BUCHANAN, ... APPELLANT.
DOUGLAS, ... RESPONDENT.

1855.
15*th*, 16*th March*.

Interdict upon Caution.—Where an interdict is granted upon a bond of caution undertaking, in the event of the interdict proving wrong, to pay such sum as the Court may award, there cannot be an appeal against the sentence ordering the payment, for in such a case the decision of the Court is final, by express agreement.

THE Appellant, on the 18th July 1846, obtained a judgment in the Court of Session for 23*l.* 0*s.* 9*d.* against one Gordon. He thereupon used diligence, upon which Gordon's furniture and goods were advertized for sale, by order of the *Sheriff*, on the 26th September 1846. The sale, however, was stopped by an interdict granted at the instance of one Anderson, who alleged that the goods were *his*, and not Gordon's. The Court required from Anderson, before granting the interdict, a bond, which he procured, with a cautioner, undertaking, in the event of the interdict turning out to have been "wrongously" awarded, that the obligors would "pay to the Appellant whatever sum the Lords of Session should modify as damages and expenses." The surety or cautioner was the Respondent, against whom, as well as against Anderson, the principal, the Appellant brought the present action on the bond, concluding that "the said Michael Anderson, as principal, and the said James Torry Douglas as cautioner, ought and should be decerned and ordained either to restore immediately to the pursuer the said furniture and other effects, as the same stood at the date of the foresaid poinding, and to make payment to the pursuer of the sum of 30*l.* sterling, or of such other sum as may be found to

be the difference between the value of the said furniture and effects at the date of the poinding, and such proceeds as the same may yield when sold, with all expenses incurred or to be incurred thereanent, or to make payment to him of the sum of 100*l.* sterling, or such other sum as may be found to be the just worth and value of the said furniture as at the date of the poinding, with interest and expenses, with the legal interest due upon said sum, and to become due thereon; or otherwise to make payment to the pursuer of the sum of 150*l.* sterling, or such other sum as may be found to be the amount of the reparation and damages due to him in the premises, and as may cover and pay the pursuer the amount of his debt, interest, and whole expenses.

On the 22d December 1848, the Court below recalled Anderson's Interdict, condemning him in costs. The furniture and goods were then in a position to satisfy the Appellant's demand, but he took no steps. Then another competitor appeared, namely, John Charles Walter Gordon, the son of the original debtor, who, proceeding with a commendable vigour, left the Appellant behind in the race of diligence, but was himself vanquished by the landlord's paramount right of hypothec.

After a litigation which lasted for a series of years, the First Division of the Court of Session, on the 3d February 1853, found as follows: "That the Interdict obtained by Michael Anderson was recalled on 22d December 1848, and that the pointed effects *are admitted* to have been of the same value then as when the interdict was obtained: That in December 1848 the landlord's right of hypothec over the poinded effects did not exist to any greater pecuniary extent than in September 1846; and that no other impediment to the sale of the furniture is averred to have existed until

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April 1849, when an interdict against the sale of the effects was obtained by John C. W. Gordon, which, though afterwards recalled, did interrupt and prevent the sale until July 1849, by which time more extensive rights on the part of the landlord had emerged: That the interdict of 1846 having previously to either of these proceedings been recalled, and in consequence not having thenceforward existed as any impediment to the poinding, any damage sustained by the pursuer in consequence of the interference of John C. W. Gordon in April 1849, and the subsequent emerging of rights on the part of the landlord, is not to be held as damage caused by the interdict by the said Michael Anderson, and for which his cautioners are responsible: That the Defender has offered to pay the sum of *4l.* 9*s.* 1*d.*, stated to be the amount of the additional expenses incurred by the pursuer in reference to the poinding and sale prior to the interdict at the instance of John Gordon, junior: Find the Defender liable to the pursuer in the said sum of *4l.* 9*s.* 1*d.*; and, *quoad ultra*, assoilzie the Defender from the whole conclusions of the action, and decern: Find the pursuer liable in the expenses of process, and remit to the auditor to tax and report."

Hence this appeal.

The *Solicitor General* (*a*) and Mr. *Rolt*, for the Appellant, contended that the Interdict having been found groundless, the words of the bond were satisfied, and could be given effect to only by allowing the Appellant's demand. *Moir* v. *Hunter* (*b*), *Lord Elibank* v. *Renton* (*c*).

[The Lord ST. LEONARDS: Was the point argued in the Court below, whether you had a right to appeal

(*a*) Sir R. Bethell. (*b*) 11 Shaw, 32.
(*c*) 2 Shaw. 238.

in the face of a bond undertaking to abide by their decision ?]

[The Lord BROUGHAM: This seems to be a case of a bond of caution to pay whatever the Court shall award. You were offered all that you were entitled to, 4*l.* 9*s.* 1*d.*]

[The LORD CHANCELLOR (*a*): Is there any instance of an appeal on the ground that the Court has not given damages enough ?]

Sir *Fitzroy Kelly* and Mr. *Anderson* for the Respondent: Looking at this bond, an appeal cannot lie. The Court below were made arbitrators. This is an assessment, not a judgment.

[The Lord ST. LEONARDS: The question is, can any one award the payment except the Lords of Session ?]

The *Solicitor General* replied.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, in the month of July 1846, the present Appellant, Mr. Buchanan, recovered judgment in Scotland against Mr. Gordon for a small sum of money and the expenses,—being about 30*l.* In the month of September 1846 he caused the furniture, which he had taken in execution, to be advertised for sale on the 26th of that month. But, before the sale took place, a gentleman of the name of Anderson interposed upon the allegation, that the furniture so taken in execution was his property, and not the property of Gordon the debtor; and applying to the Court so to stop the sale, he obtained a suspension and interdict, upon the ground that the goods were his and not the goods of Gordon. The application was interlocutory, and relief was granted only upon the condition of Anderson entering into a bond, with

(*a*) Lord Cranworth.

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one surety, and one attestator, as it is called, substantially another surety.

The words of the bond are these,—"to pay whatever sum the Lords of Council and Session shall modify and award in name of damages in case of wrongous interdicting, in a note of suspension and interdict between the said parties, in case it shall be found by the Lords of Council and Session that he ought so to do." That is to say, an interdict was granted at the instance of Anderson only, upon the terms of Anderson, with two sureties (one of those sureties being Douglas, the present Respondent, I may say, therefore, upon the terms of Douglas) entering into a bond to pay to Buchanan, or to any other person that the Lords of Council and Session may direct, "whatever sum the Lords of Council and Session shall modify and award in name of damages in case of wrongous interdicting, in a note of suspension and interdict," in case it should be found that they were entitled to any damages.

My Lords, the proceedings on the question, whether these were goods that Buchanan might lawfully take in execution for the debt of Gordon or not, seem to have occupied a most extraordinary length of time in the Court of Session. For, having commenced in the month of September 1846, it was not till the 22d of December 1848, two years and a quarter afterwards, that the point was finally disposed of; the Lords of Session deciding that the goods were the goods of Gordon, or, at all events, that they were goods which Buchanan was entitled to take in execution for the debt of Gordon; and accordingly, as we should say in England, they dissolved the injunction, or, as they say in Scotland, they recalled the interdict.

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Then, my Lords, what were Buchanan's rights under that bond? The interdict was recalled upon the 22d of December, and he proceeded to what we should call in England revive, but what they call in Scotland awaken the proceedings, that is to say, set it on foot again. That occupied three or four months; and it was not till the month of April 1849 that he again advertised the sale of these goods. He was then stopped by another interdict, at the instance of another person claiming a right to these goods; and thereupon Mr. Buchanan took steps in the Court of Session upon the bond, in order, by virtue of that bond, to recover payment of the expenses of the proceedings against Anderson and the sureties. With regard to Anderson, your Lordships have no concern at present. Therefore we may treat this as a suit against Douglas, the surety, only. Buchanan seeks to obtain, by means of that bond, satisfaction of the original debt recovered against Gordon, and the costs of the subsequent proceedings. The *Lord Ordinary* held that Buchanan was so entitled. But upon the matter coming before the Court of Session, they were of opinion that he was not entitled; that is to say they considered that there had been no wrongous interdicting which entitled him to damages, except in respect of a small sum on account of some expenses that had been incurred, amounting to 4*l.* 9*s.* 1*d.* They considered that he was entitled to that sum, but that he was not entitled to any other damages resulting from the interdict.

All the Lords of Session were of opinion that, although a stoppage had indeed been put upon Buchanan's proceedings, yet that that stoppage did not arise from the interdict which had been granted in September 1846, but from a want of due activity and vigilance on the part of Buchanan himself, after

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the interdict was recalled on the 22d December 1848, in not proceeding then and there to enforce his execution; in consequence of which laches, another person, John Charles Gordon, son of Mr. Gordon aforesaid, had, in the month of April 1849, wrongfully interposed to stop him in respect of a transaction as to which the original interdict had no reference whatever. That was the view taken by the Court of Session, and they held substantially that there were no damages which he was entitled to recover. It is true there were certain expenses which all parties admitted he ought to have, amounting to 4*l.* 9*s.* 1*d.*; but the Lords of Session held that that was the only sum to which he was entitled. Now it is against that decision of the Lords of Session that Buchanan has appealed to this House.

That a case of this sort, of extremely minute importance, originating in a debt of 23*l.*, should have been carried through the Courts of Scotland and occupied them for so long a time, and now after the lapse of nine years from the commencement of the suit should be argued for a day and a half at your Lordships' bar, is a matter deeply to be deplored; of course I need not say that your Lordships will do what appears to you to be just in this case, and if you see your way to the conclusion that the Lords of Session have come to a wrong determination, it will be your duty to say so; whatever may be the consequences—*Fiat justitia.* At the same time, I think in such a case your Lordships ought to be well satisfied that the Court was wrong, before you interpose to help a person carrying on a proceeding of this sort for a debt of 23*l.* during nine years, through all the Courts of Scotland, in the way here exhibited.

Now, although I will not deny that in the course of the argument I have had doubts as to the course

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which I should recommend your Lordships to pursue, I have finally come to the conclusion that there is no reason whatsoever which ought to induce your Lordships to disturb the decision of the Court below.

I come to that conclusion upon these grounds. The Bond which Mr. Anderson was required to procure was not a bond *simpliciter* to indemnify Buchanan against the consequences of the Interdict. If that had been the case, it might have been open to the argument, as was urged by Mr. *Rolt* yesterday at your Lordships' Bar, that the moment the interdict was dissolved, as we should say in this country, an action would lie, and Buchanan would be entitled to say, If you had not interdicted me I should have had the money in my pocket now to which I am entitled. If you are to indemnify me, you must put that money into my pocket which I should have had by virtue of the former execution. But that is not the form, nor, as I understand it, the intention of the bond. The bond is to help the Court as it were. The Court is asked to interdict, and the Court says, The interdict shall be granted upon these terms. You shall procure sureties who shall bind and oblige themselves to pay to the pursuer, or any other person to whom they may be ordained to pay, whatever sum the Lords of Council and Session shall modify and award in the name of damages in case of wrongous interdicting and suspending, and in case it shall be found by the Lords of Council and Session that they ought so to do.

Now, that being the character of the bond, the Court of Session, after discussion, are of opinion, looking at the circumstances of the case, that there has been no damage occasioned by the interdict. I do not think it was the intendment of that bond that it should ever by possibility be carried further.

What is alleged here is, that the Lords of Session proceeded to assess the damages upon an erroneous

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principle. But if your Lordships were to listen to this application in the present instance, I do not know what is to prevent an appeal upon a future occasion. Because when the Lords of Session have taken upon themselves to say damages have been incurred, and we think they amount to 100*l.*, there may be an appeal to your Lordships' House, stating that the damages ought to have been 500*l.* There would be no end to the questions of that sort which might be brought before your Lordships. The very nature and condition of this bond, which was that the parties were to pay such damages as the Court should award, seem to me to point irresistably to the conclusion, that the finding on that subject was to be absolutely conclusive and final, because the amount of damages is a matter that never can be legitimately made the subject of appeal.

Therefore, my Lords, even if I were satisfied that the Lords of Session had proceeded upon erroneous grounds, I should still say, that upon this bond no relief could be had upon this appeal. But I wish very much to guard myself against being supposed to come to the conclusion that the Lords of Ssssion, upon this bond, have decided erroneously, or differently from the mode in which I should have myself decided. What the Lords of Session had to do was, to look at the circumstances of the case, and say what amount of damages, if any, had been incurred by wrongous interdicting. Now I can easily understand that there might have been a state of circumstances which would have made it the duty of the Lords of Session to say, "Why, the quantum of damages will be the whole amount of your debt, because before the interdict you had the means of obtaining the goods in your hands, but you have now lost those means. If it had been the fact that before the interdict the goods were worth a sum of money that would have paid your debt, and, now they are not worth half that sum, you ought to

be absolved from any proceeding of the Court." But here it turns out that the goods were worth the same amount at the end as they were at the beginning. And there is no manner of doubt that this Plaintiff Buchanan might, immediately after the 22d of December 1848, if he had thought fit, have resumed the execution, put it in force, and paid himself the sum which he claimed, just the same as in the month of September 1846. Therefore the Lords of Session came to the conclusion, that, with the exception of a small sum in the shape of expenses, there were no damages legitimately within the description of damages resulting from wrongous interdicting.

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I rather think that the Lords of Session were right in that conclusion; but I do not trouble myself to come to any final decision upon that point, because, whether they were right or wrong, the question is not one upon which your Lordships ought or can be legitimately called upon to adjudicate by way of appeal. I therefore move, your Lordships, that the interlocutor be affirmed.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I entirely agree with my noble and learned friend, in the view which he takes of this case. The note of suspension was presented without caution or consignation. It then went before Lord *Cunninghame*, as *Lord Ordinary* on the bills, and he, as it is called, sisted execution, and granted the interdict reserving the consideration of the caution. Then Lord *Ivory*, before whom it afterwards comes, passes the note, on condition that caution be found within ten days. Caution is then found by order of the Court, which, as my noble and learned friend stated, makes the party entering into the bond of caution a guarantee for the performance of whatever the Court shall there-

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after direct in the matter. By that bond the amount to be paid is to be "whatever sum the Lords of Council and Session shall modify and award in name of damages, in case of wrongous interdicting," and afterwards also "whatever sum the said Lords shall modify in name of damages and expenses, in case of wrongous suspending."

The Court have, upon a full consideration of the matter, come to the conclusion, that in one respect no damages shall be given at all, and that in another respect, the sum offered to be paid, of 4*l.* 9*s.* 1*d.*, is sufficient, and that that shall stand as the damages and expenses to be found in accordance with the condition of the obligation.

My Lords, I hold in this case, with my noble and learned friend, that though it is a most truly lamentable matter to see, that upon so very trifling a sum as that which is involved in this case, there should have been an eight or nine years' litigation running through the various processes in the Court below, and ending in an appeal to this House, yet that if there has been error committed in the Court below, and that error appears clear to your Lordships, you have no choice but to reverse or to alter the interlocutor complained of.

But my Lords, in the first place, I consider that the Court below are right in the view which they take of this case. In the next place, I consider that very much here depends upon the practice in the Court below. Now none of the learned Judges, hardly even excepting Lord *Robertson*, the *Lord Ordinary*, but certainly none of the three learned Judges before whom the case came in the Inner House, and by reason of whose interlocutor the present Appeal is before your Lordships, had any doubt whatever upon that practice which was so well known to them, that there was no ground for damages in this case. It would be a very

difficult thing indeed to pursuade me, even if the sum were a larger one, that we ought to reverse their finding, and to absolve the obligor in the bond of caution from that which he had undertaken to pay in respect of whatever the Court below should award in the name of damages and expenses. Taking the case as if it had been before us for the first time, and we had been only referred to the authorities and to the practice as we have been here, it would be a strong thing to say that I differed from the view entertained by the Court below upon it, and that I should not, even if it had been before us in the first instance, have come to the same conclusion. It would be a far stronger thing to say that I thought the Court below upon a matter very much of their practice had come to an erroneous conclusion, and by the result of that to absolve the cautioner from the obligation which he had incurred.

My Lords, I must say that so far as my opinion goes I desire it to be very distinctly understood that I do not partake of the doubt expressed by one of the learned Judges in the Court below, with respect to the *bona fides* in this case. It is to me a new doctrine which would make a distinction between the obligation of a cautioner for an Interdict obtained *bonâ fide* and for an Interdict held to have been unduly and improperly obtained, and therefore set aside. It is new to me that that question of *bona fides* can thus be entered into, and I hold that at any rate we should be slow to countenance that doctrine, even upon the statement of a doubt by one of the learned Judges. But that question is not before us, we are not called upon to dispose of it in one way or another. I only thought it right to enter my protest against its being understood that I partook of the doubt.

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Lord Brougham's opinion.

My noble and learned friend (*a*), who was present yesterday, takes entirely the same view of this case, subject of course to any alteration of opinion which might have been occasioned by his hearing the residue of the argument to-day. But my belief is, that if he had heard the residue of the learned *Solicitor General's* very able argument this day, it would not have altered his opinion.

Interlocutors affirmed with Costs.

A. DUNLOP.—JOHNSTON, FARQUHAR, AND LEECH.

(*a*) Lord St. Leonards.