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

money coming into his hands for the purpose of being used as a production in a criminal trial?

A person named Hale was robbed in Edinburgh of a sum of about £60 on 28th January 1882. The thief was apprehended, and a sum of £40 was recovered by the criminal authorities. On 22d February 1882 an arrestment was used in the hands of the Procurator-Fiscal of Midlothian by Abraham Eastburne, who alleged that he was a creditor of Hale, the owner of the money, and who on 20th March thereafter, in an action then depending between him and Hale, obtained a decree finding Hale bound to count and reckon with him for the profits of a joint adventure in which they were engaged. On 24th February he used a similar arrestment in the hands of the Sheriff-Clerk of Midlothian, into whose hands the money would in due course come that it might be produced at the trial, the diet in which was fixed for 9th March. At the date of these arrestments the money had not come into the hands of either of the arrestees, being still in the possession of the Procurator-Fiscal of the City.

On 28th February the money came into the hands of the Sheriff-Clerk of Midlothian for the purpose of the trial. On 9th March the thief was tried before the Sheriff with a jury at the instance of the Procurator-Fiscal of Midlothian and convicted.

On 29th March Samuel Cowan & Co., printers in Perth, who had raised an action against Hale for an account, used an arrestment in the hands of the Procurator-Fiscal of Midlothian on the dependence of the action. On 31st March they used an arrestment in the hands of the Sheriff-Clerk. On 21st April, having obtained decree in the action, they used arrestments in execution thereof in the hands of both the Procurator-Fiscal of Midlothian and the Sheriff-Clerk. In point of fact, the money, which had been between the 28th February and the 9th March in the hands of the Sheriff-Clerk, remained after the trial on the latter date in the hands of the Procurator-Fiscal.

Cowan & Co. raised this multiplepoinding in name of the Procurator-Fiscal and Sheriff Clerk to determine the question between them and Eastburne, the other arresting creditor of Hale, as to which of them was entitled to obtain the money from the nominal raisers.

Both Cowan & Co. and Eastburne claimed the whole fund, each claiming a preference in respect of their arrestments. After a proof the Sheriff-Substitute (Rutherfurd), on the ground that Eastburne's arrestment was premature and attached nothing, sustained the claim for Cowan & Co.

On appeal the Sheriff (Davidson) adhered.

"*Note*—The facts as to the times the fund *in medio* came into the hands of Mr Stuart and Mr Whitten, and the dates of the respective arrestments, are now beyond controversy. The objection taken at the debate under this appeal, that the fund was not arrestable in the hands of the Procurator-Fiscal or the Sheriff-Clerk, was not stated before; and it is thought besides that it is not well founded."

Eastburne appealed to the Court of Session, and argued that his arrestment, which was admittedly prior in date, had validly attached the fund, since though the money might not be actually in the hands of the Procurator-Fiscal of the County at the date of his arrestment, it was within his control for the purpose of the trial, and was thus constructively in his possession. (2) Alternatively, the respondent could not prevail, for an arrestment in the hands of a public functionary such as a procurator-fiscal was bad. He had nothing to do with a race of diligences, and only held the fund for a temporary and limited purpose connected with his public duty, and, that purpose accomplished, was bound to hand over the money to the person from whom it had been stolen.

Argued for respondents—If the multiplepoinding was competent, there was no question that the judgment was right, for appellant's arrestment was premature and attached nothing. In any view, the appellant was barred by his own pleading from assailing the competency of a process to which he had not taken his opportunity of objecting, but in which he had stated his own claim. (2) The arrestments used were competent. The test of the competency of an arrestment was the liability of the arrestee to account to the common debtor, and not a precise relation of debtor and creditor. There was clearly such liability to account here. Assuming the question to be, whether it is competent in the hands of a procurator-fiscal to arrest funds coming into his hands in the course of his public duty, the analogous cases in which arrestment of money consigned with a Clerk of Court had been held competent were in point. The only limitation was that the arrestment must not interfere with the consignation or other purpose for which the official holds the funds in accordance with the orders of Court or his public duty—*Pollock* v. *Scott*, 6 D. 1297; *Lockwood*, July 4, 1738, Elch. Notes 37; *Cross*, Feb. 21, 1775, Hailes 615. It was matter of practice for such officials to raise multiplepoindings to determine such questions as the present. A Clerk of Court did so in the case of *Campbell* v. *Lothians & Finlay*, 21 D. 63. A procurator-fiscal did so in *Brown* v. *Marr and Others*, July 8, 1880, 7 R. 427; See Bell's Comm., ii. 71 (7th ed).

At advising—

Lord Justice-Clerk—The question which has been mainly argued before us in this case is one of very considerable difficulty—that is to say, if a person obtains casual possession of a thing in such an unexpected emergency as this here, where there is no other title to possession, Whether that admits of an arrestment being used in his hands against the true owner? I see great difficulty in it; it is clear that it has never been settled by authority. As to the person in whose custody the thing is for the ends of justice I am inclined to think that no arrestment in his hands could bar him from returning it to its true owner, for he holds it under the primary obligation to return it to him. I am not prepared, however, to give an opinion on the general question. But here we have to judge simply between two persons alleging themselves to be creditors of the true owner—one of them Cowan & Co., holding a debt constituted by decree, while the other (whose claim is simply as a partner in a joint adventure) claims on a debt which has not taken the form of decree. There is, therefore, a competition of arrestments. The question is, are we in the

circumstances of this case to enter into the question of the competency of such arrestments as those on which the claims of both parties were founded. I am of opinion that we should not do so, but that we should look at the question merely as it is raised on record, and that the judgment of the Sheriff (who has looked only to what is found on record) in favour of Cowan & Co. should be affirmed.

Lord Young—That is also my opinion. I should like to avoid giving any opinion, assuming it as not yet settled whether a competition of arrestments may arise on an arrestment in the hands of a criminal officer, even with the consent of the debtor, or with the consent of the criminal officer having the thing or sum in his hands for the ends of justice. I want to avoid considering that question, even assuming the consent of both these parties. For I think it would be a matter attended with some inconvenience that a preference of creditors should arise on a race of diligence depending on arrestments in the hands of police constables, prison searchers, procurators-fiscal, sheriff-clerks, and others who are not in the position of debtors, but into whose hands the thing has come in the course of the administration of justice. I want to avoid that question altogether, and I agree with your Lordship that it is not necessary for us to decide it. We are sitting here as a Court of Appeal, and there is a judgment of the Sheriff under appeal by the claimant Abraham Eastburne, and he undertakes to show that that judgment is erroneous, and his position is that he is the creditor, as partner of the man Hale, from whom the money of the firm was stolen as narrated on record. Now, he has not in these circumstances shown that he is a creditor in any way. He says he used arrestments in the hands of the sheriff-clerk. In every view this arrestment is bad, whether it was used with or without the consent of either or both the owner and the arrestee. The arrestment is incompetent entirely, for it is not valid on another ground, namely, that it is not competent to arrest anything which is not at the time in the hands of the arrestee. Therefore the party who here undertakes to show that this judgment is wrong has no *locus standi* at all. The party whom the Sheriff has preferred arrested when the money was in the hands of the arrestee. So I will not address myself to the question whether the arrestment was good on the part of Eastburne apart from this last ground, and will give no decision on the question of competency in general. I think the appeal should be refused on the grounds adopted by the Sheriff.

Lord Craighill—I am also of the same opinion that this appeal should be refused. The owner of the sum arrested does not appear to object to the competency of the arrestment, nor does any creditor either. By general consent the competency is accepted. But there are two creditors in competition, each founding on an arrestment of the fund, and the only question for the Sheriff to decide was which arrestment was prior in date, and was to be preferred. Nothing else was before him, and nothing else could be made the subject of decision, and he having given his decision, I am of opinion that in the circumstances his judgment ought to be sustained. The ground on which I have come to that conclusion is that no cause in the least degree satisfactory to impugn his judgment has been presented to us. As to the general question, I agree with your Lordships that its determination is unnecessary. Nay, more, I think that nothing incidental should be done in the way of doing so—that it would be in the highest degree inexpedient for us even to indicate an opinion on that general question.

Lord Rutherfurd Clark—I am also for affirming the Sheriff's judgment. But in doing so, I, like your Lordships, do not desire to give any opinion on the general question, whether, where the thing has gone into the hands of the procurator-fiscal or the sheriff-clerk in the course of the administration of justice, it may be arrested in his hands? But if the arrestment in their hands is not competent, the objection to it is competent only to the true owner, because the objection is that the custody of the thing is merely for public purposes, and that when the public purposes are served it is not in their hands, so as to deprive the man of his right of recovering it. But here no such question is raised. The question here is only as to the competency of the multiplepoinding and the claims in it. Each claimant claims the fund in respect of an arrestment in the hands of the sheriff-clerk. Neither party could therefore maintain that it was incompetent so to arrest. Both must maintain that it is competent to arrest them, and in respect of such an arrestment each party claimed to be preferred. So the only question which remains, assuming the competency, is which was the prior arrestment? The objection to one of the arrestments is that it was laid on before the money came into the custody of the arrestee. I think that objection is fatal, and I cannot listen to the plea now stated for that party that in such circumstances no arrestment was competent.

The Court dismissed the appeal.

Counsel for Appellant (Eastburne)— Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondents (Cowan & Co.)— Campbell Smith—Sym. Agent—Thomas M'Naught, S.S.C.

Thursday, February 8.

SECOND DIVISION.

[Sheriff of the Lothians.

PEARCEY *v.* PLAYER.

Negligence—Contract of Carriage—Loss of Article while in course of Removal from One House to Another.

A person employed a coach-hirer to send a van with two men to remove some heavy luggage from one house to another in Edinburgh. The removal of the luggage, which he himself superintended, required that both men should leave the van together for the purpose of carrying the heavy articles. He had no list of the articles, and on their arrival at the house to which he had them con-