceased son, but purely and simply for injuries and damages caused to herself, the plaintiff. These injuries and damages she complains of and claims in the present action did obviously not exist when her son was living; her right to the present action had not accrued, and could not accrue when and as long as he lived. How then can it be contended that her right of action died with him? How could her action die before it came to existence,

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before it originated, before the fact that created it happened?

It is plain that, when the death is immediate, the maxim cannot apply, because, the deceased never had an action against the person who wrongfully caused his death. *Actio personalis moritur cum p rsonâ* means that, if one, for instance, who has suffered damages from slander, battery, and false imprisonment, etc., etc, etc., dies before instituting an action for these damages, the right of action dies with him, his representatives will not have, in such cases, the action which in his lifetime belonged to him, for damages to his person, and which he did not care or refused to bring—that is all that the maxim says. It is true that it has sometimes been made to also apply to the defendant, and to mean that, if one who is answerable in damages, say, for a battery, for instance, dies before an action is instituted against him, the action for such damages is not then maintainable against his representatives. *Nox's* Maxims, 9th ed. 20; 1, *Williams* v. *Saunders* 239; note *a* to *Wheatley* v. *Lane*, (edition of 1871); *Bird* v. *Ralph* (1); *Canterbury* v. *Atty. Genl.* (2). But this principle is not derived from the maxim. *Actio personalis moritur cum personâ* applies only to the party who had the action, to the party who would have been plaintiff if he had lived. It does not apply to the deceased wrong-doer, against whom the action would have been taken. In other words, it is the *actio personalis*, the action for injuries to the person itself, not the *actio in personam*, that dies with the person. A contrary interpretation would have the maxim say that all personal as distinguished from real actions die with the person, which would be an absurdity.

I may here observe that in *Potter* v. *Metropolitan Dis-*

(1) 4 B. & Ad. 830. (2) 1 Phil. 306.

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trict Ry. Co. (1); affirmed by the Exchequer Chamber (2); and in *Bradshaw* v. *The Lancashire & Yorkshire Ry. Co.* (3); it was held that damages suffered by the personal estate of a deceased person, arising from breach of contract, can be recovered after his death by his personal representatives, though there was previously no instance of any such action ever having been brought. In this last case, the deceased had died in consequence of injuries received whilst a passenger on a railway, and the plaintiff was suing the railway company in an action for breach of contract, claiming the damage to the personal estate of the deceased arising in his lifetime from medical expenses and loss occasioned by his inability to attend business in the interval between the accident to him and his death. The court held that the maxim *actio personalis moritur cum personâ* did not apply, though death had resulted from the injuries complained of. There, the plaintiff claimed, not the damages caused to the person of the deceased, but the damage caused to the personal estate of the deceased before he died, and the claim for which formed part of his succession. Here the plaintiff claims, not the damages caused to the person of her deceased son, but the damages caused to herself. These two cases differ in this, that here the plaintiff claims damages done to her own personal estate, whilst in the other case, the plaintiff claimed damages done to the personal estate of the deceased, but they are similar in this, that in both the maxim *actio personalis moritur cum personâ* is inapplicable, for the reason that, in both, the damages claimed are not damages to the person, or, in other words, that in both the action is not *actio personalis* in the sense of the maxim.

The doctrine contended for by the defendant seems

(1) 32 L. T. (N.S.) 765. (2) 32 L. T. (N.S.) 36.
(3) L. R. 10 C. P. 189.

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to me, moreover, anomalous and unjust. A widow, for instance, has a minor son who is her only support. A physician, whom she has called to attend him for a slight indisposition, gives him a violent and deadly poison instead of a soothing draught. He dies on the spot, and she is deprived, by the gross negligence of this physician, of the only support for existence she had in this world. That she suffers damages by the loss of her son's services till at least he would have been of age, is undeniable. That this physician is the author of these damages is also clear. That these are her damages, not her deceased son's damages, is as clear. Yet, says the defendant, "this mother would have no action against the physician." And why? because he killed her son instead of disabling him only, or only rendering him ill, say, for a month. "But, just because he killed my son" (would think this mother) "I am entitled to heavier damages." "No," says the defendant, "the law exonerates this physician just because he killed your son. Had he disabled him for a short space of time only, you would be entitled to damages, but as he killed him, though he must admit that you suffered damages, and that he caused you these damages, yet the law says that he is not answerable for these damages." For, a fact which must not be lost sight of is that, on this demurrer, the defendant admits that his wrongful act caused the death of the plaintiff's son, who was her servant, that the plaintiff, by this wrongful act of the defendant, lost her son's and servant's services, and that she, the plaintiff, suffered damages in consequence. Here is the admission of a wrongful act and of a damage, of a *damnum cum injuriâ*, yet there would be, according to the defendant, no remedy, no action, no redress whatsoever. If, by his culpable negligence, this physician had sent her child to the hospital, this mother would be entitled to

damages, but, as he has brought him down to his grave, her right to any redress whatever is denied. Upon what principle can this doctrine be upheld? I may here make this observation, that the law of *Scotland* is clear upon this point, and recognizes, under the term of assythment, the right to recover the damages caused by the wrongful killing of a person. *Bell's* principles of the law of *Scotland* (1); *Weems* v. *Mathieson* (2). I have already said, I believe, that under the Roman law and the French law, the action in such cases is also given.

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But it is further argued that the immediate death of the servant cannot give a right of action to the master, because a master's claims to the services of his servant arise by contract with the servant, and that any cause therefore which terminates the contract of service must terminate the master's claim for compensation for the loss of the benefit of a contract which no longer exists. This, it seems to me, is easily answered. It is conceded, and indeed cannot be doubted, that if the child and servant, is by a wrongful act or neglect of a third party, disabled from work, but not killed, the father and master has his action for loss of service. If the child is so seriously disabled or maimed that his father is for ever deprived of his services, this would be, it is likewise conceded, an aggravation of the damages. Now, in this case also, as in the case of death, the contract or presumed contract is broken and terminated. Yet the action lies. Why then should the action not lie where it is the death of the child that terminates the contract, whilst it lies where it is a wounding or a maiming that terminates it. It is, in fact, in both cases, just because the contract is terminated that the action lies, just because the wrong-doer tortiously terminated it that he is answerable to the parent for the damages

(1) P. 749. (2) 4 Macq. H. L. Cases, 215.

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to him caused by this premature termination of it. To say that the cause which terminates the contract of service must terminate the master's or father's claim for compensation, is to say that the claim for compensation would cease before having existed, for, as I view it, it is the termination of the contract that creates the action against the wrong-doer. In other words, the termination of the contract by the wrong-doer, far from terminating the master's claim, is the origin, the cause, the sole ground of his claim and of this action.

Then suppose that the master's ground of damages is the pre-payment of wages to his deceased servant. Could it be said that because the contract is terminated, the action is terminated? I repeat it, it is because the contract is terminated, but the action lies in such a case.

It is somewhere advanced as a reason why the action should be refused, in the case of immediate death, that to give it would be setting a price upon human life, or estimating its value by a pecuniary standard. But would not this reason equally apply to the action given by Lord *Campbell's* Act and our own corresponding statutes. Then, does not the law of insurance, for instance, allow any one, who has an interest in the life of another, to insure that life, and so to put, as it were, a premium on his death, or, in other words, convert this interest in a life to an interest in death, in the termination of that life? Moreover, in this very doctrine contended for by the defendant, is not an interest given in death? To say to the wrong-doer, that if he crushes my servant's foot he will be answerable to me in heavy damages, but that if he kills him he will escape scot free, is, it seems to me, almost inciting the wrong-doer, when he is put in the alternative, to kill my servant.

I now pass to the consideration of the *United States*

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cases. The majority of them, it cannot be denied, support the defendant's contention, and refuse, or seem to refuse, the right of action at common law where death is immediate. There are, however, some where the right of action is admitted. In *Ford* v. *Monroe*, for instance (1), the Supreme Court of *New York* maintained an action by a father for the loss of the services of his child, who had been killed by the negligence of the defendant. *Cross* v. *Guthery* (2) is also cited in the same sense, but I have been unable to see the report itself. In *James* v. *Christy* (3) the Supreme Court of *Missouri* also held that the father whose son was killed by the negligence of the defendant, a common carrier, has an action for the damages he suffered from the loss of his son's services.

In *Lynch* v. *Davis* (4) *Harris*, J., delivering the judgment of the court, says :

> The common law gave the husband and the father a right to recover of the wrong-doer the pecuniary injury he had sustained by the reason of the killing of his wife and child.

In *Shields v. Yonge* (5) it was held that a father, whose son has been killed by negligence, has an action for the damages suffered by the loss of his child's services, if the son is old enough to render service.

In that case the son killed was eighteen years old. In the present case, the libel shows that the libellant's child was between thirteen and fourteen. The defendant contends that there is a presumption that a child under fourteen is incapable of earning anything, or of being a servant, and that the libellant cannot therefore be injured by his death. The answer to this, it seems to me, is that we cannot now-a-days admit such a presumption. We all know that thousands and thousands

(1) 20 Wendell 299.
(2) 2 Root Conn. 90.
(3) 18 Mo. 162.
(4) 12 How. Pract. Rep. 323.
(5) 15 Ga. 349.

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of children under fourteen, in *America* at least, earn good wages, and even make sometimes from four to five dollars a month or more by their industry, as for example, our newspaper boys. Moreover, this, it seems to me, will be a matter of proof. On this demurrer, the defendant admits that he, by his negligence, deprived the plaintiff of her child's services, and that thereby he caused her damage. Any presumption that the child could not render any service, if such presumption there was, must surely be taken as rebutted by the admission, on the part of the defendant, that the plaintiff, by the loss of this child's services, suffered two thousand dollars damages. Another case in point, and where the whole question is thoroughly reviewed, by one whose ability and science is universally, in this as in his own country, acknowledged. *Dillon*, J, *In re Sullivan* v. *Union Pacific Railroad Co.* (1). That eminent jurist there repudiated the doctrine contended for here by the defence, and held directly that where a servant is killed on the spot by the wrongful act of any one, the master may recover for the loss of service. "Is it then," he says, "a principle of the common law that where the "death of the servant immediately ensues from the "wrongful act of another, there is no remedy for the "master, and that where it ensues therefrom afterwards, "the master's loss connot be estimated beyond the period "where the death occurred. Such a principle cannot be "indicated on considerations of reason, justice or policy, "and I could only consent to recognize it upon being "satisfied that it was one of the rules of the common law, "so long and so well settled that the courts are bound "to accept it and apply it until it is changed by legisla-"tive action." The learned judge then reviews the English and American cases on this point, and shows that Lord *Ellenborough*, upon whose dictum, in *Baker* v.

(1) 3 Dill. 334.

Bolton (1), is based the doctrine that where the death is immediate, no action lies, cites no cases, enters into no discussion, and does not profess to rest upon precedent. He then justly remarks that the majority of the court, who, in *Osborne* v. *Gillett* (2), felt bound to follow *Baker* v. *Bolton*, did not attempt to vindicate the doctrine therein enunciated, its policy, or reasonableness. The learned judge concludes by holding that a father, whose minor son has been killed by the wrongful act of another, can, in law, recover the value of his son's services from the date of his death until he would have become of age. An able note by the reporter is attached to the report.

But even if such an action could not be maintained at common law, the Admiralty Courts, according to some decisions, will entertain it.

In *Cutting* v. *Seabury* (3), *Sprague*, J., whom *Chase*, C J., *in re The Sea Gull* (4), calls "a very enlightened and able judge," said " * * * the weight of authority in common law courts seems to be against the action, but natural equity and the general principles of law are in favour of it," and held that the Admiralty Courts would entertain such an action.

Plummer v. *Webb* (5), has been cited as being in the same, but I could not lay my hands on the report.

In re "The Sea Gull" (6), that distinguished jurist, the late Chief Justice *Chase*, held that the rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in the admiralty, and that a husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby. The learned judge, after ob-

(1) 1 Camp. 493.
(2) L. R. 8 Ex. 88.
(3) 1 Sprague 522.
(4) Ubi Post.
(5) Ware 80.
(6) Chase's Decisions 145.

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serving that it is difficult to explain why a father may maintain an action for the loss of his son's services personally injured by the wrongful act of a third party, if the son survives, but should have no action if the son is killed on the spot, adds:

> Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.

I have considered carefully, amongst other cases cited by the defendant, *Insurance Co.* v. *Browne* (1), from the United States Supreme Court, a tribunal, whose decisions are always entitled to the greatest consideration. That case does not seem to me in point, though there is in the judgment of *Hunt*, J., a re-statement of the maxim that, at common law, actions for injuries to the person abate by death. I have already said that this means that an action for injuries and damages, for instance, to *B.* abates by *B's* death, but that this is not an action for the injuries and damages caused to *B.*, the deceased, but purely and simply for the injuries and damages caused to *A.*, the plaintiff, and which she the plaintiff, has suffered by *B's* death. In other words, the plaintiff *A.* does not claim the damages that *B.*, the deceased, suffered, but damages that she, the plaintiff, suffers, and which the defendant, on this demurrer and for the purposes of this argument, admits to have, by his wrongful act, caused, not to the deceased, but to her, the plaintiff. We have been referred by the defendant to quite a number of decisions in the *United States* wherein, as he reads them, the doctrine he contends for here has been approved of and received as law. In not many of them can the decision be said to be directly in point, as between master and servant. It must be conceded, however, that if the cases are to be counted merely, the defendant's contention must prevail. But if, on the

(1) 95 U. S. R. 754.

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contrary, they are to be weighed, if we are to be guided in the determination of this question by the best established principles of justice, this doctrine appears to me utterly indefensible. I would allow the appeal, and overrule the demurrer.

GWYNNE, J.:—

This case cannot be determined upon any supposed distinction between the extent of the jurisdiction given to the High Court of Admiralty by the Imperial Statute 24 *Vic.* c. 10, sec. 7, and of that given to the Vice Admiralty Courts by the Imperial Statute 26 *Vic.* c. 24, sec. 10, sub-sec. 6.

By the former of those acts it is enacted that, "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," and by the latter that, "the matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows:" then follow eleven subjects, all commencing with the word "claims," the sixth of which is, "claims for damage done by any ship." This form of expression comprehends when expressed in the singular number, "every claim for damage done by any ship." The only difference between the two acts is, that the former uses the singular number "any claim," while the latter uses the word "claims" in the plural, comprehending "all" claims and "every claim" in the singular, so that whatever jurisdiction the High Court of Admiralty has over "any claim for damage done by any ship," the Vice Admiralty Courts in the British possessions have to entertain and adjudicate upon a like claim.

In the present case, we are not called upon to express any opinion whether, upon a question arising as to the jurisdiction of the Maritime Courts of this Dominion upon a claim for compensation for loss of life under the provisions of what is called in *England* Lord *Campbell's*

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Act, Imperial Statute 9 & 10 *Vic.* c. 93, with which the statute of *Canada* 10 & 11 *Vic.* c. 6, corresponds, we shall be governed by the decisions of the High Court of Admiralty in *England* in the cases of "The Guldfax," "*The Explorer*" and "*The Franconia*," affirmed by the judgments of Lords Justices *Baggallay* and *James* in the case of "*The Franconia*" (1) or by the judgment of the Court of Queen's Bench in *Smith* v. *Brown* (2), approved by the Court of Common Pleas (3), although the point did not directly arise, and by the Court of Exchequer in *James* v. *London & South-Western Railway Co.* (4), although the point did not there arise either, and by the judgments of Lord Justices *Bramwell* and *Brett* in the case of "*The Franconia*" in the Court of Appeals, where the point did directly arise.

The question raised upon this record is not whether the jurisdiction of the Dominion maritime courts extends to cases of personal injuries resulting in death, within the provisions of Lord *Campbell's* Act, for this suit is not instituted by a personal representative of the deceased, as it must be, if brought under that Act, or the corresponding Canadian Act (5.)

The questions raised upon this record are whether, wholly independently of the above acts, an action lies in the maritime courts of *Ontario*, at the suit of the mother, of a child under age killed by negligence, to recover damages against the party whose negligence caused the death, either in the character of parent for the loss of her child, or of mistress for the loss of a servant, and, if it lies in respect of the latter relationship, whether the record is so framed as to enable the petitioner to recover in respect of that relationship. But as the jurisdiction given to the maritime courts is, by

(1) 2 Pro. Div. 172.
(2) L. R. 6 Q. B., 729.
(3) L. R. 7 C. P. 300.
(4) L. R. 7 Ex. 187.
(5) 10 & 11 *Vic.*, ch. 6.

the Act constituting those courts (1) stated to be, such jurisdiction—

"In all matters, including cases of contract and tort "and proceedings *in rem* and *in personam*, arising out "of, or connected with navigation, shipping, trade or "commerce on any river, lake, canal, or inland water, "of which the whole, or part, is in the province of "*Ontario* as belongs in similar matters within the reach "of its process, to any existing British Vice-Admiralty "Court;" the question becomes one as to what the jurisdiction of the existing British Vice-Admiralty Courts in like case would be, if the area of jurisdiction of such courts extended over the above mentioned waters.

The petition does not state whether the waters upon which the collision, which is alleged to have taken place, occurred, were within the limits of any of the *United States* of *America* or within the Province of *Ontario*, nor do the pleadings raise any question, as to there being any foreign law affecting the case, if the collision occurred within the limits of any of the *United States* of *America*; so that, in fact, the question which we have to determine is finally resolved into this, namely:—whether according to the law of *England*, as administered in the Court of Admiralty in *England*, as that court was constituted before the constitution of the High Court of Justice, an action would have lain at suit of the plaintiff under the circumstances set out in the petition, in the Court of Admiralty, if the collision causing the damage had occurred within the jurisdiction of that court.

Now the law as administered in the Court of Admiralty, as regards the point in question, is in substance the same as that which is administered in the courts of common law. There is no *lex maris* placing trespass to the person upon a different foundation at sea from

(1) 40 *Vic.*, ch. 21.

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what it has on land, or which subjects a party to damages for an injury sustained by another at sea, under circumstances which would not subject the same party to damages, if the injury had occurred on land, although as to the remedy, the party complaining of the injury has greater remedial relief by proceeding *in rem* where the injury is committed at sea. There is no variety in the subject matter of torts whether committed on sea or land. They cannot, like contracts, relate some to terrene and some to marine affairs. Treason, murder, *battery*, must be the same in their nature and their punishment, whether committed on land or water (1). Neither is it of any importance, that in some countries where the civil law prevails, an action does lie at the suit of the widow and children for the loss of a husband or father by death caused by negligence against the party causing it, and at the suit of the husband for the loss of a wife, so killed, for the law, which is administered in the Court of Admiralty in *England*, is not the law simply of any foreign country. The courts admit the proof of foreign law as part of the circumstances upon which the existence of the tort, or the right to damage may depend, and then applies and enforces its own law, as far as it is applicable to the case thus established; but it is alike contrary to principle and authority to hold that an English court of justice will enforce a foreign municipal law and will give a remedy in the shape of damages in respect of an act, which, according to its own principles, imposes no liability on the person from whom the damages are claimed. This was the principle enunciated by the Privy Council in the case of "*The Halley*" (2); and in "*The M. Moxham*" Lord Justice *Mellish*, in the Court of Appeal, says:

> The law respecting personal injuries and respecting wrongs to

(1) 2 Brown Civil and Ad. Law 110.

(2) L. M. 2 P. C. 203-4.

(3) 1 Pro. Div. 111.

personal property, appears to me to be perfectly settled, but no actions can be maintained, in the courts of this country, on account of a wrongful act, either to a person or to personal property, committed within the juris liction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country.

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Neither the civil law, as administered in any foreign country, nor any other foreign law, if any such had been pleaded, could affect this case, unless such law is also adopted as part of the law of *England.*

In the case of "*The Sylph*" (1) it was held by Sir *Robt Phillimore* that the jurisdiction of the Admiralty Court was so extended by 24 *Vic.* c. 10, sec. 7, as to give to the court jurisdiction to entertain a cause of damage for personal injuries caused to a person engaged in diving, in the river *Mersey*, by a steamer employed as a ferryboat on the river. The learned judge was of opinion that the court originally had jurisdiction over such a case, of which it had been deprived by 13 *Ric.* 2, c. 5; which enacted, "that the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea as it had been used in the time of *Edward* III." But in the case of "*The Guldfaxe*" (2) the question of the jurisdiction of the court in the case of an injury resulting in death, first arose. That was a cause of damage on behalf of the administratrix of one of the crew of a vessel called "The Four Brothers" who was killed by collision with "The Guldfax," caused, as was alleged, by the mismanagement of "The Guldfax," The contention of the counsel for the defendant was: 1st. That until the passing of Lord *Campbell's* Act 9 & 10 *Vic.*, ch 93, there was no right of action for the recovery of damages in respect of an injury causing death. Upon the part of the plaintiff it was admitted

(1) L. R. 2 Ad. & Ec. 24. (2) L. R. 2 Ad. & Ec. 325.

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that before the passing of Lord *Campbell's* act the action would not have lain, but that that act gave a new right, not a new remedy. The learned Judge, Sir *Robt. Phillimore*, pronouncing judgment, says:

> Though it has been suggested, and is possible, that this court may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the court, or from other sources, to warrant me in pronouncing in favor of the jurisdiction of the court upon this ground. If the court be competent to entertain this suit it must have derived such competence from statute law. The counsel for the plaintiff have mainly, I might almost say exclusively, relied upon certain recent statutes as having conferred this jurisdiction upon the court, it becomes therefore necessary to examine those statutes.

He proceeds then to examine Lord *Campbell's* Act, and says:

> The effect of this statute then, was to give a new right previously unknown to the common law.

And again:

> This statute, though it effected the material alteration in the common law, which I have mentioned, conferred no jurisdiction upon the Admiralty Court.

He then proceeds to examine 24 *Vic.*, ch. 10, and other acts, and finally concludes, not without doubt and hesitation, that by the combined effect of Lord *Campbell's* Act and the other acts, the court had jurisdiction to entertain the suit. The same learned judge in the case of "The Explorer" (1,, came to the same conclusion, and that the provisions of Lord *Campbell's* Act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was, at the time of the wrongful act, neglect or default which caused his death, on board a foreign vessel on the high seas.

In the case of "The Franconia" (2), it was not contended that the Court of Admiralty had jurisdiction in

(1) L. R. L. 3 Ad. & Ec. 289. (2) 2 Pro. Div. 163.

the case of personal injury resulting in death apart from and independently of Lord *Campbell's* Act. That Act was treated as having first created the right of action, and the question whether the action *given by that statute* could be entertained by the Admiralty Court under the extended jurisdiction given to it by 24th *Vic.*, ch. 10, s. 7.

In the case of "The George and Richard" (1), which was a suit for limitation of liability, instituted under the provisions of the Merchants' Shipping Act, on behalf of the owners of a brig, charged with having caused death by collision with another vessel, Sir *Robt. Phillimore*, giving judgment, says (2):—

> It has been contended that the men, whose lives were lost, were guilty of negligence which contributed to the catastrophe, and therefore that their representatives cannot recover damages under Lord *Campbell's* Act, it was not denied that if the facts shew this negligence the law is as has been stated.

The learned judge also held that the measure of damages recoverable was regulated by the judgment of the Court of Queen's Bench, in *Blake* v. *The Midland Ry. Co.* (3), so that in effect, in accordance with what appears to be just and reasonable, the learned judge held that in causes of damage for injury resulting in death the same principles must be applied in the Admiralty Court as would be applied in the same case in the courts of common law, thus adopting the alternative of giving up in cases of personal injury to which the injured person himself contributed the admiralty rule as to contributory negligence, which in the subsequent case of "The Franconia" was one of the objections relied upon by Lord Justice *Bramwell* to the Admiralty Court having jurisdiction under Lord *Campbell's* Act, when he says:—

(1) L. R. 3 Ad. & Ec. 466. (2) P. 476.
(3) 18 Q. B. 93.

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The admiralty rule must be given up or an action be given where Lord *Campbell's* Act gives no action.

In *Osborne* v. *Gillett* (1), the Court of Exchequer, *Bramwell, B*, dissenting, held that no action lies at the suit of a master for injuries which cause the immediate death of the servant. It is not necessary, as it appears to me, to inquire whether or not the foundation upon which this conclusion has been rested by some is satisfactory or otherwise; the fact, as stated by *Kelly*, C. B., that:

> No decision is to be found in the books from the earliest times by which an action for this cause has been sustained—no dictum, is to be found, by any judge, or upon any competent authority that such an action is maintainable—all the authority that exists is against it.

is conclusive, to my mind, that no such action lies by the law of *England*; if, however, I entertained a different opinion, as the point which we are called upon to determine here is, what is the law of *England* under the circumstances in issue in *Osborn* v. *Gillett*, I should feel myself bound by the law as enunciated in that case, which is the only decision upon the point in the English courts, until the judgment rendered in that case shall be overruled by competent authority. I am sensible that I expose myself to the imputation of being presumptious when I say that (but still, with the most deferential respect for the high judicial attainments of Mr. Justice *Bramwell*, I must say that) there does appear to my mind good reason why, where death is instantaneous, the action should not be maintainable, and why, when death is not immediate but the injury eventually results in death, no damages should be recoverable for any portion of time subsequent to the death.

It has never been suggested that an action lies at the suit of one person for personal injury done to

(1) L. R. 8 Ex. 88.

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another, except upon the ground that by the injury the plaintiff was deprived of the services of the injured person, to the benefit arising from which service he was, in law, entitled; *per quod servitium amisit* is the very gist and sole foundation of the action. The master's claim to the services of his servant arises out of a contract with the servant, and the right to compensation for the loss of services is based upon and commensurate with the continuing existence of the contract, in virtue of which alone they are due and can be claimed. If then a servant, be injured by the tort of a third person, and can no longer render to his master the services due under the contract of service, both master and servant have their separate action for the damage accruing to each from this injury, but the measure of the master's damage is the loss of the service to which he was entitled under the contract of hiring with the servant. The contract of service still continuing, notwithstanding the injury to the servant which incapacitates him from rendering the services due thereunder, the master is entitled to compensation for the loss of such services still due; but in such a case of injury to the servant, supposing that the servant, finding himself incapable by reason of the injury received, of rendering any further service, for which damage he has a complete cause of action against the wrong-doer, declines to continue in the service of the master any longer, and in express terms puts an end to the contract of service, can it be said that the master would nevertheless still be entitled to recover damages from the person who injured the servant for loss of service during any portion of time subsequent to the servant so terminating the contract of service? The answer must clearly, in my judgment, be in the negative, and for the reason that, the contract of service being terminated, the master cannot be entitled to demand compensation for the loss of services to

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which he is no longer entitled. The gist of the master's action is not that the act of the wrong-doer to his servant has caused the termination of the master's contract with his servant, in virtue of which contract, if not terminated, the master would have been entitled to the benefit of the services of the servant, but that the act of the wrong-doer has deprived the master of the benefit of services to which he continued to be entitled under a still existing contract with his servant, so when the death of the servant results from the injury, the contract of service and the master's claim to any future service thereunder is conclusively determined, and so all claim for damages for loss of service subsequent to the death must cease. Up to the death, if the contract still continues, the master is entitled to recover damages, but *ne plus ultra*. It is no answer to say, but the tort feaser, who injured the servant, has been the cause of the termination of the contract, and for such injury to the master he should render compensation, notwithstanding the death of the servant, and for a period of time subsequent to the death. In my mind, the answer to this suggestion is complete, and is, that as there is no cause of action in the master against the person who has injured the servant which the law recognizes, except for compensation for the loss of service to which in virtue of a continuing existing contract the master is entitled, when the death of the servant occurs, (no matter from what cause occurring), the contract of hiring being determined, the right of the master to all service under the contract ceases, and such right ceasing, all claim for damages for loss of service must cease also. It would be very anomalous if the same common law, which gave no cause of action to the personal representatives of the injured person to recover damages for a period subsequent to the death of the injured person, should give to a master damages for

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such period founded upon the claim that he had lost the benefit of the services of the deceased person to which alone he was entitled in virtue of a contract with the deceased, and which contract was in law terminated by his decease.

The case, then, may be said to stand thus:—

The Admiralty Court exercises jurisdiction in cases of personal injury resulting in death under the provisions of Lord *Campbell's* Act; as to the right to exercise the jurisdiction, the Court of Appeal from the judgments of the Admiralty Court is divided. The majority of the common law judges who have had the matter before them, is of opinion that the Admiralty Court has not the jurisdiction which, however, it continues to exercise. All the judges of all the courts, including the judge of the Admiralty Court hold that, except in virtue of Lord *Campbell's* Act, the Admiralty Court has no jurisdiction in a case of the nature of the present, and no such jurisdiction in such a case has ever been asserted. This action, therefore, cannot be maintained in the Maritime Courts of the Dominion by the petitioner, either in the character of mother or of mistress of the deceased.

In the view which I take, it is unnecessary to inquire whether the plaintiff's petition is framed upon the relationship of master and servant having been in existence. As it is only for loss of service that a master can recover in respect of an injury done to his servant, which loss must be averred and proved, *Grunnell* v. *Wells* (1) and cases *ibi*, it seems to be essentially necessary, and this is the invariable practice, to aver that the person injured was, at the time of the injury being received, the servant of the plaintiff. This, the petitioner in this case seems studiously to avoid doing. The petitioner preferring to rest

(1) 7 M. & G. 1042.

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her claim upon the relationship of parent, and although as parent, she may have been entitled to the service of her deceased child, still that was not necessarily so, for consistently with what is alleged in the petition the deceased at the time of the collision may have been *de facto*, the servant of another. It certainly is not averred that he was the servant of the plaintiff, and if he was not so *de facto* the plaintiff would have no cause of action; but this is a point of no importance, as in the case of master and servant, the action does not lie at all when the death of the servant is the immediate result of the injury. The appeal must, in my opinion, be dismissed with costs for the reasons above stated.

Appeal dismissed with costs.

Solicitors for appellant: *Robinson, O'Brien & Scott.*

Solicitor for respondent: *Duncan Dougall.*