Saturday, December 22.

FIRST DIVISION.

CARLBERG AND OTHERS *v.* BORJESSON AND MANDATORY.

(*Vide ante*, November 21, 1877, p. 112.)

Diligence — Arrestment — Re-arrestment where Ship illegally arrested and brought back to Port—Mandate.

Where arrestments had been used against a ship which had been pursued on her voyage and illegally brought back to port at the instance of certain parties and their mandatory, to the latter of whom the illegality was directly due, and where these arrestments were recalled without caution—*held* that the ship could not then be arrested at the hands either (1) of the granter of the mandate, or (2) of the mandatory in his private capacity, or (3) of parties who had granted authority to the mandant to act for them, and who had a common end to serve with him in executing the diligence.

This petition for recall of arrestments arose out of the circumstances of the case between the same parties reported *ante*, p. 112. It was there found, *inter alia*, that the ship "Edgar Cecil," after she had fairly started on her voyage, had been illegally brought back to Greenock by a messenger-at-arms employed by Mr B. O. Borjesson, through his mandatory Mr James Wright, to execute a warrant of arrestment upon her. The respondents in the present petition, who were Borjesson and his mandatory, and also Lars Borjesson and Anders Borjesson, part-owners of the vessel along with the first (but not in any way related to him), took the opportunity of the ship being thus again in port to cause other and new arrestments to be used against her. These were used both *ad fundandam jurisdictionem* and upon the dependence of several actions raised at the instance of each of the above-named part-owners of the vessel, or one or more of them, and James Wright, their mandatory, for the purpose of bringing Carlberg, the managing owner and master of the vessel, to account for his intromissions. One was also at the instance of Wright & Company, of which James Wright was a partner.

Carlberg the master, and certain others of the owners, now petitioned for recall of these arrestments.

In the answers for the respondents, B. O. Borjesson abandoned the arrestments at his instance, and it was further stated that although Wright had acted as mandatory, he had not instructed the execution of the previous arrestments, and that the other respondents had no connection with it. It was stated that the action at the instance of Wright & Company was for remuneration for services actually rendered, and for advances made by them to the vessel as shipbrokers. It was said that Carlberg was in embarrassed circumstances, and that it was an object with him to keep his ship away from Sweden.

Authorities—*Balle* v. *Renton*, M. 4036; *Rintoul* v. *Bannatyne*, December 13, 1862, 1 Macph. 137; Brougham's Legal Maxims, 299.

At advising—

LORD PRESIDENT—It is very clear that had it not been that this ship was illegally seized and brought back by B. O. Borjesson, and Mr Wright, his mandatory, she would not be in Greenock now, and consequently would not have been subject to these arrestments, the recall of which is now petitioned for. She would otherwise have been at the present moment in prosecution of the voyage, in the course of which, we have already held, she was illegally seized and brought back.

If under these circumstances some entirely independent third party had arrested her on the dependence of an action between him and the master, the question would have been quite different from that with which we have now to deal. But, in my opinion, there is here no independent third party. One of the arrestments is at the instance of Mr Borjesson, by whose illegal act she was actually brought back, and who therefore in making this arrestment is trying to benefit by his former illegal proceeding. And I think exactly the same objection applies to the arrestment by Mr Wright. Mr Wright was Mr Borjesson's mandatory, and was engaged in carrying on the process, the object of which was to bring back the vessel, and to compel the master Carlberg to account for his intromissions. Therefore he is equally with Borjesson an actor in the illegal proceedings, and not entitled to take any advantage from them.

But there still remains for consideration the arrestments at the instance of Messrs Lars and Anders Borjesson. Now, these two gentlemen are among that class of owners who authorised Mr B. O. Borjesson to bring Carlberg to account in this country. It is distinctly stated in the answers to this petition that they are dissatisfied with Carlberg, and they have authorised Mr B. O. Borjesson to take proceedings to have him removed, and the ship detained till they have carried through the accounting, and they confirm that authority now. Whether this is the authority on which the actions are raised on the dependence of which the arrestments have been used we are not informed; on the contrary, the answer we received to a question on that subject was very ambiguous. At all events, it is the only authority that has been produced, and if that be so, these actions have been raised by that authority, and for the purposes for which the previous arrestments were issued, the illegal use of which prevents Mr B. O. Borjesson and Mr Wright from benefitting by the present arrestments. It was therefore for the sake of Lars and Anders Borjesson as well as for B. O. Borjesson, that that illegal proceeding was carried out. They are all in combination. They are all working for a common end, and it was for the promotion of that end that the previous illegality was committed. I cannot find it possible to dissociate Lars and Anders Borjesson from the others; they all have a common purpose, as disclosed by the answers to the petition, and the authority is shown by those answers. These arrestments are for the purpose of recovering sums of money advanced to Carlberg for the ship, and to make him account for his intromissions with them. It is therefore impossible to say that we have independent third parties. None of them are more entitled than B. O. Borjesson was to use arrestments on the ship being accidentally brought back to Greenock, and therefore I am for recalling all the arrestments.

Lords Deas, Mure, and Shand concurred.

The Court accordingly recalled the arrestments.

Counsel for Petitioners (Reclaimers)—Balfour—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Trayner—Murray. Agents—Mason & Smith, S.S.C.

HOUSE OF LORDS.

Thursday, December 13.

LORD PERTH AND MELFORT *v.* LADY WILLOUGHBY D'ERESBY'S TRUSTEES.

(Before the Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante,* March 9, 1875, 2 Rettie 538.)

Entail—Crown Charter—Attainder—Effect of Crown Charter as obviating consequences of Attainder.

A party founding on an entail created by a procuratory of resignation dated in 1687, raised an action to have it found that under the Act of 1690, cap. 33, on the attainder in 1746 of one of the heirs of entail, nothing passed to the Crown but the life interest of the attainted heir, and that on his death the estates reverted to the heirs nominated in the deed. The action was dismissed (the House of Lords *aff.*) on the ground that it was essential to the plea stated that the deed of entail should be recorded, which had not been done.

A second action was then brought founding on a Crown charter following upon the above-mentioned procuratory of resignation, and containing a provision that on the attainder of any of the heirs of entail the estate should revert to the next heir in succession. It was maintained that the charter was a fresh grant importing a new title apart from the entail.

Held (*aff.* judgment of Court of Session) (1) that the sole warrant for the charter being the procuratory of resignation, it was a mere charter by progress, the conditions of which as founded upon could not be held to affect the superior's right, and could have no such result as was contended for; and (2) that the terms of the entail, and the history of the title following upon these down to the date of the attainder, further precluded the action.

Observed by the Lord Chancellor that even if the charter had been an original royal grant it was doubtful how far it would have protected a subject from the constitutional consequences of an attainder for high treason.

In an action dealing with the right to the Perth estates, finally decided by the House of Lords on June 19, 1871, 9 Macph. (H. of L.) 83 (reported in the Court of Session, March 11, 1869, 7 Macph. 642), Lord Perth unsuccessfully founded upon a deed of entail dated 11th October 1687, but which was not registered in accordance with the Act of 1690, cap. 33. He thereafter raised another action relating to the same matter, in which he relied upon a Crown charter of 17th November 1687, contending that it was a fresh grant from the Crown, and that as it contained a clause shifting the estate upon the treason of any holder to the next in succession the Act of 1690 as to registration was inapplicable.

By the terms of that charter James Lord Drummond, the first heir of entail called under the deed, was not restricted from disponing, and in 1713 did dispone, in favour of his son, all the fetters in the charter being omitted. Again, in 1731, the third Duke of Perth expeded a Crown charter of resignation and *novodamus* in favour of himself and the heirs-male of his body, whom failing his other heirs and assignees whomsoever. In this charter, on which infeftment followed, all restricting and fettering clauses were omitted. Upon that state of the titles the respondents urged that the estates were held in absolute fee-simple, and the heir-apparent, Lord John Drummond, being attainted, that the Crown became entitled to the estates. The Second Division of the Court of Session, on 9th March 1875, 2 Rettie 538, decided that although they could not sustain the plea of *res judicata*, as the Lord Ordinary (Young) had done, yet that, as the new grounds of action were not relevant to support the pursuer's title to call for production of the writs specified, they must dismiss the action upon that ground.

The pursuer appealed to the House of Lords.

Their Lordships did not call on the respondents' counsel.

On delivering judgment—

Lord Chancellor—My Lords, in the year 1868 the present appellant raised an action against the present respondents claiming the same estates which are claimed in the action out of which the present appeal arises. That litigation, after some interlocutors had been pronounced by the Court of Session, came before your Lordships' House, and was finally decided adversely to the appellant on the 19th June 1871.

The Lord Ordinary, before whom the present case was first discussed, was of opinion that the whole of the claim of the appellant in the present action was covered by what was decided in the former action, and was in fact *res judicata*. The Second Division of the Court of Session differed from the Lord Ordinary, in so far that they held that the whole of the claim of the appellant was not *res judicata*, but they found that the *media concludendi* on which the present summons proceeds, in so far as the same differ or are maintained to be different from those on which the former action was founded, are not relevant or sufficient to support the appellant's title to call for production of the writs specified in the summons. The Lord Advocate, appearing for the appellant at your Lordships' bar, stated very distinctly the points which he considered were not concluded by the judgment in the former action, and the question comes simply to be one of relevancy—whether, taking those points, they are sufficient to support the appellant's title?

The first point in the case of the appellant arises in this way:—In the former action the appellant founded upon a deed of entail created by