to retain possession of the subjects let to him under his lease after the period determined, or if he did not do that to take possession of the plant and machinery in order to make them forthcoming to the arrester. I think there was no obligation of the kind, and therefore I am still unable to see that any obligation by the tenant to the landlord existed which has been effectually attached by arrestment, and which the arresting creditor can now compel the tenant to perform to him. In that view I think we are now in a position to say that the arrestment has been futile, that the interest of the landlord in the machinery and plant in question has not been validly attached, and that the defenders are therefore to be assoilzied.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court dismissed the action as incompetent.

Counsel for the Pursuers and Respondents—H. Johnston—Macfarlane. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Defenders and Reclaimers—W. C. Smith—Sym. Agents—A. P. Purves & Aitken, W.S.

Saturday, July 7.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

HOGG *v.* MAGISTRATES OF EDINBURGH.

Burgh—Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. c.* 136), *sec.* 44—*Edinburgh Improvement and Municipal Police (Amendment) Act* 1893 (56 *and* 57 *Vict. c.* 154), *sec.* 34—*Height of New Buildings Erected in Existing Street.*

Held that the provisions of section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891, as amended by section 34 of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, regulating the height of houses and buildings in existing streets, apply to buildings erected on ground vacant and unbuilt on, fronting an existing street.

By section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891 (54 and 55 Vict. cap. 136) it is enacted:—"Houses or buildings in any existing street or court shall not without the sanction of the Magistrates and Council be increased in height above the height of one and a quarter times the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest habitable room. Provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height." By section 34, sub-section 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893 (56 and 57 Vict. cap. 154) it is enacted:—"Sections 42 and 44 [*i.e.*, of the 1891 Act] shall be read as if the word 'habitable' occurring therein respectively were omitted therefrom."

On 6th April 1894 John Hogg, builder, Leith, presented a petition to the Lord Dean of Guild of the city of Edinburgh for warrant to erect two tenements of dwelling-houses of an average height of 42 feet from the level of the pavement to the ceiling of the highest room on a piece of ground vacant and unbuilt upon fronting the public street of Maryfield Place, Edinburgh, by which access was to be obtained to the said tenements.

Maryfield Place is an existing public paved street 24 feet in width. One and a quarter times the width of the street thus equalled 30 feet, which, if the sections above quoted applied to the tenements proposed to be built, was the maximum height allowed for these tenements, and was thus exceeded to the extent of 12 feet by the proposed height of the tenements.

On 14th June 1894 the Dean of Guild pronounced the following interlocutor:—"In respect that the height of the petitioner's proposed tenements exceeds the height prescribed by section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891, as amended by section 34, sub-section 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, and that the petitioner has not obtained the consent of the Town Council to such increased height, refuses the prayer of the petition *in hoc statu*, and decerns."

Against this interlocutor the petitioner reclaimed, and argued—The 44th section of the Act of 1891 did not apply to houses or buildings newly erected on ground previously unbuilt on. In the words of Lord President Inglis when construing section 129 of the Edinburgh Municipal and Police Act 1879 (the section in that Act analogous to the present), this section only applied to "existing houses or buildings in existing streets or entirely new houses or buildings which have been erected in place of old houses which have been pulled down"—*Pitman's Trustees*, 9 R. 444. A building which did not exist could not be increased. If the Legislature had intended this section to apply to buildings newly erected in vacant ground, they would have used the word "exceed," as had been done in section 42. The decision of the Dean of Guild should therefore be reversed.

Argued for the respondents, the Lord Provost and Magistrates of the city of Edinburgh—The general object of this part of the Statute of 1891 was to control the heights of houses in the city. The special object of section 44 was to fix a definite standard for all houses in existing streets. It was the evident intention of the Legislature that this section should apply to houses built on vacant ground fronting a public street and even on a strict gramma-

tical construction the terms of the section applied to such houses, because a building could not be increased in height until part of it was erected. The term "increased" in this section was to be read as meaning exceed in height. The decision of the Dean of Guild was sound.

At advising—

LORD RUTHERFURD CLARK—The question is, whether the 44th section of the Edinburgh Police Act of 1891 applies to a house built on a site on which a house had never been erected? It provides that houses in an existing street shall not be "increased in height" beyond a limit therein specified. The appellant contends that these words are applicable to existing houses only, because it is a solecism in language to speak of a non-existent house being increased in height.

The respondents admit the inaccuracy of the expression, but they maintain that it means "shall not be raised higher," or "shall not exceed in height." If so, it is unfortunate that neither phrase is used, and that the appropriate correction was not made when the section was amended in 1893.

It seems to be certain that the section applies to houses which are taken down and re-built. A similar section in a previous Act was so construed by the Lord President in the case of *Pitman*, 9 R. 444. The proviso, however, removes all doubt. It declares that any existing house in any existing street, if taken down, may be rebuilt to its existing height. Perhaps there may be difficulty in finding the existing height of a house that has ceased to exist. I daresay that it may be overcome by legitimate construction. But in declaring that a house which is rebuilt may be exceptionally dealt with, the proviso shows that if the benefit of the exception cannot be claimed, the house must be within the rule. In that case the house cannot be raised higher than the height specified in the statute. It follows that in regard to a new house of this kind the words which we are considering must have the meaning which is attributed to them by the respondents.

When this result is reached all difficulty ceases. The same construction which is necessary in one class of new houses must be adopted for all. The words of the section are very general. They comprehend all the houses and buildings in any existing street, and, subject to the proviso, put all under the same limitations as to height. There is no reason why all should not be under the same regulations, or why any should be under none. We must, if it is possible, construe the statute so as not to limit its generality, and in holding that the words "shall not be increased in height" are to be read as equivalent to "shall not exceed in height," I do not offend against the ordinary rules of construction. I am giving them a meaning that they are capable of bearing, and which is in consonance with the purpose of the Act. I have shown that in one case they are used in that sense. I think that they are used in the same sense in all cases.

LORD TRAYNER—The decision of this case depends upon the construction which is put upon the 44th section of the Edinburgh Police Act of 1891. That section is certainly not happily expressed, but the construction put upon it by the appellant, and which he asks us to adopt, is a construction which is practically destructive of the section. This, in my view, is not an admissible construction if any other can be reasonably given to the section which will preserve it and make it of avail, and this, in my opinion, can be done. The word "increased," on which the question turns, may be read, no doubt, as having reference to existing houses; and the observation made by the appellant was quite a fair one, that you cannot "increase" what does not already exist. But "increase" may also be read as equivalent to "made greater." And so read, it will apply to houses already built or to be built. That is the construction I adopt, and I therefore agree with the decision of the Dean of Guild appealed against.

LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court affirmed.

Counsel for the Petitioner — Clyde. Strathern & Blair, W.S.

Counsel for the Respondents—Boyd. Agents—Millar, Robson, & M'Lean, W.S.

Saturday, July 7.

SECOND DIVISION.

[Sheriff of Ross-shire.

GROAT *v.* STEWART AND OTHERS.

Succession—Vesting—Trustee—Title to Sell.

A truster appointed his widow and his son and daughter trustees, and directed them to give his widow the liferent of his estate, and on her death to dispone and convey to his daughter certain heritable property, "but in the event of her marrying and having no children alive at the time of her death the same shall revert and belong to my surviving children share and share alike." The deed conferred no power of sale on the trustees.

The trustees exposed for sale by public roup the said heritable property during the lifetime of the widow. The purchaser consigned the price in bank in name of himself and the trustees, but being dissatisfied with the title offered, he brought an action to enable him to uplift the purchase money.

Held that the fee of the subjects did not vest in the truster's daughter *a morte testatoris;* that the trustees in conjunction with the widow and daugh-