The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Appellant—T. B. Morison. Agent—F. J. Martin, W.S.

Counsel for the Respondents—W. Thomson. Agent—W. J. Haig Scott, S.S.C.

Saturday, July 7.

SECOND DIVISION.

MIDDLETON'S TRUSTEES *v.* MIDDLETON.

Succession—Faculties and Powers—Power of Appointment — Exercise — Validity — Power to Appoint to Fee—Appointment to Fee Subsequently Restricted to Liferent —Restriction Held pro non scripto—Introduction of Appointees not Objects of Power.

By her marriage contract a wife was empowered to apportion the fee of a sum of money among the children of the marriage "in such proportions, and with such restrictions, and on such terms, and payable at such periods" as she might declare in writing. There were two children, a son and daughter. By her will and codicil she appointed the whole sum to her son, with a declaration that instead of being paid to him it should be held by her testamentary trustees for his liferent use allenarly and his issue in fee, subject to such conditions and in such shares as he might appoint, and failing appointment, equally. There followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by issue, as also powers to the trustees to make advances to the son out of capital, and to the son to provide a liferent to his wife if he married in case of her surviving him.

Held (1) that the provisions restricting the son's right to a liferent, and disposing otherwise of the fee, were *ultra vires* and wholly invalid, the suggestion being rejected that the valid could be eliminated from the invalid with the effect of giving a fee to the daughter and a liferent to the son, as figured by Lord M'Laren in *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; (2) that they fell to be treated as *pro non scriptis*, the son taking the fee of the whole fund under the initial part of the appointment. *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635, *followed*.

By an antenuptial contract of marriage between John Archibald Middleton and Elizabeth Somervell, the latter conveyed her whole means and estate to trustees, the fourth purpose of the contract providing that the fee should be held and applied by the trustees, burdened with a liferent to the surviving spouse, for behoof of Elizabeth Somervell's lawful children, and the survivors and survivor of them, and the lawful issue of such of them as might decease leaving issue, "in such proportions, and with such restrictions, and on such terms, and payable at such periods as the said Elizabeth Somervell, whom failing the said John Archibald Middleton, may appoint by a writing under her or his hand, and failing such appointment, equally to and amongst the said children if more than one, or the survivors or survivor of them jointly with the lawful issue of such of them as may decease leaving issue (the division being *per stirpes*), payable, unless otherwise directed as aforesaid, at the first term of Whitsunday or Martinmas occurring after the death of the survivor of the said Elizabeth Somervell and John Archibald Middleton, and after the said child or children, being sons, shall attain majority, or being daughters shall attain majority or be married, whichever of these events shall first happen. . . ."

John Archibald Middleton died in 1897.

Mrs Elizabeth Somervell or Middleton died on 26th September 1904 survived by two children, the only offspring of the marriage, viz., Constance Henrietta Middleton or Robertson Aikman and George Graham Middleton, and leaving a trust-disposition and settlement by which she conveyed her whole means and estate to trustees. The daughter Constance had by antenuptial contract of marriage entered into in 1899 conveyed her whole means and estate to trustees.

By the third purpose of her trust-disposition Mrs Middleton directed that the means and estate over which she had power of appointment under her antenuptial contract of marriage should be divided and apportioned as follows, viz.—(*First*) To her daughter Constance Henrietta Middleton the sum of £1000 sterling, payable to her at the period provided by the contract of marriage; (*Second*) to her son George Graham Middleton the remaining sum of £4001 sterling. And with respect to the sum thereby apportioned to her son, Mrs Middleton provided "that instead of being paid over to him, the same shall be paid to and held by my trustees as and when the same becomes available and invested in their own names as trustees foresaid for the liferent alimentary use allenarly of my said son, and for behoof of his lawful issue in fee, in such shares and proportions, and subject to such conditions and limitations, including the restriction of the share of any child to a bare liferent, as my said son may appoint, and failing such appointment, equally among them, share and share alike: Declaring that should my said son die without being survived by a child or children or remoter issue, the share of residue falling to him in liferent and his issue in fee shall fall and accresce to my said daughter or her issue equally among them: And notwithstanding what is above written, I hereby authorise and empower my trustees to advance and pay to my said son by way of loan or otherwise, and for any purpose they may consider proper, such sum or sums out of the capital of the

sum to be liferented by him as aforesaid as they in their own absolute discretion may think fit, and the receipt of my said son for any sums so advanced or paid to him shall be a sufficient exoneration and discharge to my trustees: And I hereby empower my said son to confer upon any wife whom he may marry, in the event of her surviving him, a liferent of said sum of £4001, or any portion thereof."

Mrs Middleton also left a codicil by which she revoked the appointment made in the third purpose of her trust-disposition and settlement set forth above, and in lieu appointed the whole of said fund of £5001 to her son George Graham Middleton, "and that under the same provisions and declarations, and with the same authorities and powers, as are specified in my said trust-disposition and settlement with regard to the proportion of said fund thereby originally provided to him."

The present special case was brought to elucidate certain questions which arose as to the effect of the exercise of her power of appointment by Mrs Middleton.

The antenuptial contract trustees of John Archibald Middleton and Mrs Middleton were the *first* parties to the case; the trustees acting under Mrs Middleton's trust-disposition and settlement and codicil were the *second* parties; George Graham Middleton was the *third* party; the antenuptial marriage contract trustees of Mrs Constance Henrietta Middleton or Robertson Aikman were the *fourth* parties.

The third party maintained that the power of appointment reserved to Mrs Middleton under her antenuptial contract of marriage had been validly exercised by her in so far as she made an appointment of the whole fund to him, but that the conditions and restrictions which the appointer endeavoured to impose were *ultra vires* and invalid, and ought therefore to be disregarded. In this contention the second parties concurred. Alternatively the third party maintained that Mrs Middleton validly exercised the power of appointment conferred upon her, and that the provisions made by her with regard to the destination of the fund were valid in their entirety. He further contended that in the event of its being held that he was entitled only to a liferent of the fund, and that he had no power of disposal with regard to the fee, the fee would fall to his issue if he had any.

The fourth parties maintained that Mrs Middleton had not validly exercised the power of appointment, and that the estate in the hands of the first parties fell to be divided equally between the third and fourth parties. Alternatively the fourth parties maintained (*a*) that the power of appointment was validly exercised by Mrs Middleton to the extent of appointing an alimentary liferent of the estate to the third party, and the fee to Constance Henrietta Middleton or Robertson Aikman, in which case the estate became wholly payable to the fourth parties on the termination of the third party's liferent thereof; or otherwise (*b*) that the power of appointment was validly exercised by Mrs Middleton only to the extent of appointing an alimentary liferent of the estate to the third party, leaving the fee unappointed and divisible equally between the third and fourth parties at the termination of the third party's liferent. In any event they maintained that the clauses authorising the trustees to make advances of capital to the third party, and empowering the third party to confer a liferent of the fund on his widow, were *ultra vires* and invalid.

The following questions were, *inter alia*, submitted to the Court—"1. Is the appointment of the marriage-contract funds contained in the said trust-disposition and settlement and codicil (1) wholly valid, or (2) only partly valid, or (3) wholly invalid? 2. If the second alternative be answered in the affirmative—(*a*) Is the third party entitled to the fee of the whole fund absolutely? or (*b*) Has there been a valid restriction of the third party's interest to a bare liferent?"

Argued for the third party—The only power the appointer had being that of appointing to the fee, any attempt to restrict was clearly *ultra vires*, fee and liferent being in no sense *ejusdem generis*—*Baikie's Trustees* v. *Oxley & Cowan*, February 14, 1862, 24 D. 589; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R., 273; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, Lord Adam at 639, 39 S.L.R. 426; *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401. Initially, however, the appointer had made a valid appointment of the fee to the third party, and it was now well settled that where a good appointment was hampered by invalid restrictions, and where the good could be separated from the bad, the appointment was treated as absolute and the invalid conditions read *pro non scriptis*—*M'Donald* v. *M'Donald's Trustees*, January 17, 1875, 2 R. (H.L.) 125, at 132, 12 S.L.R. 635; *Warrand's Trustees*, *cit. sup.*, *Matthews Duncan's Trustees*, *cit. sup.*; *Carver* v. *Bowles*, 1831, 2 Russell & Mylne 301; *Woolridge* v. *Woolridge*, 1859, Johnson's Reports, 63, at 69. In the present case all the conditions were invalid and must go by the board. This was admitted, except as to the accretion to the daughter, which it was argued was good, she being one of the objects of the power, the result being, it was contended, to give the fee to her, subject to a liferent by the third party. The answer, however, was that the various parts of the destination were inextricably bound up with one another, the destination to the daughter being a mere destination-over, and one which the testatrix obviously did not intend to have the effect of an unconditional gift of fee. This was not the class of case figured by Lord M'Laren in *Neill's Trustees*, *cit. sup.*

Argued for the fourth parties—The whole appointment was bad. The testatrix would never have intended the initial words of gift to stand without qualification. The cases founded on by the third party where conditions which were *ultra vires* had been

eliminated were all distinguishable. But if the appointment was good at all it was an appointment of the fee to the daughter burdened by a liferent to the son—*Neill's Trustees, cit. sup.*, Lord M'Laren; *Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, 42 S.L.R. 404. The only way to restrict a fee was to limit it to a liferent. Compare also *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450; *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *Marder's Trustees* v. *Marder*, March 30, 1853, 15 D. 633.

LORD KYLLACHY—In this case the late Mrs Middleton had, under her marriage contract, in the events which have happened, power to apportion the fee of a sum of £5001 between the two children of the marriage, who, it is common ground, both survived its dissolution, and subject to the exercise of the power had each a vested interest in the fund. The apportionment was to be an apportionment of the fee, but it might be made "with such restrictions and on such terms and payable at such periods as Mrs Middleton or, failing her, her husband" (who predeceased her) "might appoint."

In pursuance of this power Mrs Middleton by her trust-disposition and settlement made in the first place in absolute terms a division of the fee between her son and daughter, giving £1000 to the daughter and £4001 to the son. But then she proceeded with respect to the sum apportioned to her son to provide and declare that he should (subject to certain powers to the trustees to make advances to him out of capital, and a power to himself to provide a liferent of the fund to his wife) *be restricted to an alimentary liferent*, the fee going on his death to his issue, if he left any, whom failing to his sister, the other child of the marriage, whom failing to her issue, if she left issue.

A codicil which was executed on the daughter's marriage revoked the appointment thus made, and in lieu thereof appointed the whole fund to the son, but under the same provisions and declarations as were expressed in the trust-disposition and settlement.

The first question to be decided is whether the above adjected "provisions and declarations," by which the son's right was in effect reduced to a liferent, and the fee disposed of as above expressed, were within or beyond the power conferred by the marriage contract. It was not disputed that, taken as a whole, they are beyond the power. For they not only restrict to a mere liferent the son (the third party to the case), who had right under the contract to obtain a share of the fee, but they carry the fee primarily to persons who are not objects of the power at all, and failing them—at least contingently—to other persons who are also not objects of the power.

The suggestion, however, is that among the persons who under the adjected provisions might in possible circumstances take the eventual fee, is included the third party's said sister—the daughter of the marriage—and she being, of course, personally an object of the power, it is contended that that circumstance brings the case within the exception figured by one of the judges in the case of *Neill's Trustees*, 4 F. 636, and more recently approved, if not accepted, in the case of *Dalziel's Trustees*, 7 F. 545.

Now without at all expressing or suggesting any opinion adverse to the exception referred to, or to anything said or decided in either of the cases just mentioned, it appears to me to be, for present purposes, a sufficient answer that the somewhat complex set of provisions or declarations which are here in question must necessarily be read as a whole, and must stand or fall as a whole. In other words, they cannot upon their just construction be broken up into parts, and (all their illegitimate elements being cut out) be read as providing substantially that while the son (the third party) shall have only a liferent, the fee shall belong wholly to his sister, the other child of the marriage. As against that suggestion it seems enough to point out that it would be making, in effect, a new apportionment for Mrs Middleton—an apportionment which there is no reason to think she would have desired. Assumptions on such matters are, of course, inadmissible, but even if that were otherwise it would I think be a violent assumption that Mrs Middleton if she had known or been informed that the whole provisions in favour of her son's issue and her daughter's issue were ineffectual, would have desired that the contingent fee given in certain events to her daughter, should go to her daughter absolutely and carry to her the fee of the whole fund. Nothing of that kind was affirmed in the cases of *Neill's Trustees* and *Dalziel's Trustees*, nor is there, so far as I know, any principle or authority for such a contention.

It therefore appears to me that the provisions or declarations—or whatever they may be called—which are here in question, are not partially but wholly outside the power, and are therefore wholly *ultra vires* and invalid.

The question which remains is whether that being so the said provisions and declarations are so attached to and bound up with the initial gift as to make their efficacy a condition of the gift, and thus in result to make the whole apportionment invalid. That is the alternative contention of the fourth parties, who represent the daughter—a contention which would give them one-half of the fund. As to this I do not, I think, need to say more than that it is now too late to quarrel or canvass the canon of construction which has in this matter been conclusively established by the class of cases of which *Carver* v. *Bowles* (2 Russell and Mylne, 301) and *M'Donald* (2 R. (H.L.) 125) are the best known examples. That rule or canon is, I apprehend, just this, that if in terms absolute and unqualified an initial gift, self-contained and

complete, is given under a power of apportionment or of appointment to an object or objects of the power, any adjected conditions or restrictions which are in excess of the power have no effect and are to be treated simply as *pro non scripto*. Applying that principle I am unable to doubt that the result here is as contended for by the third party and that he is entitled to have immediate payment of the whole fund.

LORD STORMONTH DARLING—The power which the late Mrs Middleton had by her marriage contract to appoint the sum of £5001 among her children was coupled with an option to appoint "with such restrictions and on such terms, and payable at such periods," as she might declare in writing. She exercised the power by a will dated in 1898 and a codicil dated in 1900. She herself died in 1904, leaving two children, an unmarried son (Captain Middleton) and a married daughter (Mrs Robertson-Aikman). The effect of her will and codicil taken together was to appoint the whole fund of £5001 to her son, but declaring that instead of being paid over to him the same should be held and invested by her testamentary trustees for his liferent use allenarly, and for behoof of his lawful issue in fee, in such shares and subject to such conditions and limitations (including the restriction of the share of any child to a bare liferent) as her son might appoint, and failing such appointment, equally. Then followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by a child or children or remoter issue, as also a power to the trustees to make advances to the son out of the capital for any purpose they might consider proper; and lastly, a power to the son to provide a liferent to any wife he might marry in case of her surviving him.

Now, a power to appoint a fee "with such restrictions, and on such terms, and payable at such periods," as the donee of the power may appoint, does not, either on principle or authority, justify its exercise by cutting down the fee to a liferent and giving the fee to somebody else. Whatever the restrictions are they must be such as are consistent with a right of fee in the beneficiary or beneficiaries who are objects of the power, Here the possible issue of Captain Middleton were not objects of the power, and the attempt to give a fee to them and a mere liferent to Captain Middleton was plainly *ultra vires*.

But it does not follow that the whole appointment is thereby vitiated. The judgment of the House of Lords in *M'Donald* v. *M'Donald's Trustees* (2 R. (H.L.) 125), as explained by Lord Chancellor Cairns at p. 132 and by Lord Selborne at p. 135, makes it clear that where you have a gift to an object of the power, and nothing which can invalidate that gift but conditions superadded as to the mode in which the object of the power is to enjoy what is given, the gift is valid, and takes effect without reference to the conditions, notwithstanding that the conditions may have operated as a motive in the mind of the person appointing.

Here the initial gift to Captain Middleton is as plain as words can make it. The words of the will are—"To my son George Graham Middleton the remaining sum of £4001; and with respect to the sum hereby apportioned to my said son, I hereby provide and declare," and so on. Then in the codicil, when the sum mentioned in the will is increased to £5001, the words are—"I hereby appoint the whole of said fund of £5001 to my son George Graham Middleton, and that under the same provisions and declarations" as in the will. The reason for this change of amount is explained in the codicil on the ground that the lady's daughter "is now otherwise sufficiently provided for."

The true effect, therefore, of what Mrs Middleton has done is to give the whole fee absolutely to her son, the third party. The case would really be too clear for argument, except for an ingenious contention by the marriage-contract trustees of Mrs Robertson-Aikman, which, as I understood it, was this—"That inasmuch as there was a destination over in favour of her or her issue, and she was undoubtedly an object of the power, the proper way to construe the will and codicil was to read out everything in favour of Captain Middleton's possible issue as not being objects of the power, and to hold that the power was validly exercised to the effect of giving the fee to Mrs Aikman (or to the trustees themselves for her behoof) subject to an alimentary liferent in favour of Captain Middleton. When any case arises where the donee of a power to appoint a fee between two persons attempts to exercise it by giving an immediate fee of the whole to one of them subject to a liferent of the whole (or a part) to the other, it will be time enough to deal with it. That was probably the kind of case suggested by Lord M'Laren in *Neill's Trustees* (4 F. 636), which his Lordship described as "unlikely to occur, because a testator generally wishes to give the fee to the children of the person to whom he gives the liferent." But I do not see how the recent judgment of the First Division in *Dalziel's* case (7 F. 545) touches the question in any way. And certainly the case suggested is miles away from the present case. The destination to Mrs Aikman's trustees is a mere destination-over, to take effect only "should my said son die without being survived by a child or children or remoter issue." To turn that into an immediate and unconditional gift of the fee, particularly to a person described as "otherwise sufficiently provided for," would be to do such violence to Mrs Middleton's plain intention as to be quite inadmissible on any known canon of construction.

Accordingly, I agree that the second alternative of the first question and head (*a*) of the second question should be answered in the affirmative, and that all the other questions are superseded.

LORD LOW—I am of opinion that the rule laid down in the House of Lords in the case of *M'Donald* (2 R. (H.L.) 125), and which has been so accurately stated by Lord Kyllachy, is applicable to the present case. The rule had not been recognised in Scotland prior to the case of *M'Donald*, but it was well settled in English law, the leading case being *Carver* v. *Bowles* (2 Russell and Mylne, 301, and 34 "Revised Reports," p. 102). And it is worthy of notice that the circumstances in the latter case closely resembled those with which we are dealing.

There as here a certain sum was conveyed to trustees under an antenuptial marriage contract which they were directed to hold for the spouses and the survivor in liferent, and upon the death of the survivor to transfer the fund to and among the children of the marriage at such times, in such shares, and under such conditions, restrictions, and so on, as the spouses or the survivor might appoint.

The husband survived his wife, and exercised the power of appointment in his will, whereby "in pursuance of said power" he did "direct and appoint, give and bequeath the said sum unto my five children" (whom he named) "equally to be divided among them, share and share alike." He then, however, went on to declare that the shares appointed to his daughters should be held by his trustees "upon and for the same trusts, intents, and purposes for the benefit of each of my said daughters and their issue," as were directed in regard to the shares of the residue of his personal estate which he had bequeathed to his daughters and their issue. These trusts were for the daughters in liferent for their separate use without power of anticipation, and for their issue in fee.

The Master of the Rolls held that the initial words of appointment were sufficient to vest the shares absolutely in the daughters, and that the attempt to restrict their interest by limitations to their issue being inoperative did not cut down the absolute appointment.

Now in the present case the circumstances are, for the purpose of the question at issue, practically the same as in the case of *Carver*. I think that it is convenient to take the clause exercising the power of appointment as it originally stood in Mrs Middleton's settlement, because it is upon that clause that the question depends, and the result is not affected by the change which was made by the codicil. The clause commences with words which unequivocally and unconditionally appoint the fund to Mrs Middleton's son and daughter—£1000 to the latter and £4001 to the former. Mrs Middleton, however, having made that absolute appointment proceeded to attempt to restrict the interest of the son by limiting his enjoyment to a liferent and giving the fee to his lawful issue. That being an attempt to appoint to the fund persons who were not objects of the power, was, according to the rule laid down in the case of *Carver*, and adopted by the House of Lords in *M'Donald's Trustees*, inoperative, and falls to be disregarded, leaving the initial absolute appointment unaffected.

It was, however, further argued that if all the provisions in favour of persons who were not objects of the power were struck out there would remain not an absolute gift of £4001 to the son Captain Middleton, but a gift of that amount to him in liferent only and to his sister Mrs Aikman (who was also an object of the power) in fee. Now I do not think it necessary to consider whether if that had in fact been the appointment which was made, it would or would not have been valid, because it seems to me to be impossible to separate the contingent right of fee which was given to Mrs Aikman from the context. The primary object which Mrs Middleton had in view in limiting her son's interest to a liferent was to secure the fee to his issue, and accordingly it was only failing his issue that Mrs Aikman and her issue were brought in. But a destination to Captain Middleton in liferent and his children in fee, whom failing to Mrs Aikman or her issue, and a destination to Captain Middleton in liferent and Mrs Aikman in fee, are entirely different destinations, and to read the former (by striking out everyone who was not an object of the power) as meaning the latter, would be not to construe the disposition of the fund which Mrs Middleton actually made, but to make a disposition for her. The disposition was obviously made upon the assumption that Mrs Middleton had power to give a fee to her son's issue, and it is impossible to say what she would have done if she had been aware that such a destination was *ultra vires* of her and would be altogether inoperative.

I am therefore of opinion that the second branch of the first question should be answered in the affirmative and the other two branches in the negative, and that branch (*a*) of the second question should be answered in the affirmative and branch (*b*) in the negative. The first two questions being answered in that way, it is probably unnecessary to dispose of the remaining questions.

LORD JUSTICE-CLERK—The restrictions in the deed in this case were plainly not within the power of appointment, as they were proposed to be exercised in favour of beneficiaries who were not within the objects of the power.

That being so, the question is whether the provisions and restrictions must be read as a whole, and on that matter I agree with Lord Kyllachy in holding that they must.

It would, I think, be a stretch such as has never been made in similar cases to give effect to any other contention. The remaining question is Whether, as was ingeniously contended, the destination-over to the daughter can be read as a gift of the fee to her in fulfilment of the power of appointment? The purpose of the proposed liferent was solely to secure the fee to her son's children. I agree with all that your Lordships have said.

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