These limitations being considered, there is quite satisfactory evidence that Law Lane was used for all purposes for which access was needed. It was used for riding horses, for cows, for carts drawn by horses and loaded with coals, peats, and manure, for hand carts, for wheelbarrows, for carrying ladders, and for rolling casks. The fact that the lane was paved is nothing against the fact that these uses are proved, and is quite natural considering the comparatively few occasions of using the lane with wheeled vehicles. The uses which I have spoken of were open and were never challenged until the other day, when the present theory of the Police Commissioners required such interference. That theory would also compel the Commissioners to put in force the various penal enactments which are intended to secure the comfort of foot-passengers generally by relegating from the footway to the carriageway those foot-passengers who are the bearers of burdens. As in the case of the Law Lane proprietors there is no carriageway, this would be to deprive them of access for all commodities, whereas heretofore they have enjoyed it.

These being the facts, it seems to me that in no sense of the term is Law Lane a footway, and in particular that it is not a footway in the sense of section 142. There is no difficulty in finding its proper place in the economy of the statute. Law Lane is, as its name indicates, a lane, and it is therefore a street under the comprehensive definition given in sub-sec. 31 of sec. 4; but whether it is also a "private street" under sub-sec. 28 is not a question *hujus loci*. It may be right to add by way of further reservation that I have considered the case of Law Lane alone, and I have had no occasion to consider or form any opinion about any of the other streets which are mentioned in the evidence.

I am for sustaining the appeal and quashing the requisition appealed against.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court sustained the appeal and quashed the requisition appealed against.

Counsel for the Appellant—Balfour, Q.C.—Galloway. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—W. Campbell, Q.C. Agents—Irons, Roberts, & Co., W.S.

Thursday, July 14.

SECOND DIVISION.

(With Three Judges of the First Division).

[Sheriff-Substitute of Lanarkshire.

COOPER'S TRUSTEES *v.* STARK'S TRUSTEES.

Property — Parts and Pertinents—Bounding Title — Flatted Tenement — Back Ground of Flatted Tenement — Prescriptive Possession.

A tenement of three storeys was divided into six separate houses, two on each flat, with corresponding sunk cellars. In the title of the purchaser, who had acquired the whole property, the subjects were described as follows: "All and whole that lodging, being the eastmost of the middle flat of that stone tenement of land covered with slates in Brownfield, lately built by David Reid, wright in Glasgow, consisting, the said tenement of cellars in the sunk storey, and three square storeys, which lodging consists of a kitchen and three rooms, together with two cellars in the sunk storey (the cellars being described, and their dimensions given), with free ish and entry to the said lodging and pertinents by the common staircase of the tenement, and from the street called Brown Street by a passage or entry leading into the said staircase, together with the whole parts, pertinents, and privileges of the said lodging, item All and whole" the five other lodgings into which the stone tenement was originally divided, "together with the whole parts, pendicles, privileges, and pertinents of the said several subjects."

Held (*diss.* Lord Trayner) that this was not a bounding title, and was sufficient to enable the holders of it, who had been in the sole and uninterrupted possession of certain enclosed back ground behind the tenement for longer than the prescriptive period, to acquire a good right to the back ground in question under the clause of "parts and pertinents" in their title.

This was an action brought in the Sheriff Court at Glasgow by the marriage-contract trustees of Mr and Mrs Joseph Jeremiah Cooper, against the testamentary trustees of the late James Stark, sometime residing at Barwood, Gourock. The pursuers prayed the Court to find and declare that the defenders had no right or title to any part of certain ground lying within the territory of the burgh of Glasgow, with the exception of a certain "stone tenement" at the corner of Argyle Street and Brown Street, to ordain the defenders to flit and remove from a portion of said piece of ground situated at the back of said "stone tenement" upon which they had erected a saloon, and to take down and remove said building, or

otherwise to grant warrant to the pursuers to take it down and remove it, and to interdict the defenders from erecting any buildings upon any part of said piece of ground.

The question in the case was, whether the defenders as proprietors of the "stone tenement" had a title in such terms as to enable them by prescriptive possession to acquire right to the back ground above mentioned.

The pursuers' property was described as follows in their title:—"All and whole these two lots or pieces of ground consisting of eight hundred and five and one-half square yards or thereby being lots numbers thirty-first and thirty-second laid off for building of that park or enclosure containing nine acres one rood and ten falls or thereby of ground known by the name of Brownfield acquired by John Brown junior and Robert Carrick merchants in Glasgow from the Principals and Professors of Glasgow College lying within the territory of the burgh of Glasgow in that part called the Broomielaw and immediately to the west of the lands now or lately belonging to the Delftfield Company in Glasgow which lots are bounded on the north by the road leading from Glasgow to Anderston along which they extend fifty-four feet and one-half foot by that street running through the said ground called Brown Street on the east along which they extend one hundred and nine feet and one-half foot by that lot number thirtieth on the south along which they extend eighty-one feet and by lots numbers thirty-third and thirty-fifth on the west along which they extend one hundred and fourteen feet with free ish and entry thereto by the foresaid road or street: Together with a brick tenement and offices next to the west boundary and a stone tenement and offices fronting Brown Street erected by David Reid wright in Glasgow on said two lots of ground and together also with the whole other houses and buildings erected on said subjects whole parts and pertinents thereof, But excepting from the subjects conveyed by said disposition that large stone tenement fronting the road leading from Glasgow to Anderston situated on said two lots and sold by the said David Reid to several purchasers."

The "road leading from Glasgow to Anderston" is now known at the place in question as Argyle Street.

In the "stone tenement" erected by David Reid there were six "lodgings," two on each flat, with corresponding sunk cellars, and these lodgings were disponed by him to various purchasers. The lodgings were distinguished as the eastmost of the first flat, the westmost of the first flat, the eastmost of the middle flat, the westmost of the middle flat, the eastmost of the third flat, and the westmost of the third flat.

The defenders' trustee became vested in all the "lodgings" and relative cellars, offices, and others in 1855 under an instrument of sasine in his favour recorded 27th November 1855. This deed was not printed, but it was admitted that the description of the property was identical with that contained in the defender's own title, which was a notarial instrument recorded 19th March 1890 following upon their trustee's sasine and deed of settlement.

In this deed the description was as follows:—"All and whole that lodging being the eastmost of the middle flat of that stone tenement of land covered with slate in Brownfield lately built by David Reid wright in Glasgow, consisting the said tenement of cellars in the sunk storey and three square storeys which lodging consists of a kitchen and three rooms together with two cellars in the sunk storey which cellars are situated on the south-east corner of that storey and which cellars are of the following dimensions namely eight feet long by seven and one-half feet wide with free ish and entry to the said lodging and pertinents by the common staircase of the tenement and from the street called Brown Street by a passage or entry leading into the said staircase, together with the whole parts pertinents and privileges of the said lodging." (Then followed a description of each of the other five "lodgings" in similar terms, *mutatis mutandis*)—"And also the whole dung and fulzie of the said tenement and of the tenement built on the formerly vacant steading of ground fronting Brown Street, which dung and fulzie shall be carried to the common middenstead of the said tenement and shall be the exclusive property of the successors of the deceased James Russell, sometime grain merchant in Glasgow thereafter portioner Brownfield Glasgow and residing at Hillside Partick near Glasgow, in all time coming, with free ish and entry to the said lodgings and pertinents by the common staircase of the tenement and from the street called Brown Street by a passage or entry leading into the said staircase, together with the whole parts pertinents and privileges of the said lodgings, which tenement containing the subjects above described fronts the public street from Glasgow to Anderston and is built upon a part of All and whole these lots or pieces of ground number thirty-one and number thirty-two laid off for building of that park or enclosure called Brownfield, acquired by John Brown and Robert Carrick, merchants in Glasgow, from the Principal and Professors of Glasgow College, lying within the burgh of Glasgow in that part called Broomielaw immediately to the west of the lands belonging to the Delftfield Company, together with the whole parts pendicles privileges and pertinents of the said several subjects."

A plan was prepared, upon which the whole subjects described in the pursuers' title, including the "stone tenement," were shown as existing in 1897 before the present action was raised. This plan showed a building which was in shape a rectangular parallelogram, with one of its longer sides facing Argyle Street on the north, and one of its shorter sides facing Brown Street on the east. Its longer sides were about 56 feet, and its shorter sides about 30 feet in length. This building was admitted to be the property of the defenders. The

remainder of the ground shown on the plan was occupied as follows:—(1) By two blocks of buildings and a court which were situated upon the southern part of the ground, and extended over nearly two-thirds of the whole area, and which were admittedly the property of the pursuers; and (2) by the piece of back ground now in question. This piece of back ground was occupied, as shown on the plan by (1) a close, (2) an area, (3) a round building containing a stair projecting from the back or south side of the rectangular building first above mentioned, (4) a wash-house, and (5) a back saloon. The close was about 6 feet wide, and about 17 feet in length, and ran from Brown Street between the wall of the rectangular building belonging to the defenders and the north wall of the most easterly of the two blocks of buildings belonging to the pursuers. Beginning from the west end of the close, the back ground in question was bounded as follows:—(First) by the wall of the last-mentioned block of buildings, which then ran southwards for a distance of about 11 feet; (2nd) by the wall of the same block of buildings which then ran westwards for a distance of about 12 feet; (3rd), by the wall of the same block of buildings which then ran southwards again for a distance of about 9 feet; (4th) by a "division wall" running westwards for a distance of about 15 feet, and separating the back ground in question from the court above mentioned belonging to the pursuers; and (5th) by the north wall of the westmost block of buildings belonging to the pursuers.

The "back saloon" was erected about the year 1864 on the back ground behind a shop occupying the westmost part of the ground floor of the rectangular building belonging to the defenders, and was used by the tenant of that shop as a workshop.

It was ultimately conceded that for more than the prescriptive period the defenders and their predecessors had by their tenants in the property at the corner of Argyle Street and Brown Street occupied the ground at the back of that property (being the ground now in question) and the erections thereon, and that all the back ground and the erections thereon had been occupied and used by the defenders' tenants without interruption on the part of the pursuers or any other person.

There were no windows in the blocks of buildings belong to the pursuers above mentioned which looked on to the back ground now in dispute, and there was no access from it to them or to the court belonging to the pursuers.

The instrument of sasine recorded 15th October 1798 in favour of Thomas Stenhouse, who was the original disponee of two of the "lodgings" in the "stone tenement," and consequently one of the defenders' authors, contained the following clauses:—(After the description of two of the "lodgings")—"as Also the whole dung and fulzie of the said tenement to be built on the vacant steading of ground fronting Brown Street so soon as the same is built, which dung and fulzie shall be carried to the common middenstead of the said tenement and shall be the exclusive property of the said Thomas Stenhouse or his foresaids in all time coming. But the dung of the back brick tenement lately erected by the granter at the back of the said steading is by the said disposition wholly reserved to himself and the said dung is thereby conveyed to his said disponee upon condition that he shall keep the common close and area behind the said tenement clean and shall take out and remove the dunghill at proper times at his own expence. So that the same shall be always fit for the reception of the dung and ashes of the other subjects attached thereto, together with free ish and entry to the said lodgings and pertinents by the common staircase of the tenement, and from the street called Brown Street by a passage or entry leading into the said staircase, together with the whole parts pertinents and privileges of the said lodgings which are so disponed with and under the following burdens and reservations which are appointed to be engrossed in the Instrument of Seisine to follow on the said disposition and in all the subsequent conveyances and infeftments, viz. first the said Thomas Stenhouse and his aforesaid shall be subjected to one-third of the expence in keeping in repair and upholding the common staircase of the said tenement, and in case that the granter or his aforesaid or that the major number of the said proprietors of the said tenement and of the granter's other adjoining property should judge it necessary to sink a well with a common pump and covering in the area behind the staircase aftermentioned, the said Thomas Stenhouse and his aforesaid shall have a proportionable part of the expence of forming erecting and keeping in repair the said well with the other proprietors corresponding to the rental of his and their several properties, the water of which well shall be common to him and to the other proprietors for domestic uses only. Secondly the said lodgings are disponed with and under the burden and reservation of full power liberty and privilege to the granter or his aforesaid to build at any time a tenement fronting Brown Street leaving an entry or passage from Brown Street of four feet and one-half foot wide and from ten to twelve feet high by the back or south side wall of the said tenement already built and to use the vents already inserted in the north wall of the tenement already built for the use of the said intended tenement and to join these two tenements from the front of Brown Street backwards 17 feet wide, being the width of the intended tenement without the side walls where these tenements are intended to join each other, and the said north wall in which the said vents are inserted so far as the said two tenements will join each other shall be be a mean and common wall to both tenements."

The instrument of sasine recorded 2nd September 1796 in favour of William Hunter, the original disponee of one of the "lodgings," and consequently one of the defender's authors, among other "burdens and reservations" contained the following

clause—"(First) The said William Hunter and his aforesaid shall be bound and obliged to carry the whole dung and ashes of the said lodging to the common dunghill to be erected by the said David Reid, with brick walls behind the said tenement, and which is thereby subjected with the servitude of receiving the same, and the said dung and ashes shall be the property of the said David Reid and his aforesaid."

The pursuers averred—"About 25 years ago the defenders or their authors surreptitiously covered over a portion of the back ground behind said corner tenement, and have since been in occupation thereof, but they have no title to the same."

The nature of the other averments and contentions of the parties sufficiently appears from the notes of the Sheriff and the Sheriff-Substitute.

The pursuers pleaded—"The ground in question being the property of the pursuers, and the defenders having taken possession thereof and erected buildings thereon, the pursuers are entitled to decree of declarator and interdict as craved."

The defenders pleaded—"(3) The ground in question being the property of the defenders, held under a valid and sufficient title, the defenders are entitled to absolvitor, with expenses. (4) The defenders' right and title to the ground in question has been established by prescriptive possession."

By interlocutor dated 12th May 1897 the Sheriff-Substitute (BALFOUR) before answer allowed the defenders a proof of their averments and to the pursuers a conjunct probation.

Note.—[*After stating the facts as above set forth*]—"The pursuers maintain that they are vested in the whole property except the tenement fronting Argyle Street, which they say does not include back ground; and the defenders, on the other hand, maintain that since the year 1789 the defenders' buildings have occupied the whole ground to the north of the division wall shown on the plan, with the exception of a strip of ground used as an access to certain portions of the tenement, and that all the ground within the boundaries coloured red belongs to them.

"It is maintained for the pursuers that the defenders have no title to anything but the flats in the front tenement, and that that is equivalent to a bounding title, and beyond the boundaries of the flats they cannot acquire any ground whatever under the clause of 'parts and pertinents' in their titles. It will be observed that the description of the flats is quite general and contains no boundaries or measurements, although the dimensions of the cellars are given; and this is not the usual kind of title known as a bounding title. In an ordinary bounding title the lands are described by their boundaries or limits or the lands are defined on a plan, and it is quite clear that where lands are so described or defined the effect is to confine the disposition to what is within the boundaries. But in this instance we have no description of boundaries, and we have no plan. The contention of the pursuers is that the description in the title is so well defined that it is equivalent to a bounding title. In other words, the lodgings are small houses in a front tenement bounded by walls, floors, and roofs, which are distinct holdings, and which exclude all outside of them. But the defenders aver that from 1789 to 1840 their buildings covered all the ground lying to the north of the division wall already referred to, with the exception of the foresaid strip of ground, that in 1840 the property was reconstructed, and does not now correspond with the description in the titles, and, in particular, that portions of the tenement, used as dwelling-houses and appurtenances since 1789 on the ground now occupied by the saloon were demolished, and that between 25 and 30 years ago the defenders' author again covered the ground with the saloon in question, and they allege that they and their authors have been in possession of the whole tenement of ground and buildings for more than a century.

"In dealing with these averments the difficulty which presents itself is that, even supposing that it could be held (and at present I cannot go the length of holding it) that the defenders' title is a bounding title, the question remains to be determined, what did the flats conveyed to the defenders consist of? Did they consist solely of six houses in the front tenement, or did they or any of them physically include the ground occupied by the back saloon? And under the circumstances I am not prepared to hold, in the face of the defenders' averments, that, having regard to the general description of six lodgings occupied as flats, the defenders have only right to the building presently fronting Argyle Street, without any right to the back ground. The onus is on the defenders to establish that the flats or some of them as a matter of fact included the back ground, and also to prove their possession for the prescriptive period of the back ground, so as to give them right to it as part and pertinent of the front tenement if it be ultimately found that the title is not a bounding one, and I have accordingly allowed a proof to the defenders of their averments as to the character and extent of the buildings in 1796, and as to the various alterations made on the buildings between that year and the present date, and also as to the possession had by them since 1796."

The defenders appealed to the Sheriff, who on 10th July 1897 issued the following interlocutor:—"Having heard parties' procurators, and considered the case: Recals the interlocutor appealed against: Finds that the defenders' title is not a bounding title so far as regards the southern boundary, and that the title includes a conveyance of parts and pertinents: Finds, with reference to the averments on record, that it is necessary for the defenders to establish by proof prescriptive possession of the ground which they claim as falling under their title; Therefore allows a proof on that point, in which the defenders will lead, and remits to the Sheriff-Substitute to take the

same and for further procedure.

"*Note.*—It is a vital question in this case whether the title of the defenders is or is not a bounding title. In some respects it is no doubt a bounding title. Thus the property is described as bounded on the north to the extent of a specified number of feet by the road leading from Glasgow to Anderston. But the important question is whether it is a bounding title so far as the southern boundary is concerned, as it is on that side that the defenders desire to extend their new premises, and to which the conclusions of the action are directed. The Sheriff-Substitute gives in his note an excerpt from the title to one of the flats in the defenders' building, which is a fair specimen of the titles to the different flats of the property, of which the defenders are now the sole proprietors. An ingenious argument, with which I was at first impressed, was addressed to me on behalf of the pursuers, to the effect that the title is a bounding title, in respect mainly of the use of the expression 'that stone tenement of land' as denoting the subject of conveyance, and also of the conveyance imposing certain obligations on the disponees of the different flats with reference to a well and a dunghill on the ground or area to the south. I do not think that the use of the expression 'that stone tenement of land' is sufficient to define the boundary in the manner essential to a bounding title. As regards the obligations referred to, the argument put forward was to the effect that they operated to show an intention on the part of the disponer to reserve the property in the ground to himself, and that the intention was to limit the right of the disponees strictly to the 'stone tenement.' On consideration, I do not think that that argument should prevail. Apart from the absence of any definite specification of the places where the well and dunghill are to be placed, there is nothing in the title to prevent an extension by the disponees of their occupation southwards, or the effect of a prescription on a possession by them of the ground to the south of the stone tenement. Each of the different titles to the flats bears to be 'with the whole parts, pertinents, and privileges of the said lodging.'

"It appears from article 4 of the pursuers' condescendence that more than twenty years ago the defenders or their authors 'surreptitiously' (as it is put) covered over a portion of the back ground to the south, and have since been in the occupation thereof, although it is averred that the defenders have no title to the same. Whether the portion so occupied includes all the ground which the defenders claim, and whether the nature of the occupation has been such as would suffice for the purposes of a prescriptive title, may require proof. A proof, therefore, to clear up these points has been allowed, in which the defenders will lead."

A proof was accordingly led. The facts established, in so far as not narrated *supra*, sufficiently appear from the Sheriff-Substitute's note, *infra*.

On 27th November 1897 the Sheriff-Substitute issued the following interlocutor:—"The Sheriff-Substitute having considered the cause, Finds that since at least the year 1840 the defenders have, by their tenants in the property at the corner of Argyle Street and Brown Street, occupied the ground at the back of that property and the erections thereon: Finds that the ground and erections were all enclosed by a high wall, and the erections consisted of a row of cellars, afterwards occupied as a store, and of an ashpit and washing-house and privy used in common by the tenants of the property: Finds that the area within which these erections were situated was first enclosed by an iron gate and afterwards by a wooden paling and gate, and the keys of the gate were kept by John M'Simon, who had the grocer's shop at the corner, and by his successor in the shop: Finds that in or about the year 1864 a saloon was erected on the back ground behind the shop of John Ferguson, one of the defenders' tenants, who occupied the saloon as a workshop: Finds that all the back-ground and erections thereon have been occupied and used by the defenders' tenants without interruption on the part of the pursuers or any other person: Finds, therefore, that under the clause of 'parts and pertinents' in their title, the defenders having been in the sole and uninterrupted possession of the back ground and erections for longer than the prescriptive period, must be held to be the proprietors thereof, and the pursuers are not entitled to interfere with them in their use and occupation of the ground: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable to them in expenses," &c.

Note.—"The proof clearly establishes that the defenders, since 1840 at least, have been in the sole and uninterrupted possession of the back ground and erections thereon. A large number of witnesses have been examined on the subject, and they testify, without any substantial disagreement, to the description and character of the subjects, and to the possession enjoyed by the defenders' tenants. The subjects were a row of coal cellars, converted into a store, with a wash-house, ashpit, and privy, and a saloon behind Ferguson the tailor's shop. M'Simon occupied the store. The tenants used the wash-house, ashpit, and privy in common, and Ferguson used the saloon. The pursuers did not controvert this evidence, and their only witness on the subject of possession was John M'Lachlan, the butcher, who admits that the ground at the back was walled in on all sides, and in entering from the close in Brown Street there was a paling and gate on the left hand, and the gate was generally locked, and he climbed it when a boy to get into the back ground. He says that the back ground was exclusively possessed by the shopkeepers of the corner property, and he never knew of the tenants in that property being disturbed by outsiders. There can, therefore, be no doubt as to the possession of the subjects enjoyed by the defenders

and their tenants, and the pursuers have not attempted to set up any title of their own to the back ground by way at least of possession, and the alleged 'surreptitious' covering over of the back ground by the defenders has certainly not been proved.

"The pursuers, however, at the last debate, maintained their position on grounds which were different from those previously submitted to me. In place of contending that the description of the subjects in the title as small lodgings in a tenement bounded by walls, floors, and roof, were tantamount to a bounding title, they maintained that the southern boundary was now by the proof shown to be the back wall of the defenders' tenement, and that this constituted the defenders' title a bounding one. They referred to two cases —*Reid* v. *M'Coll*, 7 R. 84, and *Dalhousie's Tutors* v. *Locklee*, 17 R. 1060. The rubric of the first case is that where a property in a town is described in the titles as bounded by 'the lands of A,' and it is possible to identify by proof the ancient march, it was held that the title was a bounding title and that the proprietor could not prescribe a right to ground beyond the line known to have been the boundary, The circumstances of the case shortly were that the pursuer and defender were coterminous proprietors. The ground in dispute was immediately behind the pursuer's ground and yet the defender claimed it. The defender's ground was to the west of the pursuer's, and his boundary to the east was 'the lands belonging to the heirs of Daniel Drummond' represented by the pursuers. There was an old division-wall running from the western gable of the pursuers' tenement to the Roman Road, and there was a series of march stones in a line parallel to the wall in question which formed the pursuers' eastern boundary. That wall and the march stones enclosed the disputed ground, and it was held that the existence of the wall and the march stones identified the boundary between the parties and constituted the defenders' title a bounding title. That seems to me to be a different case from the present, because the subjects conveyed in the present case are six lodgings and relative cellars and offices with parts and pertinents. The southern boundary is said to be lot No. 30th, and there is no evidence as to what that lot consists of, but neither is there anything to indicate that the back wall of the tenement is the boundary. It is competent in the case of a general description of a boundary, such as 'the lands of A,' to prove (as in *Reid's* case) that the actual boundaries are by way of a division-wall and march stones, because that explains the general description of the boundary of 'lands.' But if a man possesses a tenement or lodging with parts and pertinents, the back wall of the tenement cannot be held to be the boundary so as to prevent him acquiring as parts and pertinents an area of ground behind the tenement which is separated by walls from the next tenement. In other words, the back wall of a tenement does not bound the subjects in the sense that a division wall and march stones constitute a boundary of 'lands.' The owner of a lodging or tenement with parts and pertinents without any more limited definition or description, is obviously entitled to acquire right to an adjoining area detached and enclosed from the next property, he having occupied the area for the prescriptive period, and the fact of his lodging having a back wall does not prevent him from acquiring the area. But the owner of subjects bounded by 'the lands of A' is not entitled to extend his proprietorship beyond the ascertained line of the adjoining lands. The two cases appear to me to be entirely different.

"The other case of *Dalhousie's Tutors* does not apply to the present case, as it has no connection with a bounding title but with the evidence competent to explain the meaning of a presbytery's decree *quoad* the excambion of a glebe."

The pursuers appealed to the Court of Session.

After having heard counsel for the parties and made avizandum, their Lordships of the Second Division, by interlocutor dated 11th March 1898, appointed the cause to be argued before the Judges of the Second Division, with the assistance of three Judges of the First Division, upon the plea-in-law for the pursuers, and the third and fourth pleas-in-law for the defenders.

Argued for the pursuers and appellants—The defenders had no title even to the whole of the 'stone tenement,' but only to specified portions of it. They had no title to the *solum* of the 'stone tenement.' This was a bounding title. Where from the deed itself, or from something referred to in the deed, or by proof other than proof of possession, it was possible to fix the boundaries of the grant without proof of possession, the title was a bounding title, although no particular boundaries were specified—*Stewart* v. *Greenock Harbour Trustees*, January 12, 1866, 4 Macph. 283, *per* Lord Ardmillan at p. 284; *Darroch* v. *Ranken*, December 9, 1841, 4 D. 219; *North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200, *per* L.P. M'Neill at p. 203; *North British Railway Company* v. *Hutton*, February 19, 1896, 23 R. 522; *Reid* v. *M'Coll*, October 25, 1879, 7 R. 84. Here what was conveyed was "lodgings" in a "stone tenement covered with slate," with cellars (the cellars being described by measurements). A stone tenement covered with slate was a thing which was bounded by four walls and a roof. The boundaries of the grant could be easily ascertained without proof of possession although no boundaries were given. Upon such a title it was not possible for the defenders to acquire anything which was outside the walls of the tenement or the cellars, and consequently they could have no right to the back ground in question. As to the law on this question in the case of flatted tenements, see *Watt* v. *Burgess' Trustee*, March 19, 1891, 18 R. 766, a case which showed that Lord President Inglis' dissent in *Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25, was well founded.

The clause of parts and pertinents would not enable the defenders to acquire anything beyond their boundary, and indeed even where the title was not a bounding one the clause of parts and pertinents did not add anything to the grant. A grant of the lands of A was just as extensive as a grant of the lands of A with parts and pertinents — *Gordon* v. *Grant*, November 12, 1850, 13 D. 1, *per* L.J.-C. Hope at p. 7. The servitudes given over the back ground were inconsistent with the idea of the defenders having any right of property in that ground. It was absurd that the defenders should have a right of ish and entry over ground which was their own property.

Argued for the defenders and respondents—A conveyance of a flat or part of a flat with parts and pertinents was not a bounding title. There was nothing to prevent the holder of such a title from acquiring right by prescriptive possession to ground used as a pertinent of the "lodging" conveyed. Moreover, here the title upon which the defenders founded embraced the whole tenement. Although *de facto* a house was bounded by walls, there was nothing to prevent the holder of a title to a house with parts and pertinents, where the title said nothing about boundaries or measurements, from acquiring garden or back ground used in connection with the houses by prescriptive possession. See *Magistrates of Perth* v. *Earl of Wemyss*, November 19, 1829, 3 Ross's Leading Cases (Land Rights), 442. Here there were no boundaries or measurements or plan, and there were no materials for ascertaining the boundaries exactly. Prescriptive possession of the back ground as a pertinent of the tenement had been proved. The back ground had never been used as anything else since the stone tenement had been built, and never could have been. The pursuers had no access to it, and no windows even looking on to it. In the title right was reserved to build 17 feet back from Brown Street, which showed that the ground behind that was meant to go with the tenement. The so-called servitudes were really restrictions imposed upon the disponees of the lodgings in the use of the back ground. The cases quoted by the pursuers were not in point. In *Stewart* v. *Greenock Harbour Trustees*, *cit.*, two boundaries and measurements and dimensions were given so that the boundaries could be exactly ascertained. In *Darroch* v. *Ranken*, *cit.*, two boundaries were given, and measurements from which the others could be fixed. In *North British Railway Company* v. *Magistrates of Hawick*, *cit.*, the dimensions were given, and a plan was referred to upon which the ground conveyed was coloured red. In *North British Railway Company* v. *Hutton*, *cit.*, measurements were given and a plan was referred to on which the ground conveyed was delineated and coloured red. In this case there was no such materials for ascertaining the boundaries as in the cases cited. The case of *Watt* v. *Burgess' Trustee*, *cit.*, was not to the point. It related to the rights of the several proprietors of flats in one tenement *inter se*.

At advising—

LORD JUSTICE-CLERK—The pursuers are proprietors of a subject abutting on Argyle Street of Glasgow, which forms part of an area of 805½ yards as described in the titles. From their title there are excluded certain subjects forming part of this area, and of which the defenders are proprietors. That subject consisted at first of a tenement building divided into several flats, as is common in our Scottish towns. In course of time all these different flats came to be united in one proprietor, and they were so, so far back as the year 1855—This occurred at a time which makes the holding under one proprietor last for a period longer than the prescriptive period, and it is still the same.

The main cause of dispute between the parties relates to a back saloon of a shop and the ground on which it stands, this area being admittedly by the pursuer immediately at the back of the building containing the houses in flats of which the defenders became proprietors. The pursuers maintain that the defenders have no right to this part of the area of 805½ yards, that it belongs to them, and that they are entitled to have the defenders ordained to remove from it, and that they have right to have the defenders ordained to take the saloon down, or to take it down themselves, and have interdict against the defenders placing any building upon the ground.

The defenders found on a clause which occurs in all the titles to the different parts of the flatted houses by which the subject is conveyed, together with the whole parts, pertinents, and privileges, thereto belonging, and they maintain that by themselves and their authors they have possessed the disputed part of the area for the prescriptive period under the clause of parts and pertinents.

The facts appear to be that before the erection of the back saloon, the ground on part of which it was built was enclosed, and those who were the occupants of the flats in the defenders' building used it as a yard, and that they left the fence surrounding it locked, and that both before and after the time when the saloon was erected this space was used by them peaceably and without interruption or challenge. Thus if the defenders' title is such that the subject in dispute could be shown by prescriptive possession to be within it, the facts present no difficulty.

Have the defenders a title to which the possession may be ascribed in the case of this area of burgh property? It is certain that the defenders' grant is not described in the titles in any form such as is usual in a bounding title as regards that side of the subject which is in dispute. They do not describe the property on that side by a boundary, which is, to use Erskine's words, "obvious and undubitable.". He illustrates what is a boundary sufficient to make a title bounding by referring to certain fixed lines, either natural and paramount,

or artificial and specially laid off and marked for the purpose of fixing a boundary, such as a river in the one case, and march stones fixed in the land in the other. In this case there is no description of boundary on the south, unless it be in the words "that large stone tenement," or "that stone tenement of land." I am unable to hold that such a description excludes the proprietor of the stone tenement from maintaining that under a clause of parts and pertinents he has right to ground next to the tenement, he being able to prove that he and his authors have had possession for the prescriptive period. I think it may be quite possible so to describe a subject, although not by statements of boundaries, as to exclude the extension beyond the subjects so described. But such a description would require to be obviously and indubitably exclusive, to repeat the words of Erskine. But I do not think the description in this case is of that character. Still further, in this case there is the further point that undoubtedly the proprietors of the "stone tenement" did have rights extending beyond the south wall of the "stone tenement." There were cellars and outhouses outside the back wall of the stone tenement given by the titles directly to the proprietors of the "stone tenement," and which they occupied for more than the prescriptive period. But apart from that the conclusion to which I come is that the defenders having a title with parts and pertinents, and having had possession of the area in dispute for the prescriptive period, the result at which the Sheriffs have arrived is the right one, and that the judgment of the Sheriff should be affirmed.

LORD YOUNG concurred.

LORD ADAM—The pursuers seek to have it found and declared that the defenders have no right or title to any portion of a piece of ground described in the conclusions of the action, with the exception of the stone tenement built by David Reid, wright, in Glasgow, at the corner of Argyle Street, on a portion of said piece of ground, and to have them decerned and ordained to remove from a portion of said piece of ground situated to the south of the said stone tenement upon which they or their predecessors had erected a saloon.

The defence is that the defenders have, and have produced, a valid and prescriptive title to the ground on which the saloon is built. It was not disputed that the defenders possessed the ground in question for the prescriptive period; therefore it appears to me that the only question in the case is whether the charter or disposition founded on by the defenders as supporting their prescriptive title is in its terms habile to do so.

The charter on which the defenders found has not been printed, but we were told that it was dated prior to 1855, and that the description of the subjects contained in it is exactly the same as in the notarial instrument in their favour of date 18th March 1890.

From this deed it would appear that the stone tenement built by David Reid had at one time been divided into six separate lodgings, all of which are thereby disponed to the defenders or their predecessors.

[*His Lordship then read the portions of this deed set forth supra*]—It thus appears that the deed contains a conveyance of the six several lodgings which form the stone building built by David Reid, with the whole parts, pendicles, privileges, and pertinents thereto belonging.

It was argued to us, as I understood the argument, that the description of the several lodgings conveyed by the deed in question, as being contained in the stone tenement built by David Reid, was as definite a description of the subjects as if they had been described as bounded by the four external walls of that tenement,—and that therefore the defenders could not prescribe anything beyond that area or these limits.

I do not think it necessary to inquire how that would have been if the grant had been limited to these subjects as there described, but the subjects are conveyed "together with the parts, pendicles, privileges, and pertinents of the said several subjects." But these words are not to be ignored, and the question is, what was intended to be conveyed by the words parts, pendicles, and pertinents? That is a question of fact, and if the question had arisen within the years of prescription, possession, prior titles, or other evidence might competently have been appealed to to determine it. But if the question arises, as in this case, after the period of prescription has run, it is clear from the case of *Auld* v. *Hay*, 7 R. 663, that the possession which has followed upon such a title excludes all other inquiry, and at once explains the grant, and consitutes a prescriptive title.

I am of opinion accordingly that the defenders and their predecessors had a title on which to prescribe the ground covered by the saloon, and it being admitted that they have possessed that ground for the prescriptive period, that they must succeed in this action.

LORD M'LAREN—The case was heard by this Court pursuant to an interlocutor of the Second Division directing a rehearing of the case on certain pleas—in effect on the plea of prescriptive possession which is maintained by the defenders. I am of opinion that this defence is established.

The question arises in this way. The pursuers are proprietors of an area and buildings thereon bounded on the north and east by Argyle Street and Brown Street respectively in the city of Glasgow, being part of a larger area consisting of 805½ square yards. The form of the original title (which has been continued in subsequent transmissions) is a conveyance of the 805½ square yards by a bounding description, excepting certain subjects which belonged to the defenders' authors, and which are described in general terms as "that large stone tenement fronting the road from Glasgow to Anderston (now Argyle Street), situated on said two lots, and sold

by the said David Reid to several purchasers."

The defenders are proprietors of the excepted subjects, and the question relates to the extent of the exception. The large stone tenement was built in flats, each flat consisting of an "eastmost lodging" and a "westmost lodging," and the tenement was possessed in property by four owners of different parts thereof. These separate possessions came to be united under one owner, and the entire tenement has been possessed as one undivided subject for a period exceeding that of the positive prescription, and is now vested in the defenders, Stark's trustees. The print of documents contains the original title-deeds of the flats of the stone tenement, also an excerpt from the conveyance of all the flats in favour of Stark's trustees. It was admitted at the bar that the conveyance to their author, which is the foundation of the prescriptive title, is in identical terms with that in favour of Stark's trustees, so that we may read the printed description of the subjects as setting forth the terms of the description in the deed, which is the foundation of the defenders' alleged prescriptive title.

The stone tenement has been structurally altered, the lower storey being now converted into shops opening to Argyle Street, and it is proved that about twenty-five years ago a saloon in connection with one of the shops was built on ground to the rear of the tenement. The site of this saloon is claimed by the parties to this case, and is the subject in dispute. The pursuers claim it because it is undeniably a part of the 805½ yards, and they say that it is not covered by the exception which, *ex facie* of their title, only includes the stone tenement. The defenders rely on their possession for the prescriptive period on a written title conveying the several flats of the stone tenement, "together with the whole parts, pertinents, and privileges" thereto belonging. I may here observe that the tenement is conveyed to the defenders' author, and to the defenders themselves in separate portions, and that the description of each portion concludes with a clause of parts and pertinents in the terms quoted or equivalent terms, but this is probably not essential to the legal question, because if the conveyance of the ground floor, in connection with which the saloon is occupied, contained a proper clause of pertinents, and there were nothing in the previous description to limit the meaning of the conveyance of pertinents, the argument in my apprehension would be just the same. If we were entitled, in a question of prescriptive possession, to look at the deeds anterior to the prescriptive title, we should probably find that the clauses of pertinents had been transcribed without variation from the original grants. But according to the best and most recent legal authorities on this subject, it would appear that if a party found on a prescriptive title, and if that title is susceptible of the meaning he puts upon it, if it can be read in a manner consistent with the possession which has followed upon it, all inquiry into antecedent titles is excluded, whether for the purpose of giving a more limited construction to the grant, or for any other purpose inimical to the prescriptive title which is set up. I think this point is established by the judgment in *Auld* v. *Hay*, 7 R. 663, where the rule and the reasons for it are developed in the opinion of Lord Justice-Clerk Moncreiff. Whether it would be competent to found on the earlier titles for the purpose of construing the later titles in a sense favourable to the acquisition of a prescriptive right, is a question which I do not stop to consider, because it does not arise, as I think, in the present case, though I may say that I see no reason why the claimant of a prescriptive right of property should not trace back his title as far as he pleases under the condition of satisfying the Court that the subjects have been possessed by himself and his authors for the whole of the intervening period.

To complete the statement of the case some reference is necessary to the state of possession during the prescriptive period. But in the arguments no controversy was raised on this subject, and I therefore accept the findings in fact of the Sheriff-Substitute, according to which the site of the saloon until the year 1864¼ was enclosed, and was used for the purposes of a back yard by the tenants of the defenders' property, the key being kept by one of them who occupied part of the ground floor as a shop. In 1864 the saloon was built, and was at first used as a workshop by John Ferguson, one of the tenants. Since that time, the interlocutor continues, "all the back ground and erections thereon have been occupied and used by the defenders' tenants without interruption on the part of the pursuers or any other person." The result of these findings is that the defenders here had possession of the disputed ground during the prescriptive period on the title which they put forward, and the only question is, whether they have a title such as will support prescriptive possession.

Having stated the conditions of the case in dispute, according to my understanding of the law, I shall consider very shortly (for the points do not admit of much elaboration), first, whether the expression "parts and pertinents" in the grant on which the defenders found is an expression susceptible of being read as a conveyance of the saloon in question; and secondly, if so, whether this meaning is excluded by the circumstance that the principal subjects are, as is said, surrounded by boundaries.

As to the first point, it must be admitted that some limitation may be legitimate and necessary in applying a clause of parts and pertinents. Lands possessed in an adjoining parish would not necessarily or usually be held to fit the description, especially if, as in the case of *Gordon* v. *Grant*, 13 Dunlop 1, the principal subjects were described as lying in a different parish. Without attempting a definition, I think that in the case of urban property, if the property which is in dispute, and is claimed by the title of part and pertinent, has been occu-

pied as part of the same habitation, or as part of the same place of business in conjunction with the principal subject, the condition of fair construction is satisfied. In other words, the clause of parts and pertinents is "susceptible" of a meaning which is consistent with the actual possession. Where the disputed subject is a saloon having external communication with the shop to which it is attached, it is a pertinent of the shop according to the ordinary use of language, and this is the state of the possession in the present case. The same may be said as to the possession of the ground in its original condition of a yard attached to dwelling-houses, and fenced in against adjacent proprietors. I cannot hold that such possession of the yard and the saloon as has been described is possession without a title, because it seems to me that the saloon may very fairly be described as a pertinent of the shop, and the unbuilt-on yard as a pertinent of the houses, and this is all that is necessary in order that the possession may be consistent with the title.

With respect to the argument founded on the rule as to bounding descriptions (and this, I think, is the pursuer's whole case), I think the answer is that the conveyance of pertinents is not confined to pertinents lying within the supposed boundaries.

In the case of *The North British Railway Company* v. *Hutton*, 23 R. 522, I took occasion to point out that the rule as to bounding charters is only a more particular case of the more general rule that an owner cannot prescribe in a sense inconsistent with his title of possession. I make no claim to originality in connection with this point, but as I have not changed my opinion, I desire to say that in the present case the defenders are not, in my view, founding on a state of possession which is inconsistent with their title. I think, in common with some of your Lordships, that the disposition of the subjects in the defenders' title is not of the nature of a bounding charter. It is a descriptive title, and, *e.g.*, conveys the eastmost lodging of the middle flat, and so forth, ending with the eastmost and westmost lodgings of the first or ground flat, with which we are more immediately concerned. There is nothing that I can see inconsistent with this description in holding that the saloon is a part of the lodging on the ground floor. The deed states that the tenement is built on part of numbers 31 and 32 of an ancient feuing plan. We know nothing whatever as to the original extent of these allotments. But supposing that we are (I do not know on what grounds) to treat this as a bounding description, that description is one thing; the subsequent conveyance of parts and pertinents is another. The defender may say, I waive any claim to bring the saloon within the supposed boundary, but I say the saloon is a pertinent now; to call a thing a pertinent is to give a description of it which may err on the side of indefiniteness, but which cannot well be said to confine the disponee within any precise boundaries. A pertinent as such is indefinite alike as to position and magnitude. It is only defined as as having relation to the principal subject, and its extent is determined by proof of possession. In this case I think the relation is clear and the possession unequivocal.

I am therefore of opinion that the case has been rightly decided in the Sheriff Court, and that the appeal should be dismissed.

LORD KINNEAR—I am of the same opinion, and as I have come to that conclusion for the same reasons which have been already expressed, I do not consider it necessary to detain your Lordships by repeating them.

LORD TRAYNER—By disposition dated 20th July 1798 the trustees of David Reid conveyed to Robert Anderson two lots or pieces of ground in Glasgow containing 805½ square yards, bounded on the north by the road leading from Glasgow to Anderston (*i.e.*, Argyle Street), and on the east by Brown Street, but excepting from their conveyance "that large stone tenement fronting the said road leading from Glasgow to Anderston, situated on said two lots, and sold by the said David Reid to several purchasers." The pursuers are now feudally vested in the whole rights conveyed by that disposition. The stone tenement referred to and excepted from the conveyance consisted of three flats, on each of which there were two separate dwelling-houses, or lodgings as they are called in the titles. The defenders are now the proprietors of the whole tenement. The conveyances in favour of the several purchasers to whom David Reid sold the several houses were in the same terms, and any one of them may be taken as an example. The subjects conveyed are described as "All and whole that lodging being the westmost of the middle flat of that stone tenement or land covered with slate in Broomfield lately built by the said David Reid . . . which lodging hereby disponed consists of a kitchen and three rooms, together with two cellars in the sunk storey . . . with the whole parts, pertinents, and privileges of the said lodging." The question raised is, whether the defenders on such a title can acquire by prescriptive possession a right to land lying contiguous to and on the south of the tenement. In my opinion they cannot.

The Sheriff has held that the defenders' title is not a bounding title, and that as it contains a clause of parts and pertinents it is a title on which lands other than those described may be acquired by prescription. It is quite true that the defenders' title is not a bounding title, in the sense that the stone tenement is not described by boundaries. But that is by no means conclusive. It is not the existence of such boundaries alone which prevents a proprietor, even with a clause of parts and pertinents, from acquiring land outside his title by prescription. "The case of what is termed a bounding charter is an example, but not the only example, of a title which so defines the estate as to exclude the possibility of acquiring land by pre-

scription in excess of the subjects actually conveyed"—*per* Lord M'Laren in *North British Railway Company* v. *Hutton*, 23 R. 525. The ground, therefore, on which the Sheriff has proceeded is an inadequate ground. He appears to me to have taken a single example or case falling within a principle of law for the principle itself. The principle or rule by which this case is governed I venture to state thus: Where real property is, in the conveyance thereof, so precisely defined that the extent and limits thereof are plain and clear on the face of the title, there cannot be acquired by prescriptive possession any right of property beyond the limits so defined. The principle or rule which I have thus stated is, it humbly appears to me, amply supported by the authority of decided cases as well as of the institutional writers. Now, apply that rule to the present case. About the extent or limits of the defenders' right there can be no doubt; language could not make it clearer. There is disponed to the defender a lodging consisting of a kitchen and three rooms, with two cellars in the sunk area. Such a lodging, and nothing more, is what the defenders may and do possess under their title; anything beyond that lodging is not possessed by virtue of their title, but contrary to their title, and no length of possession contrary to their title will give them a right of property in the subjects so possessed.

The defenders, however, maintain that their title does convey more than the lodging as it is described, because the lodging is conveyed "with parts and pertinents." But that clause does not add anything to the extent of the subjects actually conveyed. The argument that it does was said by the Lord Justice-Clerk (in *Gordon* v. *Grant*, 13 D. 7) to be "entirely erroneous;" and he added—"The addition of parts and pertinents does not extend the grant," and quoted Stair (ii. 3, 36) to the like effect—"No prescription can give right to what is without the boundary as part and pertinent."

The defenders further argue that they are in a better position to maintain their present claim as proprietors of the whole tenement than they would or might have been as proprietors of only one of the six lodgings. This argument was not seriously pressed. I think it is unsound. The titles of the whole six lodgings are, *mutatis mutandis*, in the same terms. If no one of these titles would have been habile to support the acquisition of property by prescription, then the six put together would not. The insufficiency of one title is not removed by adding to it the insufficiency of other five.

I would only add that this case presents one feature which I think distinguishes it from all others of the same class. The title in favour of the defenders, and on which by prescription they seek to acquire the property of the *solum* adjoining their tenement, does not convey to them one inch of the *solum* on which that tenement is built. That *solum* is wholly vested in the pursuers. The defenders have no right to what is below the surface. They probably have a good right to support for their tenement, but the *solum* is not theirs to any extent whatever. I think this fact emphasises what I have said about the limited character of the right conveyed to the defenders. Theirs is not a conveyance of land at all. The land is conveyed to the pursuers, to whom by virtue of the conveyance in their favour the tenement built upon the land would also have gone had the tenement not been expressly excepted. But such an exception must be read with reasonable strictness, and when that is done, the defenders' right is limited and defined very clearly to be the tenement, and includes nothing beyond its walls.

I am, for these reasons, unable to concur in the judgment proposed. I think the appeal should be sustained.

LORD MONCREIFF—I agree with the majority of your Lordships that our judgment should be for the defenders; their title, as explained by prescriptive possession, establishes their right to the subjects in dispute.

The conditions of the argument are—(1) that the defenders' author became vested in the whole of the stone tenement mentioned in the earlier titles in 1855, under an instrument of sasine in his favour recorded 27th November 1855, with the whole parts, pertinents, and privileges of the several lodgings of which the said tenement was originally composed; and (2) that in virtue of that title the defenders have, far beyond the years of prescription, had exclusive possession of the back ground behind (*i.e.*, to the south of) the tenement.

The question which we have to determine is, whether the defenders' title, upon which prescriptive possession has followed, is habile to support the defenders' claim to the back ground as parts and pertinents of the tenement.

The only title to be looked to is the title of 1855. We are not called upon or entitled to consider questions which might have arisen on the terms of the earlier titles. Before the rights to the various lodgings were merged in one proprietor, and before prescriptive possession was had under them difficult questions might have arisen as to the rights which the proprietors of the respective flats had in the back ground. For instance, there might have been a question whether the proprietors of the upper flats had any right of property in the ground which is now covered by the back saloon. There might even have been a question whether the proprietors of any of the flats had more than a right of servitude in certain of the back ground—in particular, in the area in which it was proposed to sink a well. A servitude right to use the area or any other part of the back ground would have satisfied the words "parts, pertinents, and privileges."

But in my opinion we are not called upon to consider those questions. It is true that the title of 1855 consists merely of the various original grants grouped together, and not a grant of the stone tenement as a *unum quid*. But the defenders are now

proprietors of the whole of the subjects, and it is therefore immaterial to which of the sets of lodgings or flats the various pieces of back ground were originally attached. If they pertained in property to any of the lodgings in the stone tenement, the full right of property in them is in the defenders.

I find nothing in the defenders' title to make it a bounding title, so as to prevent the usual effect of prescriptive possession. It does not contain any inflexible boundary to the south, unless the walls of the tenement constitute such a boundary; but we were referred to no authority, and I know of none, in which the conveyance of a house with parts, pertinents, and privileges will not carry ground of the nature of a back-green, or curtilage, if exclusive possession for the prescriptive period is proved. The title is ambiguous in this sense, that without proof of possession it is impossible to say precisely what are parts and pertinents of the property, as they are not expressly described in the titles. But prescription "has the effect of construing the title upon which possession has followed and of removing any ambiguities which may have attached to the description of the property in that title"—*Auld* v. *Hay*, 7 R., *per* Lord President, p. 681. Construed in the light of exclusive possession, I am of opinion that the defenders' title includes as parts and pertinents the whole of the ground which they now claim.

I am therefore of opinion that the judgment of the Sheriff should be affirmed.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the appeal for the pursuers against the interlocutor of the Sheriff-Substitute of Lanark, dated 27th November 1897, with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Judges, Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Therefore of new assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for the Pursuers—Ure, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—Dundas, Q.C.—Guy. Agent—A. C. D. Vert, S.S.C.

Friday, July 15.

SECOND DIVISION.

NEWALL'S TRUSTEE *v.* INGLIS.

Vesting—Succession—Fee or Liferent—Fee with Protected Succession—Direction to Settle on Daughter so as to Exclude Jus mariti.

By her trust-disposition and settlement a testatrix directed her trustees to hold the capital of the residue of her estate, and all interest accruing thereon after her death, for behoof of her two sons and daughter *nominatim*, and on the eldest child attaining the age of twenty-five, to divide the capital and accumulations of interest equally among the survivors of them. The deed further directed the trustees, on the daughter attaining the age of 25 years, to "pay, assign, and dispone, or settle or secure the share falling to her of my trust-estate, and any interest and profits accrued on the said share subsequent to the said period of division hereinbefore mentioned in such way and manner as that the same shall be preserved and applied for behoof of my said daughter and her issue, exclusive of the *jus mariti* and right of administration of any husband she may then have, or may marry at any future period thereafter, . . . and I declare that none of my said children shall have any vested right to the capital of the trust-estate, or interest and produce thereof, till they shall respectively have attained the age of 25 years, except to the effect of transmitting the same to his, her, or their lawful issue."

Held (*diss.* Lord Young) that an absolute fee of one-third of the residue of the estate of the testatrix vested in the daughter on her attaining the age of 25 years.

Mrs Joanna Christian Newall died on 10th August 1871, survived by two sons, William Normand Newall, born on 28th September 1854, and James Normand Newall, born on 13th June 1862, and one daughter, Elizabeth Maude Newall, afterwards Elizabeth Maude Inglis, born on 10th August 1856.

By her trust-disposition and settlement, dated 3rd May 1871, and recorded 17th August 1871, Mrs Newall conveyed her whole estate for certain purposes, and *inter alia* directed as follows with respect to the residue of her estate—"Lastly, the said trustees shall hold the capital of the residue of my said estate and effects, and also all interest and profits accruing thereon after my death, for behoof of my said children William Normand Newall, Elizabeth Maude Newall, and James Normand Newall, and after deduction from said interest and profits of all payments therefrom for keeping up a house or establishment as above provided, and all expenses, incurred for board, education, and maintenance of any of my children, they shall accumulate the same until the eldest of my children who may survive shall have attained the age of twenty-five years complete; and upon the eldest of my said children attaining said age, the said trustees shall divide the capital of said residue and all accumulations of interest and profits thereon equally among said children or the survivors of them; but excepting always from said division the household furniture and others belonging to me in the event of the said trustees continuing to keep up a house or establishment for any of my children at the period at which such division may