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-

ing containing a number of dwelling-houses within four walls, all or a number of them having a common access from the street."

Burgh—Dean of Guild—Building Regulations—Open Space "Used Exclusively in Connection with" House—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 by the Edinburgh Corporation Act 1900, sec. 80, provides that the requisite open space attached to houses shall be "pertaining to and used exclusively in connection with" such houses.

A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. Access to the tenement from the street was to be obtained through a passage at one side of the villa, and through the remaining part of the back-green.

Held (*reversing* the Dean of Guild) that the petitioner was not bound to erect a fence in continuation of the side wall of the villa so as to separate the passage to the new tenement from the back-green to be used exclusively in connection with the villa.

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 5, defines "court" as including "any court or passage used solely for foot-passengers, and open and accessible to the public from a street or private street and forming a common access to lands and heritages separately occupied."

The Edinburgh Municipal and Police Amendment Act 1891 (54 and 55 Vict. cap. cxxxvi), sec. 40, provides—"Every person who proposes to lay out or make any new street or court, or part of a street or court, shall give notice of such proposal to the Magistrates and Council, and shall . . . submit plans and sections thereof for the approval of the Magistrates and Council, and such plans shall show the levels and widths thereof, its intended position in relation to the streets nearest thereto, the intended lines of drainage, and the intended size, depth, and inclination of each drain, and the details of the arrangements proposed to be adopted for the ventilation of the drains. . . ."

Section 50, as amended by section 34, sub-section 7, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893 (56 and 57 Vict. cap. cliv), and by section 80 of the Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. cxxxiii), provides—"Every new house and any building altered for the purpose of being used as a house, shall have in the rear thereof or directly attached thereto, and pertaining to and used exclusively in connection with such new house or building altered for the purpose of being used as a house, an open space at least equal to three-fourths of the area to be occupied by the intended house where such house is not of greater height than three storeys . . . Provided always that, in any case where the thorough ventilation and light of any house or building is in the opinion of the Dean of Guild Court otherwise secured, or under other special circumstances, the said court may in their discretion allow the open space to be reduced . . . Provided, further, that from and after the passing of this Act (1891 Act) all existing houses having any open space adjacent thereto shall as regards such open space be subject to the foregoing provisions of this section applicable to new houses to the extent to which such open space is available: Provided always that in the case of houses in tenements intended to be occupied or used as flats or separate dwellings having an open space or plot in front thereof, such open space or plot shall not be reckoned as part of the open space required to be provided as aforesaid."

Alexander M'Arthur, painter, proprietor of a house 34 Tower Street, Portobello, presented a petition in the Dean of Guild Court, Edinburgh, in which he called as respondents amongst others the Lord Provost, Magistrates and Council of the City of Edinburgh, and craved warrant to build a small tenement on the garden ground behind his house with cement footpath and court thereto. No. 34 Tower Street had two storeys, and formed one-half of a block of two semi-detached villas. The other half was still occupied as a semi-detached villa, but No. 34 had by a horizontal partition been converted into two dwelling-houses, the one on the ground floor, the other on the floor above. Each had its separate entrance, the ground floor house retaining the old entrance, the upper floor having its entrance by an outside stair at the back. In front of the house there was a garden plot, and at the side of the house there was a passage leading from Tower Street to a considerable area of ground behind the house; this all belonged to the petitioner. The proposed tenement, which was to consist of four dwellings, was to be built on the back part of the ground to the back of No. 34. The only access was to be through the side passage, and thence through No. 34's back-green, the proposed court. Both the front plot and also the ground or court at the back which would remain after the erection of the new tenement, extended to more than three-quarters of the area of No. 34.

The Lord Provost, Magistrates and Council appeared as respondents, and stated amongst others objections to the following effect:—(1) That the petitioner proposed to form a 'court' within the meaning of section 5 of the Act of 1879 in front of the proposed tenement, and that plans and sections of this court required to be submitted to and approved of by the Magistrates and Council as provided

by section 40 of the Edinburgh Municipal and Police Amendment Act 1891, but that this had not been done; and (2) that if the tenement was put up as proposed, the open space required to be left for the existing house, No. 34 Tower Street, would be curtailed below the area required by the Edinburgh Municipal and Police Acts.

The Dean of Guild (WILSON) on 22nd February 1906 refused to grant the warrant craved and sustained the latter objection of the Magistrates.

Note.—". . . . The first objection put forward by the Magistrates and Council depends upon the interpretation of section 5 of the Edinburgh Municipal and Police Act 1879, in which the word 'court' is defined as including 'any court or passage used solely for foot-passengers, and open and accessible to the public from a street or private street, and forming a common access to lands and heritages separately occupied.' There is no dispute that the petitioner proposes to form a court in front of the proposed tenement, but there is a dispute as to whether such court would be a court within the meaning above given. If it is a court within that meaning, it is certain that by section 40 of the 1891 Act the petitioner is bound to submit a plan of it to the Magistrates and Council, and to get their approval. The Dean of Guild is unable to take the view that the court to be formed by the petitioner is one within the meaning of the Edinburgh Acts, which requires the approval of the Magistrates and Council. The court to be formed by the petitioner will undoubtedly be solely for foot-passengers, it will be open from a street, and it will form a common access to lands and heritages separately occupied, but it will not be accessible to the public. The petitioner would be entitled to put up a gate upon the passage from the street to the area behind the existing house, No. 34 Tower Street, and the inhabitants of the proposed new tenement would be entitled to exclude the public from what the respondents say will be a court which requires their approval before it can be formed. It therefore appears to the Dean of Guild that the court proposed to be formed by the petitioner is not a court for which the petitioner requires to get the approval of the Magistrates and Council.

"The second objection insisted in by the Magistrates and Council . . . is that if the proposed tenement is erected on the site now proposed, the area attached to and in rear of the existing house, 34 Tower Street, will be curtailed below what is required as open space under the provisions of section 50 of the Edinburgh Municipal and Police Amendment Act 1891, as amended by section 34, sub-section 7, of the Edinburgh Improvement and Municipal and Police Amendment Act 1893, and by section 80 of the Edinburgh Corporation Act 1900. The objection really amounts to this, that although, if the proposed tenement were erected, there would be sufficient area of open space in rear of the existing house to comply with the requirements of the Acts, that area will not be 'used exclusively' in connection with that house, as it will form part of the court for the proposed tenement. It appeared, however, to the Dean of Guild that the passage from the street could be continued up to the proposed new tenement by putting up a fence in continuation of the side wall of 34 Tower Street, and the ground immediately in rear of 34 Tower Street would then not be used as part of the court of the proposed new tenement, but would be used exclusively in connection with 34 Tower Street. The area thus used exclusively in connection with 34 Tower Street would satisfy the requirements of the Acts. The Dean of Guild, therefore, gave the petitioner an opportunity of amending his plans by showing a fence which would separate the passage to the new tenement from the ground to be used exclusively by 34 Tower Street. The petitioner, however, refused to amend his plans, and on the plans as now before the Court the petitioner proposes to utilise, in connection with the new building, land which under the Municipal Statutes must be used exclusively in connection with the old. The Dean of Guild is therefore obliged to sustain this objection to the petitioner's plans. . . ."

On 8th March 1906 the petitioner appealed to the Court of Session, and argued—(1) No. 34 Tower Street was not a tenement in the ordinary sense of the word, which implied a number of dwellings with a common entrance; it must be taken in this sense, for there was no definition in the Municipal Statutes. That this was the meaning of "tenement" was confirmed by the references in the Municipal Acts to the duties of persons living in tenements, *e.g.*, Edinburgh Municipal Act 1891, section 52, and Building Rules in Schedule annexed; Edinburgh Corporation Act 1900, section 80. There were only two dwellings in No. 34, and each had its separate entrance. If it were not a tenement the plot in front could be reckoned, and was sufficient to fulfil the requirements of the Acts as to open space. (2) In any event the ground at the back fulfilled the statutory requirements. "Used exclusively in connection with" meant that more than one house could not have the same "open space." The new tenement would admittedly have sufficient open space elsewhere. The erection of a fence was not necessary and would not give more light or ventilation. The statute must be read reasonably, and in view of its object to provide sufficient light and ventilation. Counsel for the petitioner was not called upon to reply to the objection that although a "court" would be formed, plans had not been submitted and approved.

Argued for the respondents—(1) No. 34 Tower Street was a "house in tenements" even although the flats had separate entrances—*Couper* v. *Surveyor of Maryhill*, March 6, 1891, 18 R. 642 (the Lord Justice-Clerk at p. 644-5), 28 S.L.R. 454. The open space in front could therefore not be considered. (2) No. 34 would no longer, if the tenement were built, have its

back-green "pertaining to and used exclusively" by itself, for the petitioner had declined to erect the necessary fence; its back-green would be used as much or more by the new tenement as by itself. (3) The back-green of No. 34 would by the erection of the new tenement be made into a "court" within the meaning of section 5 of the Act of 1879; plans of it should therefore have been submitted to the Magistrates. The Dean of Guild was wrong in holding it would not be "accessible to the public." Any member of the public would be able to walk in; the phrase implied lack of physical obstruction, not right of access; that would give the words, which applied to courts opening off private streets and courts on private ground (*Couper, cit. supra*), no meaning.

LORD JUSTICE-CLERK—It is certainly a most unfortunate thing that one of the most important terms with which we have to deal in this class of case—the term "tenement"—is not defined in the statutes we have to deal with. We are accordingly obliged to take the term in the sense in which the word is used in ordinary language at the present day. Taking it in this sense, I am clearly of opinion that it does not include any building such as the existing house at 34 Tower Street. It appears that one-half of this house is still used as a semi-detached villa. The other half has been divided into two dwellings, one on the ground floor with its own entrance, and the other on the upper floor with a separate entrance by means of a stair at the back. This is not a "tenement" at all in the ordinary sense of the word. Speaking generally, the word tenement is used to describe a building containing a number of dwelling-houses within four walls, all or a number of them having a common access from the street. This view is confirmed by the references in the various statutes to the duties of the persons inhabiting the tenement, such as the duty of attending to the cleaning and lighting of the common entrance and stair. I think it would be absurd and an abuse of language to extend the meaning of the word tenement to cover a building such as that in question in the present action.

The Corporation take advantage of this appeal to raise another question—the question, namely, whether the space between the back of the existing house and the front of the proposed new building is a "court" within the meaning of section 5 of the Act of 1879. I am of opinion that it is not. All that the petitioner proposes to do is to build a house on his back-green. That is not building a court within the sense of the statute. I quite concede that it is a question of degree, for I can conceive many cases of buildings being erected at the back of other houses in such a way that the space between the houses was a court in the sense of the statute. But that is not so in the present case. I do not think that the space proposed to be left at the back of 34 Tower Street will be "open and accessible to the public." In a general sense the terms open and accessible may be applied to it, but it is not open and accessible in the sense of the statute—in the sense, that is, that members of the public would be entitled to go there as a matter of right. Persons might be allowed to go there on business, as, for instance, for the purpose of delivering goods or visiting, or even sanitary inspection, but such use would not be as a matter of personal right to members of the public as such. Accordingly on this point I agree with the judgment of the Dean of Guild.

LORD KYLLACHY—I am of the same opinion. As to the point last argued, I agree with the Dean of Guild, and do not think it necessary to add anything. As regards the other point, viz., whether the building in question falls under the class of "houses in tenements intended to be occupied or used as flats or separate dwellings," I shall not attempt any definition of the word "tenement." All I need say is that I am unable to assent to the proposition that wherever a semi-detached villa is divided either vertically or horizontally into two dwellings, each with its own entrance, it thereby becomes a tenement in the sense of these statutes.

LORD STORMONTH DARLING—I agree with your Lordships on both points which are necessary to be decided here. With regard to the question of the fence, I think that it is a carping objection, because although it professes to deal with light and ventilation it has nothing to do with either, since both are amply secured by open spaces in front and behind.

LORD LOW—I am of the same opinion. As regards the meaning of the word "tenement" in the provision under construction, I have no doubt that what your Lordship in the chair has said correctly describes what is generally meant nowadays in Scottish burghs by the word "tenement." It might, however, be better that we should not tie ourselves down to any exact definition, because there may possibly be buildings not having a common entrance which would fall within the category of tenements. I am quite clear, however, that in the present case the building in question is not a tenement within the meaning of the statutes.

The next question is, whether, there being in point of fact sufficient space left for light and ventilation, it is necessary in order to satisfy the precise words of the statute that a fence should be put up to make it certain that the area be used "exclusively" in connection with 34 Tower Street. The statutory provision requiring a certain open space to be attached to each house is designed to secure in the public interest thorough ventilation and sufficient light, but it is nevertheless a restriction on the use of private property, and ought to be construed and administered so as not to impose a greater burden upon proprietors than is necessary to attain the object in view. Here, as I have said, the space allowed admittedly satisfied the statutory

requirement, and the suggested fence would serve no practical purpose, while it would put the proprietor to considerable expense.

On the question whether the space would be a "court" I agree with your Lordships, and have nothing to add.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the said interlocutor [of 22nd Feb. 1906] appealed against: Find (1) that the court proposed to be formed by the petitioner is not a court for which the petitioner requires to submit plans for the approval of the Dean of Guild Court; (2) that the presently existing house at No. 34 Tower Street is not a tenement, and that accordingly in determining the open space required to be attached thereto the petitioner is entitled to take into account the open space left in front thereof, and is not restricted to open space left at the back thereof; and (3) that the petitioner is not called on to erect a fence in continuation of the side wall of 34 Tower Street: Remit to the said Dean of Guild to grant the lining craved."

Counsel for Petitioner (Appellant)—A. M. Anderson—J. A. Christie. Agents—Balfour & Manson, S.S.C.

Counsel for Respondents—M'Clure, K.C. —Kemp. Agent—Thomas Hunter, W.S.

Wednesday, June 27.

FIRST DIVISION.

A *v.* B.

Expenses—Husband and Wife—Petition by Wife for Custody of Children—Wife's Expenses—Whether Wife Entitled to Expenses as between Party and Party or as between Agent and Client—"Necessary" Expenses.

Held that as the expenses incurred by a wife in a successful petition for custody of children were not "necessary" expenses which a husband was bound to pay, the petitioner was only entitled to expenses in ordinary form.

Question (*per* Lord Kinnear) as to the rule observed in awarding a wife expenses in a consistorial cause, "whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband, should be applicable to the case of a wife having a considerable separate estate."

A, wife of B, presented a petition for the custody of the pupil children of the marriage between her and B, under section 5 of the Guardianship of Infants Act 1886, and at common law. Answers were lodged by the respondent, and these were followed by certain steps of procedure, but before a proof, which had been ordered, had been taken the respondent lodged a minute consenting to the prayer of the petition being granted with expenses.

On the minute appearing in the Single Bills, counsel for the petitioner moved for expenses as between agent and client. The respondent, while consenting to an award of expenses in ordinary form being pronounced against him, opposed the motion. It was admitted that the petitioner was liferented in about £50,000 of separate estate, and that the respondent was a man of ample means.

At advising—

LORD PRESIDENT—The facts here are that this is a petition by a lady for the custody of certain children, in which she makes some very strong averments against the character of the respondent. At first the respondent resisted the crave of the petition, but afterwards he lodged a minute consenting to the prayer being granted, and the sole question now before us is whether the expenses of the petitioner should be given her as ordinary expenses or as expenses as between party and agent. The only other fact in ths case that it is necessary to mention is that the respondent is a man of ample means, and that the petitioner, though not possessed of such ample means as the respondent, yet is the possessor of a separate estate.

I have looked into the authorities, and it appears to me that the only ground in this class of case for awarding expenses as between party and agent instead of in the ordinary way, is for the purpose of avoiding circuity, and by circuity I mean that a wife, having recovered expenses awarded to her in the ordinary way, should thereafter claim and receive from her husband, as a debt due to her, the difference between the expenses awarded to her as between party and party and the expenses incurred by her as between party and agent. To avoid this circuity the Court will give expenses as between party and agent. The test in all such cases therefore is this—were the expenses "necessary" expenses of the wife. Now, it has been settled that expenses incurred by a wife in a petition for custody of children are not "necessary" expenses (Fraser, Husband and Wife, i. 646), so I think that the only expenses to which the petitioner is entitled here are expenses taxed on the ordinary scale.

LORD M'LAREN—I agree. The only class of cases where a wife gets expenses as between agent and client, instead of on the more moderate scale, are such as were originally consistorial causes. Now an application for custody of children is not a consistorial cause, but is an appeal to the *nobile officium* of the Court, and the proof of this is that the case does not originate in the Outer House, as consistorial causes do, but in the Inner House. This then is not a case to which either the principle or the practice of awarding expenses in consistorial causes can be applied.