[HEARD and JUDGMENT 3rd *August*, 1850.]

THE CALEDONIAN RAILWAY COMPANY and OTHERS,
Directors of the Company, *Appellants.*

JAMES HAMILTON of Kames, with consent of JAMES MCINNES,
with concourse of His MAJESTY'S ADVOCATE, *Respondent.*

Interdict.—An interdict against interference with property must be obeyed until it is recalled, and a breach of it will not be justified by proceedings taken by the party interdicted, which in his opinion had transferred the property to himself.

Ibid.—*Jurisdiction.*—The Court of Session has power to punish any breach of its interdict by fine, with the view of punishment of the breach as a contempt of Court, but in imposing the fine, regard should be had to the motives of the party complained against.

IN the month of February, 1847, the Respondent presented a note of suspension and interdict against the Appellants, setting forth that they, by their contractors and workmen, had entered upon his property, pulled down some houses upon it, and commenced cutting a road through it, although no notice had been served upon him by the Appellants, either prior to, or after obtaining the Act under which they were constituted, and praying the Court "to suspend the proceedings complained of, "and to interdict, prohibit, and discharge the said Respondents "*from further entering upon the complainer's plot* of ground in "the town of Crawford, as lately possessed by David Murray, "as tenant, referred to in the annexed Statement of Facts, for "which he has not had any notice as proprietor, either previous "to the said Respondents applying for their Act of Parliament, "nor scheduled by the said Company in any notice under the

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" said Act of Parliament, as being required for the purposes " of the said railway: or *from proceeding with their works in* " *progress* through said piece of ground belonging to the Com- " plainer; or to do otherwise in the premises, as to your Lord- " ships shall seem proper."

After some proceedings in the Bill Chamber, not necessary to be noticed, the Lord Ordinary, on the 6th March, pronounced the following interlocutor:—" In respect of the titles in favour " of the Complainer exhibited at the Bar, and admitted to have " been delivered yesterday by one of the Agents of the Railway " Company who had possession of the same as agent for Mr. " McInnes, trustee of Mr. Hamilton; in respect the Complainer " is not scheduled under the statute as proprietor of the lands " in question, and that no notice under the said statute was even " given him thereanent; in respect no title to the lands is alleged " by the Railway Company to have been acquired by them from " any person whatever, and that it is admitted at the Bar that " no price was paid to David Murray or any other person there- " for; and in respect there is no evidence of the Suspender " having given possession of the land in question to the Railway " Company, and that he avers he has been in possession thereof " through his tenants or otherwise since the date of his title in " 1810; passes the note, and grants the interdict as craved."

The Appellants presented a reclaiming note against this interlocutor, but having permitted the statutory period for doing so to elapse, they were unable to proceed upon it. The Appellants, then, on the 23rd and 31st of March, served notices upon the Respondent under the 7th section of the Railways Clauses Consolidation Act, that they intended to apply to the Sheriff to correct the Books of Reference. On expiry of this notice, they presented such an application; setting forth that in consequence of representations by the Respondent that Nos. 176 and 177 on the plan of the railway, of which numbers David Murray was entered as the owner, truly belonged to him.

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They craved the Sheriff to correct the Book of Reference, and to grant a certificate that David Murray or James Hamilton, or James McInnes, trustee for his creditors, were owners or reputed owners of the subjects. On the 12th of April the Sheriff authorized the correction, and granted the certificate asked.

On the 20th of April the Respondents further served a notice upon the Respondent under the Lands Clauses Consolidation Act, to the effect that Nos. 176 and 177 on the railway plan would be required by them, and that they were ready to treat with him for the purchase, and that, if within 21 days a treaty were not entered upon, the compensation would be ascertained in the manner provided by the statute.

The Respondent lodged formal objections to this notice, one of them being that the matter was *sub judice* in the Court of Session, by the application for interdict.

Without abiding the result of this proceeding, the Appellants, under the 84th sect. of the Lands Clauses Consolidation Act, presented an application to the Sheriff, on the 12th of April, praying him to nominate a valuator of the ground in question. The Sheriff granted the prayer. The valuator appointed by him valued the ground at 60*l*. The Appellants deposited that sum in the bank, and at the same time granted bond for a like amount to the satisfaction of the Sheriff.

Assuming that these proceedings had vested the property of the land in themselves, the Appellants resumed their operations, in disregard of the interdict which had been granted, and formed through the land a road, in substitution for a high road which they had stopped up by the course of their railway.

The Respondent thereupon presented a petition and complaint against the Appellants and Stephenson, the contractor by whom their operations had been carried on, by which he prayed the Court to find that the Appellants had acted illegally, and been guilty of a breach and violation of the interdict

granted by the Court, and a gross contempt of its authority, and to inflict such punishment by imprisonment, fine, or otherwise, as might be considered necessary.

The Appellants in their answer to this petition, stated the course they had followed, and concluded their answer in these terms.

"The Respondents desire, in conclusion, to state, that in "what they have done, they were very far indeed from intend- "ing anything like disrespect to the Court. They know well "that all subjects of this realm are bound to obey the orders "of your Lordships, no matter at what expense or risk, and "no matter how vexatious and unjust the conduct of the "party holding an interdict may be. But they were humbly "of opinion, and now respectfully, but confidently, submit to "your Lordships, that the recent operations of the Railway "Company having been made under a good statutory warrant "and title, it is impossible to construe these to be a breach of "interdict granted under totally different circumstances, when "the Respondents held no such warrant or title."

On the 20th of July, 1847, the Court pronounced the following interlocutor upon the petition and complaint.

"The Lords having advised the petition and complaint of "James Hamilton, Esq., with answers for the Caledonian Rail- "way Company, and John Stephenson, and heard Counsel for "the parties, find that a breach of interdict has been committed "by the Caledonian Railway Company as to the ground said to "have been acquired under the proceedings before the Sheriff, "by their operations since the 18th day of May last, and there- "fore fine and amerciate the said Caledonian Railway Company, "and John James Hope Johnstone, Esq. of Annandale, M.P., "Robert Johnstone Douglas, Esq. of Lockerbie; John Ander- "son, Esq. merchant, Glasgow; Alexander Hastie, Esq. Lord "Provost of Glasgow; John Houldsworth, Esq. of Cranstoun "Hill, merchant, Glasgow; William Lockhart, Esq. of Milton

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" Lockhart, M.P.; William Macdonald, Esq. of Powderhall;
" John Masterman, jun. banker, London; Charles Murray
" Barstow, Esq. accountant in Edinburgh; David Dickson,
" Esq. of Hartree; James Seton Wightman, Esq. of Courance:
" Henry Monteith, Esq. younger, of Carstairs; T.
" Hodgson Hinde, Esq. of , M.P.; Humfrey Ewing
" Crum, Esq. merchant, Glasgow; and the Right Honourable
" Fox Maule, M.P., the Directors of the said Company, and
" David Rankine, Esq. Treasurer of the said Company, in a
" fine of 300*l.* to the Queen; and authorize and empower the
" proper officer in Exchequer to levy and recover the said fine
" from the said Respondents, the Caledonian Railway Company,
" and the Directors and Treasurer of the said Company: find
" the petitioner entitled to the expenses incurred by him; allow
" an account thereof to be given in, and remit to the auditor to
" tax the same, and to report. But in respect of the statements
" contained in the said answers, and also in an incidental peti-
" tion now given in to the Court, as to the proceedings alleged
" by the said Respondents to have been duly adopted by them
" under the Railway Clauses and Lands Clauses' Consolidation
" (Scotland) Acts, in order to acquire, and by which they aver
" they have acquired, a good right of property to the subjects
" in question, and a right of entry to the same, whereby the
" right and title of the Complainer is said no longer to subsist,
" in respect of which the interdict was granted, the Lords remit
" the said petition to the Lord Ordinary on the Bills in vacation,
" to hear parties thereon; and if he shall see good cause for
" doing so, in respect of any right of property and title of entry
" acquired by the Respondents, with power to recall the said
" interdict, or to authorize the Respondents to proceed with
" the construction of their works in the meantime.

Mr. Rolt and *Mr. Anderson*, for the Appellants.

Mr. Bethell and *Mr. A. McNeill*, for the Respondent.

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LORD BROUGHAM.—My Lords, this is a case of importance in some respects; but in my opinion it is without any difficulty whatever. I think to some extent the Court below has misCarried; but with respect to the matter first insisted upon by the Appellants, I am disposed to agree with their Lordships, and for the following reasons.

An interdict was applied for and obtained; and that interdict, the Appellants contend, was to prohibit them, the Company, from doing certain acts upon a piece of ground, the property of the original Respondent, Mr. Hamilton, now deceased. Therefore, as the interlocutor of the Lord Ordinary "grants the interdict as craved," we are carried back to look at what is craved, the contention of the Appellants being (and the case, as regards the Respondent, turns upon this point), that the interdict was to prohibit the doing of certain things upon ground now the property of the Appellants themselves.

Mr. Hamilton, in his petition, upon which the interlocutor was pronounced, prays "to suspend the proceedings complained "of, and to interdict, prohibit, and discharge the said "Respondents from further entering upon the Complainer's "plot of ground in the town of Crawford, as lately possessed "by David Murray as tenant, referred to in the annexed state-"ment of facts." And, referring to the second part of the annexed statement of facts, we find that he first sets forth that he is the proprietor of "two freedoms of the commonty lands "of Crawford," lying in the parish of Crawford, in the county of Lanark. Then comes a more particular specification of his property, in section second of the statement, there being several plots—one in the possession of Marion Weir, as tenant; and another in the possession of William and Alexander Cranstoun, innkeepers in Crawford, as tenants; "and further, a plot of "ground," the plot in question, "extending to half an acre of "ground, or thereby, with the houses built thereon, till lately "possessed by David Murray, innkeeper in Crawford, as

"tenant." That is the part which is referred to in the prayer of the petition for the interdict, because that prayer says, "the "Complainer's plot of ground in the town of Crawford, as "lately possessed by David Murray as tenant." Therefore, I look upon this as descriptive of the plot of ground, and I consider the interdict as levelled against proceeding to enter upon that plot of ground, the property of Mr. Hamilton, though the order does not state so, but only grants the interdict as craved. The craving, no doubt, is to prohibit the thing being done upon a plot of ground the property of the Petitioner, but that is not the description given;—the Petitioner's property is set forth as being a "plot of ground in the town of Crawford, as lately "possessed by David Murray as tenant" thereof. Therefore it is merely as if the interdict had said in so many words, "You "are hereby forbidden to carry your works on upon a certain "plot of ground in the parish of Crawford, in the possession of "David Murray, as tenant thereof to James Hamilton, the "Petitioner, the proprietor thereof." It is a mere description of that plot of ground on which the works are forbidden by the interdict to be carried on. The plot is identified, not by the mere mention of the property being in Mr. Hamilton, but by the parish and the late tenant also being named.

Then it was the duty of all parties thus prohibited, to abstain from carrying on their works upon that plot of ground; but they did carry on the works, though not for some time, the interdict being dated the 6th of March, and nothing being done till the subsequent month of May; but they did carry on those works, and they did thereby, in my opinion, and in the unanimous opinion of the Court below, carry on those works upon the forbidden ground, in breach of that interdict, and while it remained unrecalled.

The question therefore is—1st, what circumstances there were to justify them in carrying on those works, in breach of the interdict? and, 2ndly, if there was no ground of justifica-

tion, what was there to extenuate or excuse the breach? If there was a justification, the interdict was not broken; if there was no justification, it may be that the breach may have been excused or extenuated; and that raises the second question—whether, if anything ought to have been done for that breach at all by the Court, that which has been done was right?

Now, my Lords, the first of these questions is answered by what I have stated in prefacing my opinion, namely, the purport of the interdict. If the interdict merely means that you shall not do certain things on the property of Mr. Hamilton, and if that property is divested, and passes out of him, after the date of the interdict, and before the alleged breach, then, in whomsoever it vests, at any rate the interdict is not broken, because it only forbade the doing something upon the property of Mr. Hamilton; and nothing has been done upon the property of Mr. Hamilton; but something has been done upon the ground after it became that of the Appellants, the other party. But if, on the other hand, the interdict, as I think I have shown, and as the Court below appear to me correctly to have thought, is not to forbid something being done on the property of Mr. Hamilton, but something being done on that which happened at that time to be the property of Mr. Hamilton in possession of his tenant David Murray, namely, a plot of ground in the town and parish of Crawford; it follows, as a necessary consequence, that the interdict has been broken, although the property may in the interim between the alleged breach and the date of the interdict, have changed hands, and become divested from Mr. Hamilton and vested in the other party.

Therefore, my Lords, it is my opinion that the judgment of the Court below must stand, as regards the having visited in some way or other upon the party the consequences of their disobedience of the Court's order, in having presumed, notwithstanding the interdict, to act upon a purchase which they

thought they had made, and the possession which they thought they were entitled to, under the 84th section of this Act.

My Lords, the only question that remains is, whether that which has been done by the Court to punish the breach of the interdict is that which the Court ought to have done, or not?

Now I am very clearly of opinion that the Court has miscarried in the course which it has here taken. I think it appears that there is a practice, and that by the law in Scotland there is a right, in the Court, to inflict a penalty by way of punishment, as for a contempt, by a breach of the orders of the Court, and that this is not merely with the view of compelling justice to be done according to the orders of the Court to a party in the prosecution of his civil right; but it goes a step further, showing that in Scotland the practice, and consequently the law of the Court, is, that the Court may validly inflict a certain penalty with the view of punishment, and to make an example which may deter others, for the future, from disobeying the order of the Court: and although no case has ever been brought to this House for decision as to the right of the Court below so to proceed, yet it must not by any means be supposed that the foundations of the right are shaken, merely because it has never been recognized by the higher authority of this Appellate Court. But the question is, whether in the manner of exercising that right which they possess, in the distribution of that *quasi* penal justice which they have a right and a duty to administer, they have miscarried or no? Then comes the material question as to the circumstances under which that alleged breach, and as I consider proved—indeed admitted—breach of the interdict, for the Appellants admit that they did the thing prohibited, although they say in justification first, and afterwards in extenuation of the breach, that they did it after the property had passed from Mr. Hamilton to Mr. McInnes.

Now, my Lords, as to the circumstances under which that

alleged breach took place, I think it is perfectly clear, and cannot be denied that this party had acquired a right under the 84th section of the Act which had given them a right of entry, and I rather am inclined to think that they damnified their own right by acceding to the recommendation of the Court to present a petition. If I had been the party concerned, I should have paused before I presented that petition; I should have thought that in presenting it, I will not say I admitted myself out of Court, but that I admitted a little more than it was quite safe for me to admit. However, they presented that petition, and that petition sent them necessarily to enquiry, because the Court, upon its suggestion being complied with by the presentation of the petition, remitted it to the Lord Ordinary to proceed. That part of the interlocutor is not complained of—it is no subject-matter of the present appeal, which is confined to the breach of the interdict, and the fine with the expenses. Therefore the parties cannot now be heard to say that the Court was wrong in sending it to the Lord Ordinary. But it is said that the Lord Ordinary is by their appeal prevented from proceeding with the case. Still we are left in this position, which greatly strengthens my view that there has been a miscarriage, namely, that it is not yet finally decided by the competent authority, the Lord Ordinary, to whom this matter has been remitted on the prayer of the Appellants themselves; at the suggestion, I admit, of the Court, yet complied with, and perhaps not very providently complied with on their part. They cannot say that this is completed, because upon their application there has been a remit to the Lord Ordinary to try whether there has been a certain thing done, namely, the purchase, which justifies him in recalling the interdict. That is the very thing, as I understand it, referred to him. But I am so clearly of opinion upon the first argument which I have urged upon the attention of your Lordships, that upon this reason alone there was a breach of the interdict, inasmuch as the inter-

dict applied to the parcel by description, and not so as to be directed to the question of property, that I do not think it necessary to dwell any longer upon this part of the case. Then, what have the Court done? They have inflicted a real fine—a heavy fine—a fine of 300*l.*, and though inflicted upon a rich company, that is no reason why an extravagant fine should be inflicted; and if ever I saw a fine which ought to be called excessive, it is this fine of 300*l.* inflicted for an almost nominal offence. Doubtless it is an offence—it is the breach of an interdict—the interdict stands. They ought to have applied to the Court to have it recalled instead of breaking it by acting as if there had been no interdict in existence; the interdict was subsisting, and a breach of it was committed, and therefore, instead of acting legally, by applying to have the interdict recalled and having it recalled, there is on their part a certain offence committed, a certain degree of contempt incurred by a disobedienee to the order of the Court, but a slighter contempt, under the circumstances, I can hardly conceive—it is so small, that in an action for the wrong done, it is what would have been called in this country a case for a shilling damages.

I am, therefore, clearly of opinion that there has been a miscarriage in the Court below, and that in another respect there has been a miscarriage. For, as regards some parties, there ought to have been no fine at all—not even a shilling fine. I have read, with some degree of surprise, certain of the grounds stated by the learned Judges in the Court below. The Lord Justice Clerk says, "As there is no difference of "opinion among us, it will not be necessary for us to take "more time to consider how this case ought to be disposed "of." "The interlocutor of the Lord Ordinary seems not to "have been applicable to the state of matters which is averred "with regard to it. But I lay aside that, and I take the "case that nothing had been done by the Railway Company "till after the proceedings before the Sheriff. Still, however,

" the Company go on, with the interdict unrecalled, to do the " very things with regard to the piece of ground which they " were directly forbidden to do, assuming that the proceed- " ings under the Lands and Railways Clauses Acts, afforded " a very good ground for a recall of the interdict." His Lordship then goes on to show that, and states, " the distinction " between the Bill Chamber and the Court of Session," and says, "The only course for a party in these circumstances was to " have applied to have the interdict recalled. If the case was not " out of the Bill Chamber, he might have applied again to the " Lord Ordinary on the Bills. If out of the Bill Chamber, " he might have presented a petition to the Court, asking " them to take it up, and recall the interdict. But even if " there had been inconvenience to the Railway Company, it " was caused by the restraint of law imposed upon them in " consequence of their own mistake. This is what a party " must make up his mind to submit to. And no amount of " inconvenience can be a sufficient reason to entitle him to " presume to act at his own hand," (a Scotch mode of expressing what we call in this country to take the law into his own hands) " irrespective of the restraints which the law " has imposed." And so it is in the case I put during the argument of assault and battery upon gross abuse, which would not justify the wrong, but which is sufficient in some measure to excuse it. Then what would be said by the Judge who pronounced the sentence in a criminal or directed the Jury in a criminal case? The party taking the law into his own hands, whatever offence was given to him by the party assaulted, was wrong, but the amount of the punishment or damages must be determined, in part at least, by the provocation given. " Had it not been (his Lordship continues) that we think " there was a notion entertained by the Respondents, perhaps " on fair grounds, that the basis of the interdict had been " evacuated by their proceedings before the Sheriff, we would

" have looked upon this as a wilful breach of the interdict, " and would have punished it by imprisonment." But it is a wilful breach of the interdict, otherwise there should be no proceedings against the parties at all. Parties are not proceeded against for involuntary but only for wilful acts. The learned Judge says it was not wilful. He says, we have looked into the circumstances—we do not say there was a wilful breach of the interdict. But an involuntary act is really an innocent act as regards punishment, and inflicting a fine of 300*l.* for such an act was clearly wrong. But, although it was a serious case, we have no reason to think that it was wilful. " It is always difficult to discriminate motives, and we " have no wish to suppose that the Railway Company had an " intention of directly setting at naught the authority of the " Court." Then they ought not to have been punished at all, if they did not intend to set the authority of the Court at naught. " At the same time it is essential that the gentlemen " in the direction of this concern should be made to feel that " their responsibility to the law of their country is always " direct, and that there are circumstances in which it may be " personal. The judgment of the Court, therefore, is that a " fine of 300*l.* be inflicted." And then it desires the Company to apply to the Lord Ordinary, and the Lord Ordinary is to recal the interdict if he should think fit. Now what is added to this is manifest proof—it is demonstration—that the learned Judge who pronounced this considered, and his learned brother who agreed with him, considered it quite an application of course, to have the interdict recalled, since the property had changed hands, and there was no longer the least ground upon which that interdict could stand. This their Lordships plainly considered, else they would not at the same time that they inflicted the punishment, have desired the party to go before the Lord Ordinary to get the interdict recalled. Therefore the Court, having inflicted this punishment in cir-

cumstances, and upon a ground which they were aware the interdict could not have been proceeded upon, if only that ground had existed at the time it was granted, and at the time the breach was committed (a mere technical ground), must have felt that the merely technical contempt which had been committed, was to be visited in the lightest possible way—as with censure, and, if with any, with the smallest possible fine. As for it being serious, and not wilful, I can hardly follow this distinction. Certainly the Court were perfectly right in considering a breach of any order as wrong, and as punishable by their course of proceeding. But the amount of the offence was as trifling as possible, and the amount of the punishment should have been in the same proportion trifling.

Then upon whom were they to inflict the fine? upon the Caledonian Railway Company. Now I entirely agree that whatever is inflicted, must be inflicted upon the Caledonian Railway Company. But James Hope Johnstone, of Annandale, and a vast number of gentlemen, the Directors, ending with one of Her Majesty's present Ministers, are condemned in the fine, as well as David Rankine, the Treasurer. I shall therefore move your Lordships, that this judgment be altered; that is, affirmed, *quoad* the main point; and that will carry costs, not of the appeal, but in the Court below; and altered as regards the fine of 300*l.*, reducing it to a fine of 40*s.*,—and relieving from even the fine of 40*s.*, those different persons whose names are given here. If so, then it will stand quite clear that this is no ground for denying that in another case the Court may justly inflict a fine of 300*l.*, or even heavier punishment, if they think a wilful contempt has been committed. Our decision only will show that if there has been no wilful contempt,—if there is so remarkable a circumstance as exists in this case to extenuate the offence and make it merely technical, a nominal fine is enough; the offence being that a technically wrong course was pursued,—the course of acting before application was made by

a motion of course to the Court, the Court's right to inflict the same, or even a greater fine or other punishment, is not denied, had these specialities not existed. The discretion in exercising that right in the present circumstances, is alone disputed, and our judgment will only go to limit the discretion with which that unquestioned power shall be exercised.

Lord Brougham.—In this case, as there has been a material variation made in the interlocutor, though the costs below will follow the judgment below,—that is, will go to the representatives of the Respondent, the deceased Mr. Hamilton, yet the costs of this appeal will not be given.

Mr. McNeill.—I do not quite understand your Lordship; if I am under misapprehension I shall be set right. In this order your Lordship proposes to make the Caledonian Railway Company pay merely the costs below. I am going to submit this to your Lordship, with the permission of my learned friends. Your Lordship sees that I have been entirely successful on every point which I have had occasion to contend here. I am brought here as the Respondent upon a petition. I have not said a word to your Lordships as to the amount of the fine, as to which I have no interest.

Lord Brougham.—That is very true; still you cannot have your costs here; that is discretionary at all times.

It is Ordered and Adjudged, That so much of the said interlocutor of the 20th of July, 1847, complained of in the said appeal, as fines and amerciates the Appellants, John James Hope Johnstone, Robert Johnstone Douglas, John Anderson, Alexander Hastie, John Houldsworth, William Lockhart, William Macdonald, John Masterman, junior, Charles Murray Barstow, David Dickson, James Seton Wightman, Henry Menteith, younger, J. Hodgson Hinde, Humphrey Ewing Crum, the Right Honourable Fox Maule, and David Rankine, in a fine of 300*l.* to the Queen, and authorizes and empowers the proper Officer in Exchequer to levy and recover the said fine from the said Appellants, be, and the same is hereby reversed: And it is further

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Ordered and Adjudged, that so much of the said interlocutor as fines and amerciates the Appellants, the Caledonian Railway Company, in a fine of 300*l.* to the Queen, and authorizes and empowers the proper officer in Exchequer to levy and recover the said fine from the said Appellants, the Caledonian Railway Company, be, and the same is hereby varied, to the effect of substituting the sum of 40*s.* instead of the said sum of 300*l.*: And it is further Ordered and Adjudged, That the said interlocutor be in all other respects, and the same is hereby Affirmed: And it is also further Ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment.

GRAHAME, WEEMS, and GRAHAME.