Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hugo Young, Master of the Steamship "Furnesia," v. the Steamship "Scotia," from the Supreme Court of Newfoundland, delivered the 16th July 1903.

Present:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by the Lord Chancellor.*]

THIS is an Appeal from a Judgment of the Supreme Court of Newfoundland in a salvage suit in which the S.S. "Scotia" was arrested for salvage services. The salvage services, which will be referred to hereafter, were of no ordinary character, but the only question of law before the Board is whether the vessel so arrested was, or was not, liable to seizure, she being (as it is alleged) the property of the Crown. The "Scotia" was built for the Crown upon a contract which is before their Lordships, and the first piece of evidence which (it is suggested) makes the ship—at all events for some period of her existence—not the property of the Crown, although she was built for the Crown and money was paid for her on behalf of the Crown, is that the money had not been paid in its entirety at the time when this question arose. Their Lordships are not disposed to give any weight to that consideration. Even if the ship was still in the possession of the builders and subject to the builders' lien for the unpaid balance, that would

(22)27715. [53.] 100.—8/03. Wt. 5936. E. & S. A

not, in their Lordships' opinion, affect the question arising on this Appeal. The seizure is intended to be a preliminary to the sale of the ship, and what would be sold, would not be the mere possession, but the proprietary right. If the proprietary right could not be sold by reason of the ship's belonging to His Majesty, the question of possession may be passed by as immaterial.

But their Lordships are not disposed to take the view that there was any such possession independent of the proprietary right of the Crown. If there was anything exceptional or unusual in the contract, or not in accord with its provisions, that was a question of evidence which ought to have been dealt with at the trial. The natural presumption from the contract, apart from any evidence to the contrary, is that its provisions were followed. One of these provisions was that possession should be given to the Crown immediately after the trial trip, if such trip proved satisfactory. There was an ancillary provision for the passage of the ship across the Atlantic, which, however, was not necessarily to be carried out by the builders, but only if the parties should agree at the proper time, and elect that that should be the mode of delivery. In that case, from the moment such delivery took place, the persons navigating the ship and acting on her behalf, were doing so as servants, or agents, of the Crown. But the possession would then be in the Crown; and although their Lordships are not disposed to think any different question would arise, whether the possession was in the Crown or in the builders at the moment, it is as well that that matter should be cleared up upon the evidence which is now before their Lordships. Their Lordships are of opinion that the reasonable presumption arising upon the facts before them is that the possession was in the Crown, and not in the

builders. If the proprietary right was in the Crown, the matter before their Lordships is reduced to one of those propositions of law which are almost beyond the reach of argument. The question has been discussed in the Courts for a very long period, and after the *catena* of authorities that have been brought before their Lordships, it is vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form or in any other form. Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King, the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own Courts. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by Statute. This is not one of the cases so provided for, and it is, therefore, impossible to maintain that the power of seizing a vessel belonging to the Crown can be exercised as against the Crown.

It is, however, suggested that, although (speaking in the widest sense) the Crown cannot be impleaded, this particular vessel, under the circumstances of its employment, was not, strictly speaking, a vessel belonging to the Crown. In support of this proposition Counsel for the Appellant cited the case of "*The Cybele*" (2 P.D. 224; 3 P.D. 8). Their Lordships think that it is quite possible to defend that case on the ground suggested in the course of the argument, namely, that in taking care of the harbour of Ramsgate, the Board of Trade, to whom that harbour with all its incidents had been transferred, was not, strictly speaking, acting as a Government Department, but in the character of trustees of a particular trust. But

unless "*The Cybele*" is defensible on that ground, it is not a case that their Lordships would be disposed to follow.

It is then suggested that the particular use for which the "Scotia" was to be employed—viz., as a ferry-boat to connect one part of a railway owned by the Government of Canada with another—although forming, in a general sense, part of Government administration, yet was not sufficient to vest the property in the Crown. Having regard to the various Acts of Parliament which were cited by Counsel, their Lordships are satisfied that the land in question, including the Railway, belonged to His Majesty. The case falls, therefore, within the general proposition that the Crown cannot be impleaded in its own Courts, and the action must fail. Their Lordships are accordingly of opinion that the Judgment of the Supreme Court ought to be affirmed.

Sir Robert Reid, on behalf of the Appellant, has pointed out with great force the extraordinary condition of things which would arise if the services which were rendered by the "Furnesia," and which were undoubtedly of the greatest value, were not to receive their appropriate reward. No objection can properly be taken to the defence to this action. It is the duty of those who represent the Crown to place the privileges of the Crown very definitely before the Courts, and if the claim in the present case had been allowed to pass without the protest which has been made on behalf of the Crown, the case would undoubtedly have been quoted, and perhaps acted upon, in circumstances where it would not have been so appropriate to give a reward as in this instance. No observation can, therefore, be properly directed against those responsible for advising the Government to resist the present claim in the form in which it was made. The moment the vessel reached St. John's

she was arrested for salvage, and, without attributing blame to anybody, it is impossible to say it was wrong either for those who had rendered services to seek to obtain salvage by the appropriate method, or for those who were advising the Crown to resist a claim which it was thought might be made a precedent. Having, however, said this much, their Lordships desire to call the attention of the Canadian Government to the condition of things which this case discloses, and to the most unfortunate results which would ensue if the refusal to compensate those who rendered the services were persisted in. Nothing could be more pitiable than the condition of the vessel as described, not by the parties themselves, but by the learned Judges of the Supreme Court, who nevertheless felt compelled to adjudicate in favour of the Crown. "It must be admitted," they say, "that "an ordinary steamship, not fitted with towing "appliances, with another ship in tow, is at "considerable risk if she is suddenly compelled "to slow down on meeting an iceberg or an "approaching ship, especially in such foggy "weather as prevailed on the night of the "19th. Those experienced in maritime affairs "will appreciate the risk to a large steamer with "another large steamship in tow in mid-ocean, "in the absence of those towing appliances "which in tugs and other vessels specially "equipped for such purposes enable the "latter to manœuvre easily at all times when "meeting approaching ships or obstacles to "navigation. The 'Furnesia' was enabled to "steam from three to seven knots, according "to the weather, while she had the 'Scotia' in "tow, and in about 27 hours reached St. John's "in safety, whence, after a delay of a few hours, "she proceeded on her voyage to New York. "* * * We have no doubt that the services

" rendered by the Plaintiff to the Defendant were
" of a meritorious character and worthy of re-
" compense upon as liberal a scale as could be
" awarded by this Court in the event of its being
" subsequently held that the Plaintiff is entitled
" to recover against the Defendant ship in this
" action. The 'Scotia' was undoubtedly in an
" extremely dangerous position at the time the
" 'Furnesia' came up with her. It was a season
" of the year when strong equinoctial gales usually
" prevail in these latitudes; she was without
" coal for her engines, and had only about
" 24 hours' coal for steering purposes; and had
" actually burnt all, or nearly all, the available
" woodwork about the ship, such as wooden
" bulwarks and the woodwork specially built at her
" bow and stern. (The 'Scotia' is a ship built
" open at the bow and stern for railway ferry
" purposes, and but for the woodwork specially
" built for the voyage she would be completely
" unprotected from the water sweeping her
" 'tween decks in a heavy sea.) She would have
" become unmanageable when her fuel for steer-
" ing purposes was exhausted. She was short
" of provisions, and was on the northern edge of
" the 'northern lane' of ocean traffic, and must
" have soon drifted, with the then prevailing
" winds, further to the north, and her chances of
" assistance wouldbec ome therefore less and less
" daily. Her means of signalling passing ships
" were evidently very defective. Two steamers
" had already passed without seeing her distress
" signals, which can only be accounted for by
" the fact that she had no means by masts or
" poles, of hoisting these signals to an altitude
" sufficiently high to attract passing ships
" distant over two miles. Altogether she seems
" to have been in a more helpless condition than
" an ordinary broken-down steamer would be in
" mid-ocean. The services rendered were timely,

" and, though not performed with extra hazard-
" ous risk to life or property, there was some
" considerable risk and danger; first, in getting
" the towing hawser on board by the officer and
" crew of the 'Furnesia,' and subsequently in the
" performance of the work of towing. The
" 'Furnesia' had on board a large crew, a valuable
" cargo, and a large number of passengers, and
" in addition to the risk to his ship in the
" performance of his undertaking there was the
" danger to his passengers and cargo, and the
" responsibility to his owners and others for the
" voluntary adoption of a contract* (?) under such
" dangerous circumstances, and involving devia-
" tion and delay. These are elements, in
" addition to others, which must weigh with
" the Court in deciding upon the amount of
" compensation to be awarded for salvage
" services."

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Their Lordships cannot forbear from expressing their hearty concurrence with the view of the Supreme Court as to the meritorious nature of the services rendered, and they also concur in the very cogent observation with which Sir Robert Reid concluded. He pointed out that no question can possibly be raised in this case which would entitle the policy holder to compensation. If, therefore, the refusal to make compensation is insisted on,—properly enough insisted on, in the first instance, as a matter of right against the Crown—and if it comes to be thought that the Government will not feel called upon to pay compensation in any circumstances, not even in such circumstances as the present—in which their Lordships are sure that a foreign Government would feel called upon to pay compensation—what would be the result? As Sir Robert Reid most justly said, the result would be to warn everybody not to assist a ship belonging to His Majesty in however great

distress she might be, and thereby incur any risk, because any claim for services would be met by the technical objection—in that respect it would be a technical objection—that no one is entitled, as a matter of right, to recover salvage from the Crown. While, therefore, on the one hand their Lordships think that it was quite right to raise the question of the Crown's privilege in this case, they would deeply lament to learn that the Canadian Government, when the circumstances are brought to their attention, refused to give effect to the hearty recommendation of the Court below, which their Lordships desire emphatically to endorse and to repeat.

Their Lordships will humbly advise His Majesty to dismiss the Appeal. As the Respondents do not ask for costs, there will be no Order as to the costs of the Appeal.