

belonging to the proprietors of the ground, and from that at a distance of about half-a-mile having got upon the main line of the North British Railway Company, which was likewise without gate or fence, and been killed—in an action of damages the proprietors of the branch line were [aff. judgment of Court of Session] assolizied, there being no obligation under the Railway Statutes to erect gates and fences on private lines.

A horse belonging to the appellant [Matson] escaped from a field by night, through no fault of the owner, and strayed along an adjoining turnpike road, from which it got upon a private branch railway, the property of Baird & Co., the respondents, at a level-crossing where there were no gates either across the railway or the road, and no one in charge. It then proceeded down the branch railway till it reached the North British main line, where it was killed by a passing train. Matson brought an action of damages in the Sheriff Court of Lanarkshire against Baird & Co. and the North British Railway (the latter of whom were not parties to the present appeal), contending that Baird & Company were under a statutory obligation to have gates at level-crossings of their railway over the public road, and that if this were not so, they failed in their duty at common law in leaving open to the public road both their own line and the main line of the North British. The First Division of the Court of Session—*rev.* the Sheriff of Lanarkshire (CLARK)—assolizied the defenders (Nov. 9, 1877, *ante*, p. 73, 5 Rettie 87).

Matson appealed to the House of Lords.

The respondents were not called on.

At delivering judgment—

LORD CHANCELLOR—I quite adopt the view stated by the Lord President in his opinion in this case, that the Public Railway Statutes apply only to public railways authorised by Parliament. When level-crossings on public roads were sanctioned, fencing was enforced as a corresponding burden or obligation. In the present case the horse was killed, not on the private line of the respondents, but on the public line of the North British Railway. The case originally included that Company, but they are not embraced in the present appeal. There being no statutory obligation on the respondents to erect or maintain fences along their private line, they had, in regard to the level-crossing in question, only to deal with the trustees of the turnpike road crossed, and with them they made satisfactory arrangements. There is no ground whatever for holding the respondents liable on the ground of negligence or on any other ground, and the appeal must therefore be dismissed with costs.

LORD O'HAGAN, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor of Court of Session affirmed, and appeal dismissed with costs.

Counsel for Appellant—Herschell, Q.C.—Collyer. Agent—Andrew Beveridge, solicitor.

Counsel for Respondent—Lord Advocate (Watson)—M'Clymont. Agents—Morton & Cutter, solicitors.

Tuesday, July 9.

[Before the Lord Chancellor, Lords Hatherley, O'Hagan, Blackburn, and Gordon.]

BORJESSON AND MANDATORY V. CARLBERG AND OTHERS.

[*Ante*, p. 112, Nov. 21, 1877, 5 Rettie, 188, and Dec. 22, 1877, p. 257, 5 Rettie, 390.]

*Diligence—Arrestment—Execution—Ship—Nature and Extent of the Powers of a Messenger-at-Arms under a Warrant to Arrest a Vessel.*

Arrestments were used upon a vessel lying in Glasgow harbour for the purpose of founding jurisdiction. A messenger-at-arms who was employed to execute a second warrant of arrestment upon the dependence of the action, when he found that the vessel had in the meantime sailed from harbour, pursued her on board a tug-steamer with thirty men, overtook, seized, and brought her back to port when she was some way down the Clyde and fairly started on her voyage. *Held* [aff. judgment of Court of Session] that as the mode of executing the second warrant of arrestment was clearly illegal, the arrestments fell to be recalled, and without caution.

*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* [aff. judgment of the Court of Session] 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.

On 3d October 1877 the Swedish vessel "Edgar Cecil" was arrested *ad fundandum jurisdictionem* at the instance of the appellants, Borjesson and his mandatory, the object being to found jurisdiction against the respondents as representing the owners. Borjesson had claims against the owners for wages and advances, besides being part-owner. The ship had left Glasgow harbour, and had passed Greenock when the warrant to arrest was put into the hands of the appellants' agents at Greenock. A messenger-at-arms was at once despatched with thirty men in a tug, which overtook the ship, boarded her, and brought her back to Greenock, where she was dismantled. The managing owner (Carlberg) then applied to the Court of Session by petition to recall the arrestments as illegal. The Court unanimously held that the arrestment of a ship on her voyage was illegal and unwarrantable and an abuse of the process (Nov. 21, 1877, *ante*, p. 112, 5 Rettie, 188).

Borjesson and mandatory appealed to the House of Lords.

Another appeal arose from persons who were

parties to the illegal arrestment having issued arrestments on the ship while she was lying at Greenock after being brought back. The second arrestments were held to be illegal also [Dec. 22, 1877, p. 257, 5 *Rettie* 390].

The LORD ADVOCATE and Mr CLARKSON, for the appellants, insisted that the Admiralty warrant to arrest was legally acted on, and it was lawful to take possession wherever and whenever the ship could be found, and no distinction could be drawn as to the place of arrest.

The LORD CHANCELLOR—Do you contend that thirty messengers of the Admiralty, who may know nothing about navigation, can go and stop a steamer after she has started on her voyage, and bring her, and all her passengers too, back to any port they please?

Mr CLARKSON said it was necessary so to contend. It might be a good reason for abolishing this process of arrestment, but such seemed to be the practice both in Scotland and England. Steamers in the Thames might be arrested in the same way.

LORD BLACKBURN—What authority have you for that? It may be the law, but it is not self-evident.

Mr CLARKSON said there were no cases which he could refer to, but the Marshal of the English Admiralty said this was the practice in England.

Mr BENJAMIN, Q.C., and Mr JAMESON, for the respondents, said it was extravagant and unheard of that vessels could be stopped in this way in the course of their voyage. If they could be caught at rest in a harbour, good and well, but there was no authority for arresting ships under full sail on a foreign service. This being a question of practice, the House would be slow to disturb the judgment of the Court below, especially where the Judges were unanimous.

Mr CLARKSON replied.

At delivering judgment—

The LORD CHANCELLOR—The first appeal raises a question of practice as to what is the extent of the authority given to those who execute an arrestment of a ship for the purpose of founding jurisdiction against the owners. On a point like this the greatest attention must be paid to the opinion of the Judges in the Scotch Court, as they are necessarily the best of all authorities in all matters of practice. It is not necessary to mention the details in the present case. The ship had, no doubt, started on a foreign voyage, and was not very far from the open sea when the officers pursued her, boarded her, and brought her back to harbour. It may be a question whether the men are entitled to board her even for the purpose of serving the notice, but certainly no authority has been cited to justify their conduct in actually taking possession and turning the ship about and bringing her back. The object of dismantling a ship, when that process is resorted to, is said to be to disable the ship from moving from the spot where she lies, but no one ever heard of a ship being dismantled while she is on the high seas or near it. Therefore, as no reason whatever has been given for differing from the Judges in the Court below, the first interlocutor must be affirmed, with costs.

LORD HATHERLEY, LORD O'HAGAN, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor of Court of Session affirmed, with costs.

The second appeal was then also shortly heard, and dismissed with, costs also.

Counsel for the Appellants—Lord Advocate (Watson)—Clarkson. Agents—Hollams, Son, & Coward, solicitors.

Counsel for Respondent—Benjamin, Q.C.—Jameson. Agents—Simpson, Wakeford, & Simpson, solicitors.