The Court answered the second alternative of the first question and head (*a*) of the second question in the affirmative.

Counsel for the First and Second Parties —Black. Agents—Forrester & Davidson, W.S.

Counsel for the Third Party—Hunter, K.C. — Macmillan. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Fourth Party—Dickson, K.C.—Hon. W. Watson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

CROOKE *v.* THE SCOTS PICTORIAL PUBLISHING COMPANY, LIMITED.

Copyright — Photograph — Copyright in Photographs — More than One Person Interested in Sitting.

"It seems settled that if a person goes to a photographer and asks for a sitting, he is entitled to the copyright of the photographs then taken, it being presumed that he is liable to pay for them and intends to pay for them. On the other hand, it seems that if a photographer invites some celebrated person to give him a sitting, and the person agrees to do so, the copyright of the photograph is the photographer's, even though the sitter should afterwards pay for copies. Further, if a third person employs a photographer to take the likeness of another person, whether that person be a celebrated person or not, and arranges for a sitting accordingly, the photographs taken at such sitting belong to the third person, and he is liable to pay for the sitting."

Application of the law above stated in a case where more than one person was interested in the sitting.

The Copyright (Works of Art) Act 1862 (25 and 26 Vict. cap. 68), sec. 1, enacts—"The author, being a British subject, or resident within the dominions of the Crown, of every original . . . photograph . . . . and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying . . . such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author and seven years after his death, provided that when . . . the negative of any photograph shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or disposing of, or making or executing the same shall not retain the copyright thereof unless it be expressly reserved to him by agreement in writing, signed at or before the time of such sale or disposition by the vendee or assignee . . . of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such . . . negative of a photograph or to the person for or on whose behalf the same shall have been made or executed, nor shall the vendee or assignee thereof be entitled to any such copyright unless, at or before the time of such sale or disposition an agreement in writing, signed by the person so selling or disposing of the same or by his agent duly authorised, shall have been made to that effect."

On 18th November 1904 William Crooke, photographer, Princes Street, Edinburgh, brought an action against The Scots Pictorial Publishing Company, Limited, Hope Street, Glasgow. In it the pursuer sought, *inter alia*, (1) to have the defenders interdicted "from repeating, copying, colourably imitating, or otherwise multiplying or causing or procuring to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, without the consent of the pursuer, a photograph of Sir Henry Irving, taken on or about 28th April 1904, of which the pursuer is the author, and of the copyright of which he is the proprietor, duly registered at Stationers' Hall in terms of the Act 25 and 26 Vict. cap. 68, or of the design of said photograph, and from selling, publishing, letting to hire, exhibiting, or distributing, or offering for sale, hire, exhibition, or distribution, or causing or procuring to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution any repetition, copy, or imitation of said photograph or the design thereof made without such consent as aforesaid;" and (4) to have them ordained to make payment to him of £2000 as damages sustained by him through the infringement by the defenders of his said copyright.

The defenders, *inter alia*, pleaded—(1) "No title to sue. (2A) The pursuer not having copyright in, and not being entitled to register himself as proprietor of the copyright of the photograph founded on, the defenders should be assoilzied."

The facts in the case are given in the opinions, *infra*.

On 6th July 1905 the Lord Ordinary (ARDWALL), after a proof taken on 27th June, pronounced an interlocutor sustaining pleas 1 and 2A for the defenders and assoilzieing them from the conclusions of the summons so far as not previously disposed of.

"*Opinion.*—At the hearing on the evidence it was conceded by the counsel for the defenders that the picture of Sir Henry Irving published in the *Society Pictorial*, which forms the subject of the complaint in the present action, must be held to be a reproduction of the photograph which has been registered by the pursuer. The history of the reproduction is a short one. A copy of the said photograph was published in the *Sphere* of June 11, 1904. On the occasion of Sir Henry Irving's visit to

Dundee in October of the same year the *Dundee Advertiser* in its issue of October 31st published a reproduction of the *Sphere* picture. This reproduction was made by an artist first taking a tracing on prepared paper from the *Sphere* portrait, filling it up with chalk, filling in certain lines, and then getting it transferred to a zinc block which was used for throwing off the impressions.

"Shortly thereafter Sir Henry Irving's advance manager, in view of Sir Henry's tour in Scotland, requested the managing director of the *Society Pictorial* to insert a portrait of Sir Henry Irving in their issue of November 12, 1904. There was some difficulty about getting a suitable portrait, but finally Sir Henry's manager sent the block which had been prepared for the *Dundee Advertiser* to the defender's manager, and it is an impression from this block which appeared in the issue of the *Society Pictorial* complained of in this action. The defenders' managing director had no idea that he was infringing any copyright, and apparently he was told by Sir Henry Irving's manager that he was not doing so in publishing the portrait in question.

"The principal question which falls to be disposed of in this action is whether the pursuer is the true proprietor of the copyright of the large full-length photograph, of which the portraits in the *Sphere*, the *Dundee Advertiser*, and the *Society Pictorial* are reproductions. Counsel for the parties did not seem to be much at variance as to the law of the case, for which I was referred to section 1 of the Fine Arts Copyright Act 1862 (25 and 26 Vict. cap. 68), and to the judgments in the case of *Boucas* v. *Cooke and Others*, 1903, 2 K.B. 227. It seems settled that if a person goes to a photographer and asks for a sitting he is entitled to the copyright of the photographs then taken, it being presumed that he is liable to pay for them and intends to pay for them. On the other hand it seems that if a photographer invites some celebrated person to give him a sitting, and the person agrees to do so, the copyright of the photographs is the photographer's, even though the sitter should afterwards pay for copies. Further, if a third person employs a photographer to take the likeness of another person, whether that person be a celebrated person or not, and arranges for a sitting accordingly, the photographs taken at such sitting belong to the third person, and he is liable to pay for the sitting.

"The facts in this case are somewhat peculiar owing to the pursuer having written some extraordinary letters and taken up a position with a view to securing the copyright of certain photographs of Sir Henry Irving for himself, but I have come without any difficulty to the conclusion that the truth of the matter is that the sitting at which the photograph in question was taken was a sitting given at the request of Mr Shorter as acting for the *Sphere* newspaper, and that he is *prima facie* entitled to the copyright of all the photographs taken at that sitting, unless it could be shown that Sir Henry Irving or Mr Shorter himself agreed to the copyright of any of the photographs becoming the property of the photographer or other person. This, I think, has not been shown with regard to the photograph in question. On the contrary, I hold it proved that it was taken for Mr Shorter, that he is the person entitled to the copyright thereof, and that any agreement by him to give up the copyright of the photograph in question was entered into by him under essential error induced by the misrepresentations of the pursuer. . . . [*His Lordship then reviewed the evidence as to what occurred prior to, at, and subsequent to the sitting.*] . . ."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong in holding that the pursuer had made any misrepresentations in fact. On the contrary, an examination of the correspondence showed that he had disclosed all the facts within his knowledge both to Sir Henry Irving and Mr Shorter. The sitting was not for the latter only. The allocation of the copyright in the various negatives taken at the sitting which was proposed by the pursuer was communicated to Sir Henry and Mr Shorter and agreed to by them, and under it Mr Shorter received the copyright of the two photographs allotted to him. It was therefore clear that the copyright of the photograph in question was not in Sir Henry, and the correspondence showed that the contract which Mr Shorter had with the pursuer was that he should get the copyright of two photographs and the right to reproduce another, none of these being the photograph in question. The pursuer therefore retained his rights in the photograph in question by the law as laid down by the Lord Ordinary, and the copyright thereof was still with him. The interlocutor of the Lord Ordinary should be recalled.

Argued for the defenders and respondents —There was an agreement between Mr Shorter and the pursuer under which Sir Henry Irving went to the latter's studio for a sitting. Apart therefore from misrepresentation by the pursuer, the copyright of the resulting photographs was in Mr Shorter—*Boucas* v. *Cooke and Others* [1903], 2 K.B. 227. But even if Sir Henry consented to sit for the pursuer also, then Sir Henry's will was the determining factor, no copyright could exist without his consent, and he had the right to allocate particular photographs to particular persons. On the facts, he exercised this right and selected for Mr Shorter the photograph first taken, which was proved to have been the one now in question. By sec. 1 of the Copyright (Works of Art) Act 1862 the copyright in that photograph vested in Mr Shorter from the creation of the negative. Therefore the pursuer could not subsequently select so as to divest Mr Shorter or acquire his right save as provided by the statute.

At advising—

LORD PRESIDENT—In this case the defenders, the Scots Pictorial Publishing Company, admittedly published in the *Society Pictorial* a portrait of the late Sir Henry Irving without leave asked or obtained of the pursuer Mr Crooke. That portrait, it is now admitted, was a reproduction of a photograph of Sir Henry which had been taken by the pursuer, and of the copyright of which the pursuer was the registered owner. The present action is brought to obtain interdict against further publication of the portrait, and for damages. The defence of the publishing company is that the photograph is not the property of the pursuer.

I do not think there has in this case been any controversy as to the law governing property in the copyright of photographs. That law has been laid down in the case of *Boucas* v. *Cooke and Others*, L.R. [1903], 2 K.B. 227, which the Lord Ordinary has adopted in the present case, and I agree with his Lordship when he says . . . [*quotes statement of law by Lord Ordinary given supra in rubric*] . . . I entirely adopt that general proposition. The Lord Ordinary has applied that statement of the law to the present case, with the result that he has assoilzied the defenders. From his Lordship's long and careful opinion the ground of his judgment may be taken in a single sentence, namely—"I hold it proved that the photograph in question was taken for Mr Shorter; that he is entitled to the copyright thereof; and that any agreement by him to give up the copyright of the photograph in question was entered into by him under essential error induced by the misrepresentations of the pursuer." Accordingly the Lord Ordinary held the copyright of the photograph to be in Mr Shorter and assoilzied the defenders. I have not been able to take the same view as his Lordship.

The history of what led up to the matter is not in doubt. It was known that Sir Henry Irving was coming to pay a visit to Edinburgh, and there were at least two if not more persons at that time who were anxious to have Sir Henry's photograph taken. There is no doubt that Mr Shorter, who had to do with the *Sphere* newspaper, was anxious to publish a photograph of Sir Henry, and he was also undoubtedly anxious to have a photograph of which he should own the copyright. It is, in my opinion, satisfactorily proved that Mr Shorter, who though a friend of Sir Henry had been unable to prevail upon him to give a sitting for his photograph in London, seized upon the opportunity of his being in Edinburgh to have his photograph taken. It is also quite certain that Mr Crooke wished to have a photograph of Sir Henry, probably as an advertisement of his own powers of photography, and he was willing, probably also as an advertisement, to take the photograph gratis, and to give a copy of the photograph so taken to each of the members of the Pen and Pencil Club, he having, it seems, done the same thing on other occasions with regard to celebrities. The result of all this was that arrangements were made for Sir Henry going to sit for Mr Crooke. There is some controversy upon the letters which preceded the granting of that sitting, and it was very strongly pressed upon the Court that the pursuer had gone further than the true facts warranted him in a certain letter in which, at an early period when Mr Shorter applied to him, he replied that arrangements were already in train for Sir Henry giving a sitting. Now I am bound to say I think the pursuer's letter did go beyond the very strict statement of facts, but I do not think, for the purposes of this case, that that very much mattered, because in my opinion the result was that Sir Henry Irving came to the pursuer's studio well knowing that he was to be photographed for more persons than one. He knew he was going to be photographed for the purpose of a copyright photograph for his friend Mr Shorter. Nay more, if it had not been for his friendship for Mr Shorter I think that it is more than probable Sir Henry would have given no sitting at all. At the same time he equally well knew that while he was there he was going to be photographed with a view to a presentation copy of his photograph being given to the members of the Pen and Pencil Club, and he knew also he was going to be photographed for Mr Crooke so far as copyright was concerned. Sir Henry, through his manager, made a very proper and obvious arrangement that as he was putting himself to the trouble of being photographed like that, he should be allowed first of all to have a veto upon what photographs were to be published; and secondly, that he should be allowed to have copies for his friends at so much per copy. All that was arranged, and accordingly Sir Henry went and subjected himself to the ordeal of the camera. There is a little dubiety as to which of the various photographs that were thus taken was precisely taken first. I do not think that matter can be cleared up with perfect certainty. In the pursuer's books the photographs were put in a certain order. That order would make out that the large photograph which is said to have been the subject of piracy was taken first. On the other hand, the pursuer himself said that he thought that exceedingly improbable. I am bound to say I do not think the question is one of importance. I do not think there was an appropriation of photographs made by Sir Henry at the time, nor that he said—"Now this time I am before the camera the photograph belongs to Mr Shorter, this time it is for the Pen and Pencil Club, and this time it is for yourself." It is not in common-sense to suppose that anything of that kind happened. Sir Henry, like any other sitter, would be very anxious to get the sitting over as soon as he could. The photographs were taken, and the particular one in question was taken in rather an unusual manner, because at the precise moment at which Sir Henry sat for this large photograph he was operated on by two cameras at once, the result being the large photo-

graph, and the small photograph which was afterwards given to the Pen and Pencil Club. While what precisely passed in the matter of time in the photographer's studio is uncertain, what happened afterwards is perfectly certain, because we have the correspondence of the parties written at a time when there was no question of this or any other dispute. On 10th May 1904 Mr Crooke, the pursuer, having submitted to Sir Henry, as he promised, the whole of the negatives of the photographs thus taken, wrote to Mr Shorter—"Sir, I am herewith sending you the two negatives of Sir Henry Irving, of which you can buy the sole copyright, no copies having been printed except two of each for himself. I am also sending you for inspection a copy of the picture taken for the Pen and Pencil Club. My price for the sole copyright and possession of the two negatives, and also the permission to reproduce, if you wish, the full length now sent for your inspection, with those Sir Henry Irving is reserving for himself, if he has no objection, is £5, 5s." Mr Shorter on 11th May 1904 wrote to Mr Crooke as follows:—"Dear Sir, I accept your terms, and shall be glad if you will send in an account for five guineas to cover the copyright of the two pictures. I am also glad of your permission to reproduce the one sent to the Pen and Pencil Club, which I actually prefer." That, to my mind, ended the business. It was an offer by Mr Crooke, for the sum of five guineas, to give up the copyright of these two photographs, and it was accepted by Mr Shorter. I am bound to say I do not understand what the Lord Ordinary means by the misrepresentation of the pursuer. There is no representation in the letter at all. His Lordship cannot call representation the mere statement of fact that Sir Henry had barred the publication of certain of the negatives altogether. The pursuer's statement was that Sir Henry had chosen two, that the pursuer proposed to keep one for the purposes of the Pen and Pencil Club, and there was the offer of the other two to Mr Shorter. If Mr Shorter wanted to make that a question of selection he was bound in his letter to say so. Mr Shorter did not kick at the idea of the larger one being reserved for the Pen and Pencil Club. He did not start any theory such as has now been started, which is really a theory of there having been a determinate appropriation at the time Sir Henry sat in front of the camera. If that be so, it seems to me to end the case, the result being that as the only person who paid five guineas at all was Mr Shorter, who for that sum purchased these two pictures, neither of which was the one in question, the copyright must be in the pursuer, simply because nobody else paid for it.

I am of opinion that the pursuer is entitled to decree. What the decree is to be is another matter. It does not seem to me a case where there is any necessity for pronouncing interdict, because the wrong has been done, and it is not to be supposed that the picture complained of will again be reproduced. There remains the question of damages. We have evidence that supposing a newspaper has to ask a photographer to allow a picture to be reproduced, the ordinary price would be from half-a-guinea to a guinea. Now, here there has been taken what is called "French leave," and no doubt by the taking of "French leave" the photographer did not get what he generally did get—the right to stipulate that his name as the author of the photograph should be put in a conspicuous position. But then the damage suffered by Mr Crooke, the pursuer, seems to me exceedingly small, because one cannot as a person of common sense think really that there is a great deal of money in such copyrights. The only persons likely to want such rights are those who wanted the photographs for themselves, or other newspapers who wanted to reproduce it, and such could probably get the right for half-a-guinea or a guinea. I think the pursuer will be amply remunerated here if he gets an award of five guineas.

LORD KINNEAR—I agree.

LORD PEARSON—I do not think that the parties are much at variance either as to the law applicable to this case or as to the more important facts on which the decision of it depends. Nor do I think that it raises any question of credibility which really affects the merits. But I am unable to agree with the Lord Ordinary in the inferences which he draws from the evidence.

I assume, and I do not doubt that primarily the sitting at which the photographs in dispute were taken was Mr Shorter's sitting in this sense, that he and he only was "the occasion" of that sitting. It is true that some twelve years before, Sir Henry Irving had given what was regarded as a promise to give a sitting for a photograph to be supplied to the members of the Pen and Pencil Club. But that had lain over so long that it probably would have lain over for some time further had it not been for Mr Shorter's arrangement with Sir Henry Irving to take advantage of his visit to Edinburgh to give the pursuer a sitting. But then in point of fact, and as things turned out, it became a combined sitting (if I may so express it); for it is certain that, either in fulfilment of an old promise or owing to Mr Crooke's pressing request at the moment, Sir Henry Irving consented to give him the benefit of a sitting. So it turned out to be not only Mr Shorter's sitting but also Mr Crooke's sitting; and I do not think there is any foundation in the facts for saying that Mr Crooke's part of it was really for and on behalf of the Pen and Pencil Club in any other sense than this, that Mr Crooke intended the photograph of which he was to be the proprietor to be used by him primarily for the purpose of presenting copies of it to the members of the club. This intervention of Mr Crooke introduces this peculiar feature into the case, that not only was the sitting to be a joint sitting, but that one of the two persons interested in it was the artist himself.

Now, on that state of the facts, what is to be the test according to which the

various portraits taken at that sitting are to be appropriated among the persons interested; and by what criterion is the right in each of them to be determined? I do not favour the suggestion that that is to be determined by the order in which the negatives were taken in point of time. I do not doubt that the parties might have so arranged. Or, there being no presumption that the first taken will also be the best, they might have agreed that the choice among the portraits taken at the sitting should lie with the prime mover, Mr Shorter, or with Sir Henry Irving himself. But there was no such arrangement, and indeed I do not suppose that anyone applied his mind to that question at the time. In the absence of any arrangement, I see no alternative but to hold that it lay with the pursuer to make such apportionment of the results of the sitting as he thought fair to all concerned; and while he may have kept the best to himself from among the five which were selected by Sir Henry as being "admirable ones," all parties were in the first instance satisfied with the apportionment, and as between Mr Crooke and Mr Shorter the matter was closed by a distinct agreement embodied in letters, by which Mr Shorter accepted the copyright of two out of the five approved portraits, with the permission to reproduce in the *Sphere* the one now in dispute.

On the remaining parts of the case as to the alleged misrepresentations and as to amount of damages, I entirely agree in what your Lordship has said.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [of July 6, 1905]: Find it unnecessary to dispose of the first, second, third, and fifth conclusions of the summons, and under the fourth conclusion decern against the defenders for payment to the pursuer of the sum of Five pounds sterling in full of the claim under that conclusion, with interest on said sum at the rate of 5 per centum per annum from the date hereof until paid."

Counsel for the Pursuer and Reclaimer — Younger, K.C.—Morison. Agents — P. Morison & Son, S.S.C.

Counsel for the Defenders and Respondents — Johnston, K.C. — C. D. Murray. Agents — Fraser, Stoddart, & Ballingall, W.S.

Tuesday, June 26.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

M'ARTHUR *v.* MAGISTRATES OF EDINBURGH.

Burgh — Dean of Guild — "Court Open and Accessible to the Public"—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxii*), *sec.* 5—*Edinburgh Municipal and Police (Amendment) Act* 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 40.

A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. The only access to the tenement was to be through the remaining part of the back-green, and through a passage leading therefrom, along one side of the villa, to the public street.

Held (*aff.* the Dean of Guild) that the court which would be formed out of the remainder of the back-green after the erection of the tenement, would not be "open and accessible to the public," and so would not be a court as defined in sec. 5 of the Edinburgh Municipal and Police Act 1879, and accordingly that the provisions of sec. 40 of the Edinburgh Municipal and Police (Amendment) Act 1891, requiring the submission of plans and sections of new courts, did not apply.

Burgh — Dean of Guild — "Tenement" — Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 50—*Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 7—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 50, as amended by the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, sec. 34, sub-sec. 7, and the Edinburgh Corporation Act 1900, sec. 80, regulates the open space required to be attached to houses, and, *inter alia*, provides that "in the case of houses in tenements intended to be occupied or used as flats or separate dwellings," any open space in front is not to be reckoned as part of the open space required.

A semi-detached villa was by a horizontal partition divided into two dwelling-houses, each having its separate entrance.

Held that it was not a house "in tenements," and accordingly that in reckoning the open space required, the open space in front was to be taken into account.

Opinion per the Lord Justice-Clerk that, "speaking generally, the word 'tenement' is used to describe a build-