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 drop 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.

FORSTER *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

an action which they had raised against Lord Charles for payment of certain over advances made by them to him; but these arrestments were discharged, certain payments having been made to the arrestors, out of the rents, with the consent of the debtor.

The defenders pleaded as a defence to this action —"3. The defenders ought to be assoilzied from the conclusions of the action in respect that under and by virtue of the provisions of the said indenture or marriage settlement the effect of the arrestments used by Messrs Lindsay, Mackay, & Howe—and *separatim* of the arrestments founded on—was to cause the forfeiture and determination of all right on the part of Lord Charles Clinton to any part of the said trust-funds or effects."

The clause in the settlement which was founded on by the defenders provided that the trustees "shall pay the remaining one-third or one-half, as the case may be, of the said dividend, interest, and produce to the said Lord Charles Pelham Pelham Clinton for his own use, till such time as he shall sell, mortgage, or charge the same, or some part thereof, or attempt so to do, or become bankrupt or insolvent, *or do or suffer any act or thing* whereby the same, or any part thereof, if hereby limited absolutely, *would cease to be receivable by the said Lord Charles Pelham Pelham Clinton for his own use.*"

The Lord Ordinary (Barcaple) pronounced an interlocutor on 20th July 1865, in which, *inter alia*, he "finds that on a sound construction of the said deed of settlement or indenture, and relative trust-deed, neither the arrestments used by Messrs Lindsay, Mackay, & Howe, nor those used by the pursuer, caused a forfeiture or determination of the right of Lord Charles Pelham Pelham Clinton to any part of the trust-funds or effects, except in so far as the same may be effectually transferred to the parties using said arrestments: Therefore repels the third plea-in-law for the defenders, reverses all questions of expenses, and appoints the cause to be put to the roll for further procedure."

On this point, Lord Barcaple observed in his note—"The provision in regard to Lord Charles Clinton's share, though not in words expressed as a forfeiture, is of that nature, and must receive a strict construction. The only words in the clause which it can be maintained apply to the case are—'Do or suffer any act or thing whereby the same, or any part thereof, if hereby limited absolutely, would cease to be receivable by the said Lord Charles Pelham Pelham Clinton for his own use.' The Lord Ordinary cannot hold that this applies to the case of an arrestment, which can only attach the fund at its date in the hands of the trustees for payment to Lord Charles, or at the utmost the current rents when payable by the tenants to the trustees. The arrestment of the fund when in that position for payment of a debt of Lord Charles seems to be no more the case struck at by the clause than an order by him upon the trustees to pay the same debt would be after it was presented. In neither case would the fund, or any part of it, cease to be receivable by him for his own use, in the sense which, it is thought, must be attached to such words in such a clause."

The defenders reclaimed.

GORDON and SHAND were heard for them, and FRASER AND HALL for the pursuer.

After a debate, the Court, having doubt as to the meaning of some of the expressions used in the settlement, directed a case to be prepared for the opinion of English counsel "as to the meaning of the deed in question." The case having been prepared, they appointed it to be laid before Mr G. M. Giffard, Q.C., for his opinion thereon.

The following are the queries put in the case:—

1. Does the construction of the deed of settlement depend on any technical rule of English practice, or is it a question on which any Court conversant with the language in which the deed is written is entitled to give its own judgment?

2. What is the meaning of the several expressions—"Pay to Lord Charles Clinton, for his own use;" "If hereby limited absolutely;" and "would cease to be receivable for his own use," occurring in the clause of the deed above recited?

3. Did the arrestments used by Messrs Lindsay, Mackay, & Howe place Lord Charles Clinton in the predicament of having done and suffered any act or thing whereby the rents, or any part the same, payable to him under the settlement, if thereby limited absolutely, would have ceased to be receivable by the said Lord Charles Pelham Pelham Clinton, for his own use?

4. Have the arrestments used by Mrs Forster, either of themselves, or followed, as they have been, by an action of forthcoming, in which, however, no decree has yet been pronounced, placed Lord Charles Clinton in the predicament mentioned in the preceding query?

And the following is the opinion returned by Mr Giffard:—

1. The construction of the deed of settlement does not depend on any technical rule of English practice, but is a question on which any Court conversant with the language in which the deed is written is entitled to give its own judgment.

2. The term "Pay to Lord Charles Clinton for his own use," means payment to Lord Charles Clinton himself, or according to some direction given by him after the actual receipt by the trustees on his account; and the rest of the clause means, if the income or some part thereof should *cease* to be receivable for his own use—that is, should so *cease* to be receivable as that some other person, and not himself, should have title to receive. It is to be observed that the term is "*cease*," that is, if the right to receive should *cease* altogether, not if the right to receive should be suspended.

3. The arrestments used by Messrs Lindsay, Mackay, & Howe did not place Lord Charles Clinton in the predicament of having done or suffered any act or thing whereby the rents, or any part of the same, payable to him under the settlement, if thereby limited absolutely, would have ceased to be receivable by the said Lord Charles Pelham Pelham Clinton for his own use; and the reason for this is that the right was suspended only, but did not *cease*.

4. The arrestments used by Mrs Forster have not, either of themselves, or followed, as they have been, by an action of forthcoming, placed Lord Charles Clinton in the predicament mentioned in the preceding query; and the reason for this is, that as no decree has yet been pronounced, the right has been suspended only, and did not cease. GEORGE MARKHAM GIFFARD.

The case was thereafter again debated. Thomson's Trs. *v.* Alexander, 14 D. 217, and Jarman on Wills, vol. ii., p. 28-30, were referred to.

At advising—

The LORD PRESIDENT—There are particular conditions in this settlement which have given rise to the present question. Arrestments have been used by Lindsay, Mackay, & Howe, and they having obtained decree, the trustees paid their claim; and the pursuer also arrested, but her claim was not

paid. It appears that under the deed which gives Lord Charles Clinton any right there is a condition that his right is to be forfeited if he suffers anything to be done whereby the rents, or any part thereof, would cease to be receivable by him for his own use. It is contended that the arrestments which were used by Lindsay, Mackay, & Howe, and those which have been used by the pursuer, have the effect of putting an end to the right of Lord Charles Clinton to the sums arrested; that by allowing arrestments to be used, or an action to be raised in which a decree of forthcoming may be pronounced, he has incurred the forfeiture. This defence is contained in the third plea which the Lord Ordinary has repelled. It appeared to us that in this English deed there might be some technicality of expression, and we accordingly sent a case for opinion to an English counsel. He tells us there is no technicality, and gives us his opinion that the arrestments, and the raising of the action, did not produce the effect contended for. But it is still maintained that the direct result of pronouncing a decree of forthcoming will be to make the rents, or part thereof, no longer receivable by Lord Charles. The only question before us at present is the third plea. What effect the decree of forthcoming may have is not before us. The question is, shall this action be dismissed, or the defender assoilzied, because the demand made is for a decree of forthcoming which may have that effect? I do not think that the arrestments have the effect of interposing an obstacle to our pronouncing a decree of forthcoming. Those used by Lindsay, Mackay, & Howe were taken out of the way by reason of an arrangement whereby the debtor authorised payment to the creditors. They therefore cannot be founded on. Then, in regard to the arrestment used by the pursuers, I think it is practically in the same position. I cannot see how the funds attached by it have ceased to be payable to Lord Charles Clinton by reason of it. They are not payable to anyone else. The arrestment does not make them payable to the arrester, and the arrestment may be taken out of the way as the others were. That a decree of forthcoming if pronounced, will have the effect alleged, does not appear to me any reason why we should not pronounce it. Until it is pronounced it has not that effect. Whether it will have that effect, I do not say, but if it has, the result will be what the defenders desire. I therefore agree with the Lord Ordinary. But there is an expression in his interlocutor—"except in so far as the same may be effectually transferred to the parties using said arrestments"—which appears to me somewhat inconsistent with the rest of the interlocutor, and which I think should be deleted.

Lord CURRIEHILL—I assume that here there was an arrestable fund—that is, the trustees are debtors to Lord Charles Clinton, the common debtor. The pursuer has used the appropriate diligence for attaching that fund, and she is now following it out by an action of forthcoming, which will have the effect of transferring to her the *jus crediti*. It is said that Lord Charles Clinton's right is so qualified that such a decree cannot be demanded, in consequence of the arrestments which have been used. Those of Lindsay, Mackay, & Howe can clearly have no effect, because the *jus crediti* never was transferred by them, and they have been discharged. The only question is the effect of the arrestment founded on in this action. It is said the fund had ceased to be receivable, in other words, that Lord Charles Clinton had ceased to be the creditor. At this moment he has not ceased to be the creditor. There is nothing but a *nexus*, which may be removed by Lord Charles. But then it is said that his right is gone as soon as the decree of forthcoming is pronounced, and that as the forfeiture will then be incurred we cannot pronounce the decree. I think there is no soundness in that argument. [His Lordship concluded by reading a passage from Lord Kames' Law Tracts, which he said exposed the fallacy. It will be found in the Tract on "Property," pp. 134–6 of the 2d edition.]

Lord DEAS—I agree very much in what has been said. The question is what is the effect of this arrestment of the pursuer in giving or not giving her a right to a decree of forthcoming. That depends on the construction of the clause in the English deed. It was conceded that we are to construe the deed according to our own views. It seems substantially to declare a forfeiture of Lord Charles Clinton's right on either of three things taking place (1) on his granting any voluntary deed of sale, mortgage, or security, or attempting to do it; (2) on his bankruptcy or insolvency; (3) on his doing or suffering anything to be done whereby the rents would cease to be receivable by him for his own use. It is under the last head that it is contended the forfeiture has taken place. It is said he has suffered something to be done which will prevent the rents being receivable by him. There is no doubt that the provision applies. The question is whether he forfeits not only the rest of the fund but also that part of it which is arrested. My opinion is that he has not forfeited the sum arrested. I found that opinion on the construction of the clause. Unless this decree is pronounced the sum will not cease to be receivable by Lord Charles for his own use.

Lord ARDMILLAN—This is an extremely nice and interesting question. I arrive at the same result as your Lordship on two grounds. The first is the technical ground on which Mr Giffard has rested his opinion; the second is the wider one Lord Curriehill has referred to. I think Mr Giffard's opinion contains a sufficient answer at present to the defender's plea. The right has not ceased, it is only suspended. The arrestment does not place Lord Charles Clinton's right in the position of having ceased. But then, if it be the fact that the decree of forthcoming may have, when pronounced, the effect of putting an end to it, the maxim might apply "frustra petis quod mox restiturus es." I do not think that, reading the clause fairly, the effect is to forfeit the sum arrested. I don't say anything about the remainder. There is a difference betwixt the first branch of the clause and the last. In the first an attempt to do the thing is sufficient to infer the forfeiture, but in the last there is no reference to an attempt—success is necessary. Therefore nothing but the actual transference of the right operates the forfeiture; but in the case we have here, the moment there is enough to infer the forfeiture, that same moment there is enough to transfer the right to the pursuer.

The Court accordingly adhered to the interlocutor of the Lord Ordinary, with the variation proposed by the Lord President.

Agent for Pursuer—James Macknight, W.S.
Agent for Defenders—Alex. Howe, W.S.

BARTOLOMEO *v.* MORRISON AND MILNE, *et e contra.*

Process—Amendment of Summons. An amendment of a summons raised as a supplementary one, having for its object the conversion of the summons into a substantive one, *disallowed*