ments may be supplied after eleven o'clock without "keeping open house." "Keeping open house" is keeping it open as an inn or as a public-house, and inviting customers to come in and partake of the hospitality and accommodation which it professes to supply; and if it is proved that any inn or public-house is so kept open as such, affording to the public refreshment and accommodation, then the offence of "keeping open house" is committed. But if there is no invitation to customers to come in after that hour, I am of opinion that drink may be supplied if the customers have come in before eleven o'clock. Now, I do not think it is legitimate to charge these offences alternatively and to convict upon them generally. The conviction must specify the offence of the commission of which the magistrates are satisfied. I think further that no offence was committed here —any drink that was supplied was for lodgers in the house—for themselves and their friend. If there is no evidence that the appellant kept open house, that is, held out an invitation to customers to come in and partake of refreshments, it was quite right to give lodging and accommodation for the night, and it was not against the statute to allow a guest of the lodgers to come in with them; and if that guest had a glass of whisky along with them, that is evidence neither of keeping open house nor of permitting drinking. The lodgers and their friend were standing about till it was past eleven o'clock, and then they took him in with them to continue their conversation. That does not constitute keeping open house or supplying customers generally with liquor. It is simply supplying liquor to a guest of the inmates whose home the house temporarily was. And so this complaint on the facts as stated to us, both in form and substance, cannot constitute either of the offences charged. I am therefore of opinion that this conviction should be set aside.

Lord Craighill—I concur in thinking that the conviction complained of ought to be quashed. The ground of my opinion, however, is simply that the charge made against the appellant was alternative, and the conviction was a general conviction. On the other question which has been argued, whether what was done was a contravention of the appellant's certificate, I reserve my opinion. That question appears to me to be important as well as difficult, and as a decision of it is not required, it seems expedient that no judicial opinion upon it should be expressed. I shall only add that the views which have been expressed by Lord Young are not within the literal meaning of the words of the certificate, and are not covered by any decision hitherto pronounced. It may be that the principle recognised in previous decisions, if carried to its logical result, would be a ground on which the present sentence ought to be quashed, but there is room for a different opinion, and till it is necessary that the point should be decided, it is better, I think, that an opinion upon it should not be delivered.

Lord Justice-Clerk—I concur substantially on both grounds, though I prefer to base my judgment on the question of form. I think that a general conviction here on the alternative offences charged is manifestly inadequate, because unless there be a violation of one or other of the statutory prohibitions no offence has been committed. I take it that "keeping open house" means in the statute exactly what it does in the certificate. I agree with Lord Young as to the meaning of keeping open house; that offence may be committed though no liquor is served and though no drinking goes on in the house. The object of the clause is to prevent the innkeeper keeping his house open for the purposes of his trade. On the other hand, I cannot say that an invasion of the statute might not take place under similar circumstances to these here. But I do not think there was any violation of the statute here; no liquor was permitted to be drunk on the premises with the exception of that supplied on the order of men lodging in the house, for themselves and their friend, at their charge. On the whole matter I have come to the conclusion that this conviction should be quashed.

The Court quashed the conviction.

Counsel for Appellant—H. Johnston. Agent —P. Adair, S.S.C.

Counsel for Respondent—Campbell Smith. Agent—Party.

COURT OF SESSION.

Thursday, February 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'ARLY *v.* FRENCH AND OTHERS (FRENCH'S TRUSTEES)

Property—Neighbourhood—Property in Town—Part and Pertinent—Prescription—Common Interest--Cornice and Sign-board--Acquiescence.

A tenement was erected in 1803, the street flat, which was let as a shop, being possessed under separate titles from the flats above. In 1831 the proprietor of the street flat erected on the front wall of the tenement immediately above his shop a cornice and sign-board. A proprietor who had acquired the flat above in 1876, raised an action in 1881 to have it declared that the centre of the joists was the boundary line dividing his flat from the shop below, and that the proprietor of the latter was not entitled to place his sign-board and cornice above his window upon any part of the wall above the said boundary line. *Held*, on a proof, that the cornice was a part of the front of the shop, and had been possessed as part and pertinent of the shop for forty years and upwards, and that the pursuer was therefore *not entitled* to have it, or the sign-board placed upon it, removed.

The pursuer of this action was heritable proprietor of the first flat at the north-east corner of Argyle Street and Queen Street, Glasgow, which he acquired by disposition dated 12th of May 1876, and recorded in the Register of Sasines for the burgh of Glasgow the 19th of that month. His property was described in the titles as "All and Whole the first flat or storey immediately above the shops of the new tenement of land,

and fronting partly Argyle Street and partly Queen Street of Glasgow."

The defenders, who were the trustees acting under the trust-disposition and settlement of the deceased Robert French, were heritable proprietors of the shop No 72 Argyle Street, which was immediately under the flat belonging to the pursuer, conform to notarial instrument in their favour recorded in the register of sasines the 14th February 1877. Therein the subjects were described as follows:—"All and Whole the shop, high and laigh, situated at No. 72, and fronting Argyle Street of Glasgow, lying immediately to the east of the common close of the tenement built on the east side of Queen Street, and the north side of Argyle Street."

This petition was presented by the pursuer in the Sheriff Court of Lanarkshire at Glasgow for the purpose of having it found and declared that the centre of the joists was the boundary line dividing the shop belonging to the defenders from the flat above said shop belonging to himself, and that the defenders were not entitled to place their sign-board and cornice or other erections above the window, door, and jambs of said shop, upon any part of the wall which was above the said boundary line; and also to have the defenders decerned and ordained forthwith to remove the said sign-board and cornice, or other erections upon any part of the wall above said boundary-line; and to have them interdicted from placing any sign-board and cornice or other erections thereon in time to come, or from other wise invading or encroaching upon the pursuer's said property.

The pursuer averred:—"(Cond 4) Immediately above the window, door, and jambs of said shop the defenders have a sign-board and cornice or erections which are above the centre of the other joists, and upon part of the wall of the pursuer's property, and the defenders claim the ownership or use of that part of the wall above the centre of the joists, and illegally, and contrary to the remonstrances of the pursuer, continue to have against it the said sign-board and cornice, or other erections. These are encroachments on the pursuer's property whereby it is dwarfed, and the exclusive use and occupation thereof prevented."

The defenders averred that the tenement was erected in 1803, and that the shop flat was from the first intended to be held on separate titles from the upper flats, and had been so held; that there was a custom in business parts of Glasgow to have a cornice on the front wall above the shops extending above the line of the centre of the joists between the shops and the flats above them; that the cornice above this shop had been so used from 1803, or at least for the prescriptive period, as part and pertinent of their shop; that the pursuer had acquired his flat in 1876 in the knowledge of the existence and the previous use of the cornice.

The pursuer pleaded:—"(1) The centre of the joists being the true boundary between the properties, pursuer is entitled to decree of declarator to that effect. (2) Defenders' sign-board and cornice or other erections being encroachments on pursuer's property, the pursuer is entitled to have the same removed, and to interdict against the encroachments being renewed."

The defender pleaded, *inter alia*:—"(2) At all events, the defenders and their predecessors having used and possessed the cornice in question as part and pertinent of the shop belonging to them for forty years and upwards, have acquired a prescriptive right thereto. (4) The defenders having right to the said cornice as part and pertinent of said shop, are entitled to be maintained in the possession thereof, and to be assoilzied from this action."

The defenders raised a counter action for declarator that they had right to and in the portion of the wall of the said tenement immediately above the shop No. 72 Argyle Street belonging to them, and that as part and pertinent of the shop, and all as used and enjoyed by them and their predecessors for placing or using a sign-board and cornice above and in connection with said shop, and for interdict against M'Arly from interfering with them in the peaceable possession and occupancy of said wall for the purposes aforesaid so long as they did not encroach thereupon to any greater extent than they already possessed and claimed.

The two petitions were conjoined.

The Sheriff-Substitute (Lees) thereafter allowed a proof of the averments of parties other than those of French's trustees relating to custom, which he held to be irrelevant. Thereafter he pronounced this interlocutor—"Finds that the defenders, the trustees of the late Robert French, are proprietors of the shop No. 72 Argyle Street, with the parts and pertinents thereof, and that the pursuer David M'Arly is proprietor of the flat over said shop: Finds that for forty years there has been on the front wall of the tenement facing Argyle Street a wooden cornice covered with lead, between the windows of the shop and the flat above, and that the defenders and their authors, by themselves and their tenants, have been in use to place on the wall, between the said cornice and the window of their shop, the name and occupation of the tenant of the shop: Finds in these circumstances as matter of law—1. That the pursuer and defenders have a common interest in the cornice, and that neither party is entitled to remove it without the other's consent; and 2. That the pursuer is not entitled to interfere with the defenders or their tenants in the use to which they are putting the wall-space below the cornice as a sign for the shop: Therefore declares in terms of the above findings; interdicts the pursuer from interfering with the said cornice, or with the use to which the defenders are putting the wall-space below the cornice as a sign for their shop, and decerns.

"*Note.*— Roughly speaking, the cornice in question divides the wall-space between the windows of the pursuer's flat and the defenders' shop in such a way that two parts are above it and three below it. In this way the lion's share of the space falls to the defenders, if they can use the portion of the wall below the cornice as a sign-board. And I do not now understand them to claim any more than this amount in terms of what they have hitherto enjoyed. The pursuer relies on the case of *Alexander* v. *Butchart*, November 24, 1875, 3 R. 156, as justifying the contention that he may vindicate the possession of the wall up to the line of the medial section of the joists. But in that case no prescriptive use beyond that section was proved, and this case presents different features. In the erection of large tenements,

and especially if there are shops on the ground flat, it is a matter of common occurrence now-a-days to have one or more stone cornices between the various lines of windows, and these are not put opposite the joists, but somewhat above the level, so as to present a more tasteful appearance. In such of the older tenements as have not these cornices, but have room for them, it has for long been common to put on wooden ones in imitation of stone for embellishment sake. These are facts of every-day knowledge. But if the pursuers' contention were sound, and were given effect to commonly, there would I fear be a good deal of change in the familiar aspect of many streets in Glasgow. If these added cornices could be removed at pleasure, no matter how long they had been on, it would be unfortunate I think almost even in the public interest. But though the public could not intervene, it appears to me that the proprietors of the flats separated by a cornice have both an interest and a title to object to the removal of a structure which is there in their common interest. Such being my opinion, I have put the judgment on that footing, and not on the basis of unilateral right or of servitude asserted by the defenders.

"If I am right in thinking that the length of time during which the cornice has been on the wall precludes either party from removing it on his own option alone, the remaining question is not difficult to determine. If the cornice is to remain, and to be visible, the pursuer could not well put his portion of the wall below the cornice to any use for advertising purposes; and probably enough the defenders would be entitled to take such use of the whole of the space below the cornice. But it is unnecessary to offer a decisive opinion on the matter, for it is proved with tolerable distinctness, I think, that they have enjoyed this use during the prescriptive period. And while I attach all the weight it well deserves to the doubt expressed by Lord Gifford in *Butchart's* case, as to the possibility of constituting such a right, I cannot but think that to declare such a use a matter of mere sufferance would be found to be attended in every burgh in Scotland with serious inconvenience."

On appeal the Sheriff (CLARK) adhered.

The pursuers appealed to the Court of Session, and argued—He had a common interest with the defenders in the wall of the tenement which they both occupied, and he had (*vide* Bell's Prin. 3 1086) a right to prevent injury, and to insist on the removal of the sign-board and cornice here. These were encroachments on his right of property, which extended to the centre of the joists. The defenders could produce no express grant, and in the absence of that their sole right to the encroachments must be held as founded on a right of servitude. It was settled by the authorities (cited, *infra*), that unless a servitude was one of the known servitudes of the law of Scotland (which this certainly was not), it was incapable of being acquired by prescription.

Authorities—Bell's Prin. sec. 979; *Alexander* v. *Butchart*, November 24, 1875, 3 R. 156; *M'Taggart* v. *M'Donall*, March 6, 1867, 5 Macph. 535; *Patrick* v. *Napier*, March 28, 1867, 5 Macph. 683; *Leck* v. *Chalmers*, February 3, 1859, 21 D. 408; *Harvey* v. *Lindsay*, June 23, 1853, 15 D. 768; *Dyce* v. *Hay*, July 10, 1849, 11 D. 1266.

The defenders replied—The alleged encroachments complained of had been used and enjoyed by the proprietors and occupants of the said shop as part and pertinent thereof from the time when the tenement was completed in 1863 till the present time. This use and enjoyment had been acquiesced in by the pursuer and he could not dispute it now.

Authorities—*Moody* v. *Steggles*, June 24, 1879, L.R., 12 Ch. Div. 261; *Walker's Trustees* v. *Learmonth & Co.*, November 17, 1824, 3 S. 202.

At advising—

LORD YOUNG—The appellant here complains of two judgments—of the Sheriff-Substitute, and Sheriff-Principal affirming the Sheriff-Substitute. He is proprietor of the first flat, *i.e.*, the flat above the shops, in the corner tenement at the corner of Argyle Street and Queen Street, and his purpose is to have a cornice and sign-board over the shop below removed, in order that he may have a larger part of the front wall of the tenement on which to erect a sign-board for himself. It appears that the tenement was built in 1803 in flats, and the pursuer is, as I have said, the proprietor of the first flat, his title to it being, "All and Whole the first flat or storey immediately above the shop of the new tenement of land, and fronting partly Argyle Street and partly Queen Street of Glasgow." The defenders are proprietors of "All and Whole the shop, high and laigh, situated at No. 72 and fronting Argyle Street of Glasgow, lying immediately to the east of the common close of the tenement built on the east side of Queen Street and the north side of Argyle Street, which shop then consisted of two apartments on the ground flat, and one apartment or cellar in the sunk flat."

The tenement was built in 1803, and the ground floor has been used as shops ever since. There has always been a shop front from 1803 to the present time, but the existing shop front, on the top of which is the cornice in question, was erected in 1831 or 1832, and has stood unaltered ever since. Now, the prayer of the pursuer's application is to "find and declare that the centre of the joists is the boundary line dividing the shop No. 72 Argyle Street, Glasgow, belonging to the defenders, from the flat above said shop belonging to the pursuer, situated at the north-east corner of Argyle Street and Queen Street, Glasgow; and that the defenders are not entitled to place their sign-board and cornice or other erections above the window, door, and panels of said shop upon any part of the wall which is above the said boundary line; and also to decern and ordain the defenders forthwith to remove the said sign-board and cornice or other erections upon any part of the wall above said boundary-line; and to interdict, prohibit, and discharge them from placing any sign-board, or cornice, or other erections therein in time to come."

The question between the parties was well raised by the first action, and the second action is superfluous. That question is, whether, treating the matter as the Sheriffs have done, the proprietor of the first flat, complaining of the condition of the shop front, is entitled to have that which has existed for fifty years altered? I am of opinion with the Sheriffs that he is not.

We know there are peculiar rules of law applicable to such tenements as this, fitting to the exigencies of those cases in which tenements are built in flats. The general rule of law is that there is a proprietorship in and title on land only, and whether it is covered by water or a building or is in its natural state, the property is in land, and includes everything upon it. But in the case of tenements built and occupied in flats, the law accommodates itself to the convenience of the proprietor. In general the title is so framed that the property of the ground on which the tenement stands is vested in the owner of the ground part of the tenement, but it must remain to support the tenement, of which he has the property only of the ground floor, and he must maintain the ground floor to support the tenement above, and so on to the top, and the owners must each and all in their order maintain the tenements above to the owner of the ground tenement. There is no difficulty found in accommodating the rules of law to that state of facts. Now, nothing is more common —and the Sheriff tells us so in his note—than that first floors of such tenements in large and small towns are occupied by shops, and when they are so, they have, according to the taste of the proprietor, more or less ornamented fronts, and we are told that the shop here (and it is the fact) had such an ornamented front, and the cornice it is said has existed for more than fifty years. Now it would require a strong case to entitle the Court to interfere with operations done with the assent of the proprietors of the upper tenements. Usually we do not interfere with any usage of this sort which has subsisted so long. I do not mean to put it on the law of prescription. There has been a use of the things complained of for a period longer than the years of prescription. Now that is evidence of the agreement on which this cornice was built. It was to occupy the space of the front wall, and that being so, and there being no objection, it was part of the shop-front and part and pertinent of the shop. I say nothing of the wall behind, for it is not necessary, and we are not dealing here with it.

Now, I am of opinion that the proprietor above is not entitled to have the cornice removed, and I think we should only pronounce such judgment as looking to the long continued state of possession will continue that possession in the future as it was enjoyed in the past. Therefore I am prepared to find that this erection complained of is part and pertinent of the shop-front, and having subsisted for fifty years the proprietor of the floor above is not entitled to have it removed. On the general doctrine, and in absence of anything in the titles or to be inferred from usage, the centre is the division line between the first and ground flat, but nevertheless the wall in front is the subject in which there is a right of common use, and the state which has so long existed is to be maintained. My opinion is with the Sheriffs, and there is no need to pronounce a declarator of property.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Young. Doubtless in tenements like these questions may arise as to how various parts of one tenement are exclusive or common property. But it is unnecessary to determine any such question here where the case is clear. As undoubtedly there are certain rights of common interest and use in such tenements, these rights are capable of being defined by prescriptive use. I therefore think that since the erections here complained of have been publicly used for a specific period, the law of prescription must be applied.

LORD CRAIGHILL was absent.

This interlocutor was pronounced:—

"Recal the interlocutor of the Sheriff-Substitute of 10th June last, and the interlocutor of the Sheriff of 19th July last in the conjoined actions: Find in fact that the cornice referred to in the prayer and in the record of the action at the instance of the appellants David M'Arly against the respondents Mrs Jean Sellers or French and others is part of the front of the shop belonging to the defenders in said action, and that the said front has existed in its present form and condition, and been possessed peaceably and uninterruptedly as part and pertinent of the said shop for forty years and upwards, and that the sign-board referred to in said record is placed on and within the said shop-front: Find in law that the said sign-board and cornice are not encroachments on the property of the pursuer in said action, and that the said pursuer is not entitled to have the same removed: Find the said David M'Arly liable to the respondents in the expenses incurred by them in the Inferior Court and in this Court in both actions," &c.

Counsel for Appellant — Mackintosh — Ure. Agent—James F. Mackay, W.S.

Counsel for Respondents — Solicitor-General (Asher, Q.C.)—Pearson. Agent—J. C. Guthrie, S.S.C.

Thursday, February 8.

SECOND DIVISION.

[Sheriff of the Lothians.

EASTBURNE *v.* COWAN & COMPANY.

Process — Multiplepoinding — Arrestment — Competency of Arrestment in hands of Procurator-Fiscal.

Two persons having used arrestments on the dependence of actions which they had raised against a person alleged to be their debtor, one of them subsequently raised a multiplepoinding in the Sheriff Court to determine which of them was entitled to a preference in respect of his arrestment. The other lodged a claim, and took a judgment on the merits of the question without objection to the competency of the process. *Held* that he was barred from maintaining on appeal that the fund in question could not competently be arrested, and that the multiplepoinding should therefore be dismissed.

Question — Whether it is competent to arrest in the hands of a procurator-fiscal