

fender in a criminal trial that he had committed the assault in question was competent evidence against him.

In this case James Caird, hotel keeper, Cullen, was pursuer; and Alexander Innes, Excise officer, Cullen, was defender; and the issue sent to trial was as follows:—

“Whether, on or about the 18th day of October 1865, and at a place on or near the turnpike road leading from Cullen to Portsoy, about 100 yards on the north side of the Cullen toll-bar, the defender assaulted the pursuer—to his loss, injury, and damage?”

“Damages laid at £500.”

At the trial,

SHAND and THOMSON for the pursuer proposed to put in evidence, for the admission which it contained, a conviction obtained against the defender on his own confession on 10th November 1865 when he was tried criminally for the assault in question before the Sheriff of Banffshire.

CLARK and LANCASTER for the defender objected to the competency of the proposed evidence. The conviction applied to the defender, but he had pleaded guilty as the quietest way of avoiding the publicity of a criminal trial. It had been decided that a prisoner's declaration could not be used against him as evidence in a civil case (*Little v. Smith*, 9 D. 737). A conviction obtained after a trial on a plea of not guilty would not be admissible as evidence; and there is no real difference in the case of a conviction obtained on a person's confession.

The pursuer cited the following authorities in support of the admissibility of the evidence:—Taylor on Evidence, S. 1506; Starkie on Evidence, p. 362; Dickson on Evidence, S. 1085; Bell's Principles, S. 2216; Grierson, M. 14,021; Bontein, M. 14,043; Lord Arran, M. 14,023; Mackie, 3 Murray 25; Cairns, 12 D. 921; Ivory's Ersk., p. 986, note 95.

Lord KINLOCH admitted the evidence, and the defender excepted.

The jury found for the pursuer—damages, £40.

Agent for Pursuer—Alex. Morison, S.S.C.

Agents for Defender—H. & A. Inglis, W.S.

Thursday, June 21.

FIRST DIVISION.

M'KINNON *v.* HAMILTON.

Diligence—Poinding—Suspension. Note of suspension of a poinding passed on the ground that the amount of effects poinded was excessive: *Question*—Whether it is necessary in a warrant of sale under a poinding to name the hour of sale.

This was a suspension of a poinding and warrant of sale granted by the Sheriff of Buteshire. The grounds of suspension were, *inter alia*, that the warrant of sale did not specify the hour as well as the day on which the sale was to take place, and that the respondent had poinded and had obtained warrant to sell all the complainer's moveable property, the appraised value of which was £72, 9s., for a debt the amount of which was only £13. The complainer offered consignment.

The Lord Ordinary (Mure) passed the note, and continued an interim interdict which had been granted. He observed in his note—“The poinding of effects of an appraised value upwards of five times the amount of the debt sought to

be recovered is, in the opinion of the Lord Ordinary, of itself a very questionable proceeding. And when that is followed by a warrant of sale, in which no restriction is imposed upon the creditor as to the quantity of the effects which may be sold, and no precise time of sale is fixed—inasmuch as the hour of sale is left in the creditor's discretion—(Bell Com. on Statute, p. 22)—it appears to the Lord Ordinary that so much doubt is raised as to the legality of the diligence in the present case as to entitle the complainer to have the note passed upon the consignment offered being made. Kewley, March 8, 1843.”

The respondent reclaimed.

BURNET for him argued—The Personal Diligence Act only requires that the time of sale should be fixed by the Sheriff. That was done in this case, because the day was named. It was not essential that he should fix the hour of the day. But the hour of sale was duly advertised and intimated to the debtor six days before the day fixed. In regard to the amount of effects poinded, that was explained by the fact that the expenses of executing the diligence were considerable, and besides the debtor was in arrear to his landlord, whose agent had intimated that he intended to interdict the sale in order to protect his hypothec. It was therefore necessary to point as much as would enable the creditor to take the landlord's objection out of the way, and also to pay his own debt and the expenses. *Hunter v. North of England Bank*, 12 D. 65.

THOMS, for the suspender, was not called on.

The Court adhered, on the ground that the poinding was excessive. In this case the creditor may have proceeded in good faith, but if what had been done were sanctioned, great oppression and injustice might be committed. No opinion was expressed as to whether it was fatal to the diligence that the hour of the sale was not mentioned in the warrant of sale.

Agent for Suspender—Wm. Officer, S.S.C.

Agent for Respondent—John Thomson, S.S.C.

SECOND DIVISION.

M'TAGGART *v.* M'DOUALL.

Property—Foreshore—Right of Ware—Boundaries

—*Bay.* Held that the principle to be applied in fixing the boundaries of two adjacent properties situated on a bay, with reference to the exercise of the right of sea-ware on the foreshore, is to take an average line of coast, and drop a perpendicular upon it from the termination of the land march between the properties.

This is a question of boundaries between two adjacent proprietors on the Bay of Luce. The pursuer seeks for declarator that, as proprietor of the lands of Ardwell, in the parish of Stoneykirk, and county of Wigtown, he has the “sole and exclusive right to the wrack, ware, and waith, whether growing or drifted, upon the shores adjacent to and *ex adverso* of his lands,” which extend along the west side of the Bay of Luce, up to a certain boundary, or to another alternative boundary line. The defender, whose lands are situated to the south of the pursuer's, claims a different line of boundary, extending across the foreshore in a direction further north, and cutting off a part of the shore opposite the pursuer's lands. Both parties relying upon possession, as well as their legal right, a proof was taken. The Lord Ordinary (Kinloch) held that it was impos-

sible to hold the pursuer to have proved either an exclusive, or even a preponderating, possession on his part within the boundary claimed by him. His Lordship also doubted whether this was at all a question to be determined by proof of possession, for possession was of no avail without a title to which it is attributable. And if the shore boundary between two properties runs, according to law, in a particular line, the Lord Ordinary doubted extremely if possession beyond that line could be held available to constitute a right. The Lord Ordinary dismissed the action, holding that the pursuer had not properly raised the question by either of the boundary lines which he set forth, but decided that the rule applicable to such a case was to take an average line of the coast, and to drop perpendiculars to it from the termination of the land march between the boundaries so as to divide the shore.

The conclusions of the summons are as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the pursuer, as proprietor of the lands and others foresaid, has the sole and exclusive right to the wrack, ware, and waith, whether growing or drifted upon the shores adjacent to and *ex adverso* of his said lands and estate, extending said shores southward on the west side of the Bay of Luce, and that up to a boundary line, being a straight line drawn from a point at or near the stones known by the name of the March Stones, placed near Chapelrossan on the sea wall of the public road from Stranraer to Drumore, running said line seawards to the Caughy Stone or Rock in the said bay, or otherwise up to a boundary line drawn from the said point, at or near said March Stones, to a point immediately south of the yards, known by the name of the Ardwell Fish Yards in said Bay of Luce, and in the same direction seawards beyond the said fish yards, and to remove or dispose of the said wrack, ware, and waith at pleasure, by himself, his tenants, or others having possession."

And in article 8 the pursuer makes the following statement:—"The boundary line before mentioned, being the line drawn from a point at or near the stones known by the name of the March Stones, placed near Chapelrossan, on the sea wall of the public road from Stranraer to Drumore, to the Caughy Stone or Rock situated in the Bay of Luce, runs from the shore outwards into the Bay of Luce in a line nearly perpendicular to the line of coast at that point, or rather the line running seaward from the said March Stones, so as to form equal angles with the shore at that point, would run in a direction rather farther southwards than the line from the said March Stones to the said Caughy Stone. The pursuer and his authors, apart from possession, have right under their titles to the whole wrack and ware on the shore northwards of a line drawn from the March Stones, and making equal angles with the shore at that point. The boundary line claimed by the pursuer in the present action is rather farther northward, and for the sake of peace he is willing to hold the line from the said March Stones to the said Caughy Stone as the true boundary."

The pursuer reclaimed.

The SOLICITOR-GENERAL, GIFFORD, and GUTHRIE, for him, argued—The pursuer alleges that the legal line of boundary runs further to the south—that is, more into the defender's property—than the line to the Caughy Stone, and is more favourable to him. On this ground he is entitled to support his claim to the last mentioned boundary as

actually less than his legal right. He is willing to waive his right. The true legal boundary is one drawn from the extremity of the land boundary, so as to make equal angles with the average line of the shore at that point, *i.e.*, to bisect the angle formed by the line of shore on each side.

PATTON, SHAND, and BALFOUR, for the defender, supported the interlocutor of the Lord Ordinary so far as it disposed of the question of possession and dismissed the action. As to the principle to be applied, they answered—The true principle is that laid down in *Campbell v. Brown*, *viz.*, to drop a perpendicular from the end of the land boundary on the line representing the *medium flum* of the river or firth. This principle is to be followed out in the present case by taking the central line or the *medium flum* of the Bay of Luce, and dropping a perpendicular on that line from the end of the land boundary. *Campbell v. Brown*, 18th November 1813, F.C.

At advising—

The LORD JUSTICE-CLERK said—In this case it would have been more satisfactory if we had had before us the precise terms of the titles of parties. But for the purpose of the present judgment it is sufficient to know that these gentlemen, who are adjoining proprietors, have each a Crown grant of wrack and ware—that the titles prescribe no boundaries within which the right is to be exercised, and consequently that the legal presumption is that each proprietor's right extends *ex adverso* of his lands. The object of the present action is to fix the boundary between the shore *ex adverso* of the one, and the shore *ex adverso* of the other, so as to define the point of the shore where each party may exercise his right. And I think the summons raises this question well enough, whether the question is made dependent on considerations of abstract right or of possession. The pursuer concludes—[His Lordship here read the conclusions of the summons]. These are the alternative views presented by the conclusions of the summons. Now, these conclusions are supported on two separate and distinct grounds. The one is that the state of possession is conformable to the conclusions of the summons or one or other of them, and the pursuer asks that the rights should be fixed according to the state of possession. But it is a separate and totally distinct ground that the legal line—that is, the line which divides the exercise of the right according to the situation of the estate, and the conformation of the coast—so runs as to entitle the pursuer to come at least as far as the line concluded for in the action. This ground of action is set forth in the 8th article of the condescence as follows—[His Lordship read the article]. Now, it may appear at first sight not quite intelligible why the pursuer should limit his demand within the area of the legal line, but it is easily understood why, because there is a conspicuous natural object lying seawards in the direction of the line he claims, and if the boundary between the properties be fixed by an imaginary line between the shore and that point, there will be an intelligible boundary for the future. The pursuer is therefore right, if entitled to a boundary line, to limit it to a point falling within his legal right. The judgment of the Lord Ordinary proceeds on a misunderstanding of these alternative views of the case. His Lordship finds—"That the pursuer has not established that the boundary line between his property and that of the defender, on the shore *ex adverso* of the same, is either a straight line drawn from a point at or near the stones known by the name of the March Stones, placed near Chapel-

rossan, on the sea wall of the public road from Stranraer to Drumore, running said line seawards to the Caughy Stone or Rock in the Bay of Luce; or otherwise, a line drawn from the said point at or near said March Stones to a point immediately south of the yards known by the name of the Ardwell Fish Yards, in said Bay of Luce, and in the same direction seawards beyond the said Fish Yards." The pursuer has not established, according to the Lord Ordinary, that either of the lines in the conclusions of the summons is the proper legal line; for his Lordship seems to think that possession has nothing whatever to do with the question, and if it has, that the proof of possession has failed. The judgment of the Lord Ordinary amounts to this, that because the pursuer has claimed too little he must fail. I cannot go in with that. The 8th article shows that the line claimed is within the legal line, and therefore, in the first place, I am for recalling the interlocutor of the Lord Ordinary. But the next question is how to put the case in shape for judgment. All the facts necessary for this purpose are established, but we have to fix the principle upon which the legal line is to be settled, having regard to the facts that have been established. The question is one of some delicacy, and the counsel for the defender endeavoured to represent to us that the language used in the condescendence is inconsistent with legal principle, and that to draw a perpendicular line from the shore is against legal principle. That depends on what is meant by these terms, and if it is meant that the angles of the shore are the points from which the line is to be drawn, it is true that that would be irrational and absurd. But I don't so read the pursuer's averments. He says that the perpendicular is to be at equal angles with the shore, on an average line of coast; and if that is the true construction to be put on his averments, I think he is right. It was strongly pressed upon us to apply the rule of *Campbell v. Brown*, and that certainly is an important rule, and may be held to be settled for such cases. The properties there were near Port-Glasgow, the river running between the two properties, and one bank of the river being opposite the other. The rule is thus stated by Lord Meadowbank in a single sentence:—"The only invariable and universal plan which can be adopted is to take an average direction of the narrow sea, from which perpendiculars should be dropt on the march stones of the different properties. On these perpendiculars parties would be entitled to form bulwarks which would never interfere, and of which the direction would be precise and definite." Now, I think that that is a sound rule as applicable to that kind of case. But it is perfectly obvious that that rule cannot apply to all cases of fixing boundaries, because where there is no opposite bank an opposite rule must be adopted. What, then, is the rule? It should be fixed by following as near as possible the analogy of the principle laid down in *Campbell v. Brown*; and I think it is very well stated by the Lord Ordinary. His Lordship says—"Using the analogy of the case of *Campbell v. Brown*, the Lord Ordinary was disposed to think that the proper method was to take a line representing the line of the shore, drawn at such distance seawards as to clear the sinuosities of the coast, and let fall on such a line a perpendicular from the end of the land boundary. Of course he does not mean a line representing the whole coast of the Bay of Luce, but a line fairly representing the average line of the shore extending on either side of the land boundary. To let

fall a perpendicular on this line from the end of the land boundary, occurs to the Lord Ordinary as the nearest possible approximation to the application of the principle laid down in *Campbell v. Brown*." I think these reasons are well stated, and the only question that remains is, whether the principle that applies to the open sea is the one that applies to the Bay of Luce, or whether we must not apply a stricter rule. I am disposed to think that that depends on circumstances, and is a question of degree. [His Lordship referred to illustrations, made in the course of the argument, from the cases of lochs and estuaries, and continued]—In the case of bays it would be quite impossible to apply the rule of *Campbell v. Brown*, with a due consideration to the rights of parties, and giving the best attention to the Bay of Luce. I think that the principle applicable to the open sea, and not that applicable to estuaries, must be applied. It is said that if the perpendicular were raised on this principle embarrassment would be caused in rights seaward, such as oysters. I don't think this follows, because it would only divide the shore for the exercise of the right of ware and wrack, and for nothing else. Other divisions of the shore for the exercise of other rights would depend on quite different considerations, with which we are not now concerned. All we have to do is to divide the shore for these two adjacent properties, and I think the principle laid down by the Lord Ordinary, rather than that laid down in *Campbell v. Brown*, should be preferred. I would therefore propose to your Lordships, as the most convenient way of disposing of this case, that we should have a line laid down by a man of skill representing the average line of coast from which perpendiculars may be dropt, so as to divide the shore.

The other Judges concurred.

The Court accordingly remitted, before further answer, to Mr Keith Johnston, to lay down a line representing the average direction of the coast, and a perpendicular drawn to it from the termination of the land march between the properties, with leave to the parties to ask Mr Johnston to lay down such other lines as should tend to elucidate the questions at issue.

Agent for Pursuer—D. J. Macbrair, S.S.C.

Agent for Defender—George Cotton, S.S.C.

Friday, June 22.

FIRST DIVISION.

FORSYTH v. CAMPBELL AND OTHERS.

Diligence — Forthcoming — Forfeiture of Common Debtor's Right. A marriage settlement having provided that a person's right to a fund should be forfeited by his suffering anything to be done whereby it should cease to be receivable by him, held that the forfeiture was not incurred by his allowing it to be arrested and an action of forthcoming to be raised by the arrester.

This was an action of forthcoming directed against the surviving trustees acting under a deed of settlement or indenture dated 9th August 1848, made on the marriage of Lord Charles Pelham Pelham Clinton and his wife, in whose hands the pursuer had used arrestments in December 1863 and May 1864.

Arrestments had also been used in November 1863 in the hands of the defenders by Messrs Lindsay, Mackay, & Howe, on the dependence of