no such averment here. On the contrary, Mr Rankine has frankly admitted—he is not in a position to deny—that the commissioners have fixed the price at what they consider the highest figure to bring in the largest yield. That being so, it seems to me that the case falls to the ground. I think I made it sufficiently clear that in my opinion the commissioners are not entitled to resort to a guarantee rate until the price has produced the largest amount obtainable under the clause.

Having said that, I only desire to add that I think the Lord Ordinary's judgment proceeds upon an omission to observe the defect in the pursuers' case to which I have adverted. His Lordship treats it as if it were to be assumed in this case that the commissioners had only to raise the price in order to enhance the yield. Now unfortunately that fact is entirely omitted, and it seems to me that his Lordship's judgment, while stating a perfectly sound view of the working of the statute, is not maintainable, because he does not bear in view, or his attention was not called to the fact that the commissioners here, for all that appears, have applied their minds to the question of how much they can get from the consumers of Lockerbie taken as a whole.

I am therefore for recalling the Lord Ordinary's interlocutor, and I think the action should be dismissed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuers and Respondents—Rankine—Wilton. Agent—Alex. Stewart, S.S.C.

Counsel for Defenders and Reclaimers—D. Anderson. Agent—Marcus J. Brown, S.S.C.

Friday, June 22.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BYNG AND ANOTHER *v.* CAMPBELL AND SCOTT.

Process—Arrestment and Forthcoming—Arrestment of Joint-Property—Action of Forthcoming—Competency.

Held that an arrestment used in the hands of a tenant of property belonging jointly to him and his landlord for a debt of the landlord, and which could not be worked out by an action of forthcoming, was futile.

A quarry was let upon a lease under which during its continuance the plant remained the joint-property of the proprietor and tenant, the landlord at its termination being bound to pay the tenant one-half of the value of said plant. Towards the close of the lease creditors of the landlord arrested the plant in the hands of the tenant, and thereafter brought an action of forthcoming which prayed the Court to ordain the arrestee to pay the whole debt or such other sum arrested in his hands as might be owing by him to the landlord, and to pronounce such further orders as the Court might deem necessary for satisfying the pursuers' claim.

Held that the summons contained no conclusion available for working out the diligence, even assuming it had been competently used, but an opportunity was given to the pursuers to amend.

They thereafter craved the Court to ordain the whole plant arrested to be exposed for sale, and the price thereof, or so much as would satisfy the debt, paid to them, or alternatively to pronounce this order upon their paying to the arrestee one-half of the value of the plant.

The action was *dismissed* as incompetent.

The trustees of the late Sir George Beresford of Ballachulish, as proprietors of the slate quarries there, in 1878 entered into a fifteen years lease of said quarries with Dr Donald Campbell, to run until Whitsunday 1893. The lease contained, *inter alia*, the following provisions—"Further, the said Donald Campbell having paid to the said first party [the trustees] the sum of £3792, 8s. sterling, being one-half the amount of valuation of the engines, waggons, drums, rails, tools, horses, carts, and other moveable plant for the said quarries, as the same were taken over by the said first party from James Gardner, the last person in possession of the said quarries (a full list of all which has been made out and signed by both parties as relative hereto), the same shall be held to be the joint-property of the proprietors and tenant; and it is hereby agreed by and between them that during the currency of this lease, so often as the said plant now on the quarries, or other plant hereafter to be purchased as after mentioned, shall become deteriorated or unfit for use, or requiring to be renovated by other plant, the same shall be sold by the said Donald Campbell, and one-half of the free price thereof shall be paid to the said first party and their foresaids, and the other half retained by the said Donald Campbell; and on the other hand, should the necessity arise for the purchase of new plant, either in the opinion of the said parties, or, in the event of their differing in their opinion, of a person mutually chosen, whom failing to the arbiters hereinafter appointed, the price or prices and expense thereof shall be borne by the said parties in equal moieties, and the same shall be held to be the plant of the said quarries, and maintained as such as after provided; and the said first party or their foresaids shall be bound, at the termination of this lease, to pay to the said Donald Campbell or his

foresaids one-half of the value of the engines, waggons, drums, rails, tools, horses, carts, and other moveable plant, and stock of slates which may then be on said quarries . . . Further, the said Donald Campbell binds and obliges himself and his foresaids to uphold and maintain . . . the plant, comprising railways, tramways, inclines, waggons, rails, and others in full working order and quantity, and to work the said quarries in an efficient and workman-like manner, and without any unnecessary waste of material, during the whole period of this lease."

In December 1891 the Hon. James Master Owen Byng and another, the marriage-contract trustees of Admiral and Mrs Lucas, as assignees of a bond and disposition of £10,000 over the lands of Ballachulish granted in 1879 by Sir George Beresford's trustees, raised an action against Ebenezer Erskine Scott, C.A., trustee under a deed of direction and declaration of trust granted by the said Sir George Beresford, for payment of the £10,000, upon which they obtained decree as craved in June 1892.

On 3rd December 1891 they caused an arrestment on the dependence of the action to be used in the hands of Dr Donald Campbell, lessee of the quarries, to the extent of £15,200. Further, upon 18th May 1893 they, in virtue of their decree, arrested the sum of £15,000 in the hands of the said Donald Campbell, and on 31st May 1893 they brought an action of forthcoming against the said Donald Campbell as arrestee, and the said E. E. Scott as principal debtor, concluding as follows—"*Therefore the defender Donald Campbell, in whose hands arrestments have been used, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment and delivery to the pursuers of the sum of* £15,000, *or such other sum or sums as may be owing by him to the defender Ebenezer Erskine Scott, as trustee foresaid, and arrested in his hands upon* 3rd *day of December* 1891, *and upon the* 18*th day of May* 1893, *at the instance of the pursuers, or at least of such part thereof* as shall satisfy and pay the pursuers the principal sum of £10,000, with interest on said principal sum of £10,000 at the rate of £5 per centum per annum from Martinmas 1885, and payable half-yearly at Whitsunday and Martinmas in each year thereafter, together with interest at the rate of £5 per centum per annum on each half-yearly sum of interest becoming due at the terms of Whitsunday and Martinmas from and after the said term of Martinmas 1885, down to and including the term of Martinmas 1891, but with and under the deduction of two sums of £200 each, making £400 in all, paid to the pursuers on 5th March 1887 and on 1st December 1887, and of a corresponding deduction of interest in respect of such payments from the amount of interest, all as decerned for in an interim decree obtained by the pursuers in an action before the Lords of our Council and Session against the principal debtor Ebenezer Erskine Scott, dated at Edinburgh the 29th day of June 1892, and extracted the 16th day of August 1892; *and such further orders for production, delivery, inspection, sale, consignation, and payment with reference to the goods or property of said Ebenezer Erskine Scott in the possession of the defender Donald Campbell, should be pronounced by our Lordships as may seem necessary for satisfying the said claim of the pursuers.*"

The pursuers, after setting forth the facts given above, averred that—"(Cond. 4) The said lease terminated at Whitsunday 1893, and there is now in the possession of the said arrestee, the defender Donald Campbell, a large quantity of valuable plant, consisting of engines, waggons, drums, rails, tools, horses, and carts connected with the working of the quarry, which plant is the property of the principal debtor, and which the arrestee is under obligation to deliver to the principal debtor. In terms of said lease, the tenant was bound to deliver the plant to the proprietor at the term of Whitsunday 1893, and the defender Scott was bound to make certain payments in respect thereof. (Cond. 6) . . . Under the said arrestment the foresaid plant in the quarries of Ballachulish was attached. The plant is now and has since the commencement of the lease been wholly in the possession of, and subject to the control of, the defender Campbell. (Cond. 7) The said arrestee Dr Campbell refuses to make payment to the pursuers of the sums in his hands arrested as condescended on, and the present action has been rendered necessary in order to make the said sums forthcoming to the pursuers."

They pleaded, *inter alia*—"(1) The pursuers having arrested in the hands of the arrestee the sums owing, or goods and gear deliverable by him to the principal debtor, they are entitled to have the same made furthcoming in satisfaction of their debt, to the extent due by the arrestee to the principal debtor. (2) The present action having been rendered necessary for recovery of the sums due by the defender and principal debtor to the pursuers, decree should be pronounced, with expenses, as concluded for. (5) On a sound construction of the said lease, the plant connected with the quarries at the termination of the lease was the property of the lessor."

Answers were lodged for both defenders in which it was explained that the plant in the quarries was not attached by the arrestments. Said plant was the joint property of Dr Campbell, the tenant of the quarries, and of Mr Scott, the trustee, and did not form part of the subjects let to Dr Campbell. Also, that although the original lease expired at Whitsunday 1893, by agreement between the parties in November 1891, it had been extended until Whitsunday 1894.

It was pleaded for the defenders—"(1) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should

be dismissed. (2) The arrestee not having had in his hands at the date of said arrestments any arrestable funds or goods belonging to the principal debtor, the action should be dismissed."

Upon 5th December 1893 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Having considered the cause, Finds that the pursuers have competently arrested the right to the sole property of the plant referred to on record, arising to the common debtor at the close of the lease between his predecessors in the lands therein mentioned and the arrestee, in terms of the provisions of the lease libelled: Before further answer, allows to the defenders a proof of the averments in answer 4, to the effect that the lease in question was extended from Whitsunday 1893 to Whitsunday 1894, and appoints the same to proceed on a day to be afterwards fixed.

"*Opinion.*—This is an action of furthcoming, signeted on 31st May 1893, based on two arrestments, the one dated 3rd December 1891, used on the dependence of an action raised by the present pursuers, trustees of Admiral and Mrs Lucas against Ebenezer Erskine Scott, C.A., trustee for Sir George de la Poer Beresford, and another, dated 18th May 1893, proceeding on an extract-decreet obtained in that action. The arrestments were used in the hands of Dr Donald Campbell, and this action is brought against Mr Scott as common debtor and Dr Campbell as arrestee, and is defended by both.

"By lease dated in 1878, the then trustees of Sir George de la Poer Beresford, with consent of the beneficiaries under his trust-deed, let to Dr Campbell the slate quarries of Ballachulish for fifteen years from Whitsunday 1878, the ish of the lease being Whitsunday 1893.

"The lease contains the following provision in regard to the plant of the quarry—[*This provision is given above*].

"The pursuers maintained that the plant in the quarry has been arrested by both arrestments, and that since the commencement of the lease it has been wholly in the possession of Dr Campbell, and subject to his control. They have pleaded—'(1) The pursuers having arrested in the hands of the arrestee the sums owing or goods and gear deliverable by him to the principal debtor, they are entitled to have the same made furthcoming in satisfaction of their debt to the extent due by the arrestee to the principal debtor.'

"The defenders plead that there were not in the hands of the arrestee at the date of the arrestments any arrestable funds or goods belonging to the common debtor, and that the action should therefore be dismissed.

"The first question then is, were the arrestments competent and effectual? In considering this question, it does not seem to me to be necessary to distinguish between the two arrestments. Either, if competent and effectual, might be a good warrant for this action of furthcoming, and the defenders' objections are common to both. The pursuers say that the later arrestment was used *ob majorem cautelam*.

"The pursuers maintained that it resulted from a sound construction of the lease, that the plant was truly the property of the landlord, and not at all the property of the tenant; and that therefore being moveable property, belonging to the common debtor in the possession of the tenant, it was duly arrested in his possession.

"I cannot assent to that argument. The deed declares expressly that the plant shall be during the lease the joint property of the landlord and the tenant. There is not the slightest reason to suggest that the parties designed to conceal their true relations or to make them appear other than they really were. It was competent for them to contract that the plant should be joint property. They have contracted to that effect expressly, and there seems no reason why the words of the contract should not receive the effect according to their unambiguous meaning.

"The pursuers further maintained, that supposing the plant to be at the date of the arrestment the joint property of the landlord and tenant, it was competent to arrest it. I do not think that it can be asserted as an abstract and general proposition that it is competent for the creditor of one of two joint owners of moveable property to arrest the subjects of that joint property, or even the interests of his debtor in that property, and to bring it to sale by means of a furthcoming. It is true that it has been held competent to arrest shares in a joint stock company—*Sinclair* v. *Staples*, January 27, 1860, 22 D. 600. But in that case the shares of the common debtor could be brought to a sale without affecting the interests of the other shareholders. In the present case I am unable to see how anyone article of the plant in this quarry could be brought to a sale if the whole stipulation of the parties had been that it should be joint property. It would not be possible to sell any part of the property of Dr Campbell in order to pay the debts of Beresford's trustee. In *Fleming* v. *Twaddle*, December 2, 1828, 7 S. 92, it was held incompetent to poind joint property for the individual debt of one of the joint owners; and it must, I think, be equally incompetent to arrest it and follow out the arrestment by a furthcoming and sale.

"But then it is provided by the contract that at the termination of the lease the landlords (that is now Mr Scott as Beresford's trustee) should pay to Dr Campbell one-half of the value of the plant 'which may then be on said quarries.' The contract contains no express provision that the plant should on such payment become the property of the landlord; but I think that such a declaration may, and indeed must of necessity be inferred. The contract therefore is so conceived as to eventuate, if its stipulations are duly carried out, in this, that the plant which before the termination of the lease was the joint property of the landlord and tenant, shall then, on the stipulated payment by the landlord, become the sole property of the landlord, and that

the tenant shall then be bound to deliver the plant to the landlord, or rather shall leave it on the landlord's property, and shall himself quit the occupation of the property and the possession of the plant; and the difficult and somewhat novel question of law arises—Is this right of the landlord so resulting from the stipulations of the contract an arrestable right? If it is, then I apprehend it has been arrested. I think the first plea-in-law for the pursuers sufficiently, although not very aptly, expresses the pursuers' contention that this ultimate right of the landlord has been arrested.

"The right thus sought to be arrested was not at the date of either arrestment a right prestable by the landlord. But it is established that a personal interest may be arrested although no sum be payable on account of it at the date of the arrestment. The contents of a policy of insurance were held validly attached by an arrestment used between the date of the last premium paid and the death of the person insured—*Strachan* v. *M'Dougle*, June 9, 1835, 13 S. 954. Again, Lord Gifford as Lord Ordinary in *Bankhardt's Trustees* v. *Scottish Amicable Society and Duncan*, Jan. 21, 1871, 9 Macph. 443, held that an arrestment of a policy of insurance used in the hands of the insurance company during the life of the person insured was effectual although a period for payment of the premium had intervened between the date of the arrestment and the date of the furthcoming, and he found that the arresters were entitled to have the principal debtor's interest in the policy sold and the price made furthcoming. So, bills on a third party, for which the holder is accountable to the common debtor, are arrestable before the bills have been paid—*Gordon* v. *Innes*, February 3, 1740, M. 715; *Lothian* v. *M'Cree*, February 27, 1828, 7 S. 72. On the same principle rents and annuities are arrestable *currente termino*.

"A case still more in point is *Marshall* v. *Nimmo*, December 18, 1847, 10 D. 328. There the creditor of a slater, who had contracted to slate a roof for the arrestee, was held entitled to arrest the sum which would fall due under the contract, although it was not then due, and might not become due at all, as, for example, if the slater had not performed his contract. Here the right of the common debtor was held arrestable although not then prestable, and although contingent and indeed dependent on the actings of the common debtor. That case is closely applicable. But in it the eventual right of the common debtor under the contract was for a sum of money, and here it is for certain moveable property. That, I think, makes no difference.

"The defenders maintained that furniture or plant belonging to a landlord was not arrestable in the hands of a tenant, but was capable of being attached by poinding, and they quoted the case of *Davidson* v. *Murray*, December 18, 1784, M. 761, which at first sight appears to decide that furniture in possession of a tenant could not be arrested by the creditors of the owners of the furniture. The pursuer maintained that the case was not good law, and had not been followed. But it is quoted both by Erskine and Bell without disapproval. I do not, however, think that it decided that point. The common debtor was tenant of a house, and the arrestee was his sub-tenant, and the furniture of the common debtor was let to the arrestee along with the house. The arrestments were used after the principal lease had expired, and therefore after the sublease had fallen with it, and the arrestee was therefore possessing the house and furniture precariously, without any title, and under no contract, and in these circumstances it was held that the furniture must be regarded as really in the possession of the common debtor, but the case does not, in my opinion, decide that furniture possessed under a lease would not be arrestable.

"The present case presents the further peculiarity that according to the conception of the contract, the same event which converts the joint right to the plant into a sole right in the landlord also determines the possession of the tenant, and it may be that arrestments of the plant on the ground used on the expiry of the lease would be bad, and that then poinding would at that time be the appropriate diligence on the authority of *Murray* v. *Davidson*, because then the plant would be no longer in the possession of Dr Campbell under a contract, so that it was argued that as the plant could not be arrested before the expiry of the lease because it was joint property, nor after the expiry of the lease because it then ceased to be in the possession of the tenant, it could not be arrested at all. I think this difficulty is met by the consideration that the diligence of arrestment attaches a right in the person of the arrestee at its date, not a right, or money, or a moveable coming into his hands afterwards. It is effectual at the very first, or not at all. In this case the arrestments cannot correctly be said to have attached the plant either at the date of the arrestments or at the close of the lease. What they did attach was the obligation by Dr Campbell to leave the whole plant for the landlord at the end of the lease, an obligation existing at the date of the arrestments, and, as I think, attached by them.

"I am therefore prepared to find that the arrestments used were habile to attach the claim to the sole property of the plant arising to the common debtor at the close of the lease.

"But the defenders have averred that in November 1891 — that is, before either arrestment — the lease was extended by agreement for the year from Whitsunday 1893 to Whitsunday 1894. It was maintained on the one hand that this was an averment of a lease for a year, capable of being proved by parole, and, on the other hand, that being a contract regarding heritage, and differing from the ordinary case of a yearly lease, it could not be constituted or proved without writing.

"I can see no good ground for holding that the ordinary rule that a lease for one

year may be proved by parole should not apply in this case. I think that the peculiarity of the case, or what is unusual in it, namely, that the lease agreed on was not to commence for more than a year after the agreement, does not affect the mode of proving it. And although it was maintained that the averments were too vague and indefinite to be admitted to proof, I am of opinion that a proof cannot be refused on that ground.

"It appears to me therefore to be necessary, first of all, to ascertain what is the true ish of this lease. If it shall turn out to be Whitsunday 1893, then the furthcoming will proceed in the ordinary way. But if it shall be found that the ish has been postponed till Whitsunday 1894, I think that it will not on that account be found necessary to dismiss this action as premature, but that it will be sufficient to sist it until the lease shall come to an end.

"It was suggested in argument that the lease might be continued from year to year for an indefinite period. No further extension, however, has been made, and it will be time enough to consider the effect of such an extension of the lease when it is made, when it will fall to be considered whether such an extension of the lease could be allowed to defeat the pursuers' arrestments."

The defenders reclaimed, and argued that the action was irrelevant and incompetent.

The pursuers and respondents asked to be allowed to amend.

At advising (upon 16th February 1894)—

LORD KINNEAR—This is an action of furthcoming based upon arrestments, by which the pursuers allege that they have effectually attached certain machinery and plant belonging to the common debtor in the possession of Donald Campbell, the arrestee. It is not alleged that the arrestee is indebted to the common debtor in any sum of money, or that anything has been attached by the arrestments excepting the machinery and plant in question. The arrestee was tenant of the slate quarries of Ballachulish belonging to the trust-estate of the late Sir George Beresford, which is now held by the defender Mr Ebenezer Erskine Scott as trustee. The lease was granted for a term of fifteen years, which expired at Whitsunday 1893. It is provided by this lease that inasmuch as the tenant Donald Campbell had paid to the landlord one-half of the amount of the valuation of the engines and other moveable plant for the quarries, the same should be "held to be the joint property of the proprietors and the tenant," and that at the termination of the lease the proprietors should be bound to pay to the tenant one-half of the value of the moveable plant and stock of slates which may then be in the quarries. On the construction of this clause the Lord Ordinary has held that on the termination of the lease, and on the stipulated payment being made by the landlord, the plant and stock will become the sole property of the landlord, and must be delivered to him or left on the ground by the outgoing tenant, and that the landlord's right to acquire this property on the stipulated condition is arrestable, and has been effectually arrested. I do not express any opinion on these questions at present, because assuming the arrestment to be valid, the summons contains no conclusion which it is possible for the Court to sustain. The purpose of an action for furthcoming is to make the debts or goods which have been arrested available for payment of the debt, and the summons contains no effective conclusion for that purpose. The only operative conclusion is for payment of £15,000, or such other sum as may be due by the arrestee to the common debtor. But a decree for payment of money is out of the question unless the property which is said to have been arrested shall first be converted into money. The law is very clearly stated in *Sinclair* v. *Staples*. Every species of moveable property may be validly arrested provided the diligence can be effectually worked out. But in order that that may be done the summons of furthcoming must be so formed as to be applicable to the specific subjects attached by the diligence. It may be that in the ordinary case when corporeal moveables have been arrested, a warrant of sale may be granted, although there is no specific conclusion for sale in the summons. But that proceeds, as Lord Stair explains, on the assumption of the arrestee's offer of the goods *ipsa corpora* in order that he may not be "decerned for making furthcoming a liquid sum for the price." And therefore assuming that a warrant for sale might be granted as a matter of course, where the arrestee has no interest in the goods arrested, but is under an absolute obligation to make them over *ipsa corpora* to the common debtor, it is obvious that the same procedure cannot be followed in a case like the present, where the method of working out the diligence is not fixed by practice. The machinery which is said to have been arrested is at present the joint property of the arrestee and the common debtor, and therefore the pursuer must work out his diligence in such a manner as to make his debtor's interest available without prejudice to the rights of his co-owner. It may be that, as the Lord Ordinary has held, the arrestee's interest may be determined so that the machinery will become the sole property of the common debtor. But then the arrestee is under no obligation to make over the property except upon condition of receiving payment of half the value. It appears to me therefore that in order that the arrested moveables may be made available for paying the bills of the common debtor, it is necessary that the common property should be secured, and also that the arrestee's right to half the value of the property should be satisfied, there can be no furthcoming unless these conditions have been satisfied, or otherwise unless the decree contains provision for their satisfaction. It may or may not be that the interests of parties might be adjusted upon a sale, and consequent division of the price. I express no opinion upon that

point, but it is obvious that the arrestee has a material interest. But if the pursuer had desired a sale, his summons should have contained a conclusion to that effect, either in absolute terms, if that be his right, or subject to such conditions as he may be able to formulate for securing the rights of the arrestee from prejudice. The only conclusion he adds to that for payment of money is—"And such further orders for production, delivery, inspection, sale, consignation, and payment with reference to the goods or property of said Ebenezer Erskine Scott in the possession of the defender Donald Campbell, should be pronounced by your Lordships as may seem necessary for satisfying the said claim of the pursuers." Now, if that means that the Court is to find out the proper order, and give any form of decree that may be effectual, I think it is an incompetent conclusion. The pursuer must formulate his demand, and express in terms the specific decree he asks. I think the summons as it stands must be dismissed, but if the pursuer thinks he can frame a conclusion which would be at once effectual and admissible as an amendment, I think he should be allowed an opportunity of doing so.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The pursuers thereafter amended the record by substituting for the first part printed above in italics the following:—"*Therefore the Lords of our Council and Session should decree and ordain the whole moveable plant, goods, and gear arrested in the hands of the defender Donald Campbell by virtue of arrestments dated 3rd December* 1893 *and 18th May* 1893 *at the instance of the pursuers, being the plant referred to in the lease mentioned in the condescendence, to be exposed to public roup at the sight of the Sheriff-Substitute at Fort-William, or such other person as the said Lords may appoint, and the price thereof paid and delivered over to the pursuers, or at least such part of said price, etc.*" And for the second part printed in italics the following:—"*Or otherwise, and as alternative to the conclusion last above written, upon payment by the pursuers to the said defender Donald Campbell of one-half of the value of the said moveable plant, goods, and gear, as the same may be ascertained in terms of the lease mentioned in the condescendence, our said Lords ought and should decern and ordain the said moveable plant, goods, and gear to be exposed to public roup at sight as aforesaid, and the price thereof, after repayment to the pursuers of the said one-half of the value of the said plant, to be paid and delivered over to the pursuers, or at least such part thereof as shall pay to them the foresaid sum of* £10,000 *with the said interest, but under the deductions foresaid.*"

They also added to Cond. 6 the following:—"The pursuers are willing, in the event of its being held that they are not entitled to have the said plant sold and the price paid over to them in terms of the first conclusion of the summons as amended, to make payment to the arrestee of one-half of the value of said plant (as determined in terms of the lease), the said one-half of the value of said plant to be repaid to the pursuers out of the first proceeds of the sale, and the remainder of the said proceeds to be applied, so far as necessary, to their said debt of £10,000 with interest. It is explained that the whole plant referred to in the lease is in fact moveable, and is so described in the lease;" and added the following pleas-in-law—"(6) In any event, the pursuers are entitled to decree of furthcoming on making payment to the arrestee of one-half the value of the plant. (7) On making payment to the arrestee as aforesaid the pursuers are entitled to repayment of the said half the value of the plant out of the first proceeds of the plant when sold."

The defenders argued that the conclusions of the summons as amended were incompetent.

At advising—

LORD KINNEAR—When this case was last before us the pursuers were allowed to amend their summons, because while we thought that the summons as it stood could not be sustained, we were not prepared to say there was no possible method of making the arrestee's obligation to his creditor prestable to the arresting creditor, while the pursuers undertook to formulate a decree which might be effectual for that purpose. In support of the amended summons the pursuers' counsel repeated an argument which we had already rejected, that they were entitled to a judgment as to the validity of the attachment effected by the arrestment irrespective of the validity of the conclusions of the summons. This appears to me to be a misconception of the legal character of arrestments in execution. An arrestment and forthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up, and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former from the arrestee. The proceedings for this purpose may vary according to the nature of the debt which is said to have been arrested, but if there be any question whether a future and conditional obligation can be arrested or not, it is essential for the arresting creditor to show that the diligence can be effectually worked out by means of a decree. Therefore, because the argument had not been directed to this point, which appears to me to be the crucial point of the case, we gave the parties an opportunity of being further heard, and allowed the pursuers, for the purpose of argument, to formulate the decree to which they claim to be entitled. The pursuers now proposed to amend their sum-

mons by substituting two conclusions for those of the original action. But after the amendment had been allowed, certain proceedings had taken place which had not been anticipated, and the effect of which may possibly be to embarrass the pursuers in argument, although I think they may also serve the purpose of clearing the question by directing the argument to the proper point. In ordinary course we should have expected the pursuers to table their amendment at once, so that the question might be finally argued before the determination of the lease, and no doubt that would have been the course which the pursuers would have desired to follow. But then it appears that it was for the interest of all parties who are equally interested in getting the highest attainable value for the machinery and plant to which their arrestment applies that arrangements should be made for handing over the plant to a new tenant. We were therefore asked, instead of disposing of the action as it stood, to allow the arrestments to be recalled in the meantime upon certain conditions which would reserve all questions as to the validity of the diligence, and also secure the rights of parties according to their ultimate determination. Now, that was allowed on these conditions, but the defenders, who asked the diligence to be recalled, appear to have been advised that it was unnecessary to follow that course. Accordingly, they did not comply with the conditions, and the arrestments stand now in exactly the same position as if no provisional order for their recal had been given. But then, in the meantime the defenders had themselves proceeded in a manner which is said to alter the position of parties. The lease has come to an end; the tenant in whose hands the arrestment was used has gone away, his claim against his landlord being satisfied, and the new tenant, as I understand, is now in possession, and therefore the position of the subjects with reference to which the action relates is materially altered. But then I think the pursuers are quite entitled to say that the validity of their action must be determined irrespective of this change of circumstances, and that we are to consider the conclusions which they now propose as amended upon exactly the same conditions as if the action had been heard before the termination of the lease, and while the machinery and plant in question were still in the undisturbed possession of the tenant. Considering the question therefore from that point of view, we are to say whether the conclusions which the pursuers now propose to substitute for their original conclusions are tenable or not. It appears to me to be clear that the first of this set of alternative conclusions could never have been sustained, because by that conclusion the pursuer asks that there shall be an immediate decree for exposing to public roup the whole moveable plant, goods, and gear which are said to have been arrested in the hands of the defender Donald Campbell. Now, that is to be an immediate decree irrespective of the conditions of the lease, and irrespective of any conditions whatever for protecting the rights and interests of the arrestee. At the time the arrestments were used the moveable plant and machinery in question were not the property of the common debtor, but were the joint property of the common debtor and the arrestee; and therefore what is proposed is to carry off and sell as for the debt of the common debtor property which is not his exclusive property at all, but is the joint property of himself and of his tenant. That appears to me to be plainly, and on the face of it, quite untenable. An arrestment can never in any way prejudice the rights and interests of the arrestee. It can do nothing but enable the arresting creditor to enforce against the arrestee the obligations which are prestable from him to the common debtor, and to found upon that as giving the arresting creditor a right which would override the separate and independent right of the arrestee in goods belonging either jointly or solely to himself is quite out of the question. But then, having no doubt that difficulty in view, the pursuers propose an alternative conclusion, by which they undertake to protect the rights and interests of the arrestee, their alternative conclusion being, that upon payment by them to the arrestee of one-half of the value of the moveable plant, goods, and gear in question, as the same may be ascertained in terms of the lease, then there shall be an order for exposing the whole of these goods and plant to public auction. Now, it appears to me that both branches of this conclusion raise very serious difficulty. In the first place, the conclusion assumes that the pursuers' right depends upon the performance of a certain condition, and I cannot see how that condition could possibly be purified by the operation of any decree of this Court, or otherwise than by the will and good pleasure of the arrestee. Now, the validity of an arrestment cannot possibly depend upon the will of the arrestee. But the right of the arrestee under his lease is to obtain payment, not of one-half of any price that may be fetched by a sale of the moveable portion of the plant, but of one-half of the value of the entire plant, whether fixed or moveable *in situ* as the plant of a going concern. The defenders say that part of the plant now in question is heritable, and that part of it is moveable. If that be so, the pursuers do not claim to have attached the heritable portion of the machinery and plant by their diligence, and they very properly confine the conclusion of their summons to the moveable plant. But then that means that before the tenant's right to obtain payment of one-half of the value of the entire plant can be set aside there is to be a severance of the moveable from the fixed portion, and that he is to have one-half of the value of the moveable portion, the pursuers leaving him to recover, as best he can, the value of the other portion from his debtor. If, therefore, it were conceded that part of the plant is

heritable, I should see very great difficulty in working out this conclusion without the consent of the arrestee. If it is not conceded, then it would be necessary that we should have an inquiry, and the arrestee would have to be kept out of his money until the termination of a litigation in which he has no interest. Apart from both of these difficulties, which appear to me to be considerable, I am unable to see how we could compel the arrestee to accept payment from the pursuers, or to reject payment from his own proper debtor. He is entitled at the termination of his lease to receive from his landlord one-half of the value of the plant upon the ground let upon his removing himself from the premises. Now, the landlord's obligation is not attached by the arrestment, and could not be attached by any diligence, for payment of the landlord's own debt. There is nothing to prevent the tenant from enforcing his obligation at the termination of the lease, and the diligence which has been used in his hands cannot compel him to accept the arresting creditor as his debitor in place of his landlord, and to refuse payment if it were offered to him by the landlord or by the incoming tenant. An arrester cannot in any way affect the right of the arrestee to recover his own debt. The sole operation of the attachment, if it be effectual at all, is to prevent the arrestee paying debts due to somebody else or parting with goods belonging to somebody else; it cannot prejudice his right to enforce obligations prestable to himself. But even if it be assumed that the tenant is willing to take payment from the arrester and to discharge his own debtor, I think the conclusion which is supposed to follow upon implement of that condition is untenable. The pursuers' assumption is that as soon as the arrestee has been paid off, there will arise to them an immediate right to obtain an order for the sale of the moveable plant. But that is not the right of an arresting creditor, and I think Mr Macfarlane's criticism upon that conclusion was perfectly just, that there is no operative decree against anybody. And that is not merely a technical objection. It rests upon a perfectly sound view of the nature of an arrestment, which is not a diligence directly affecting the goods themselves, in whose hands soever they may be, but a diligence *in personam*, which can only be carried into effect by the operation of a decree for payment or delivery against the person in whose hands the arrestment is used. It is only as a consequence of the creditor's right as against the arrestee to have the goods made forthcoming that he can have a decree for sale. That is clearly laid down in the passages in Lord Stair's Institutes, to which I called attention on a previous occasion. What Lord Stair says about forthcoming is this. In the first place, he says that "When pursuits are for making arrested goods forthcoming which are not liquid, the party in whose hands arrestment was made will not be decerned for making forthcoming a liquid sum for the price, but if he offer the goods themselves the decree will contain a warrant to roup the goods, that the price thereof may be delivered to the arrester." Then in a subsequent passage he says this, speaking of the executive action arising from arrestment—"It is an action for making arrested goods forthcoming which reacheth no further than the satisfaction of the sum for which the arrestment was laid on, and the title of it were much more suitable to be adjudication upon arrestment, for it is as properly an adjudication of a moveable interest as the adjudications of land rights. Neither is it the making of the goods or sums forthcoming that is the proper effect of this action, but the adjudging of them to the arrester; for if goods be arrested, the haver is liberated by producing the goods whereby they are made forthcoming, but they become not the arrester's until they be rouped and sold and the price delivered to the arrester." Therefore you must fix upon the arrestee an obligation to deliver the goods before you can have any decree of sale. Now, there is nothing in the conclusions of this summons, either by way of declarator or by way of operative decree, to define the claim for delivery of goods, which the pursuer supposes to have been transferred from the common debtor to himself. And when one comes to consider what the nature of the arrestee's obligation really is, I confess I do not wonder that the pursuers have not been able to formulate a decree which would satisfy these conditions. The tenant under the lease is joint-owner of the machinery and plant, half the value of which he paid for at the beginning, but on the determination of the lease he is to obtain one-half of the value from the landlord, and the plant is to become the exclusive property of the latter. Now, the assumption of the action is, that upon that payment being made, some obligation will arise against him to make over or deliver the plant to the landlord; but it appears to me that the only obligation in the lease is that upon the determination of his right the tenant shall leave the premises and depart, leaving the plant for the landlord. Therefore it appears to me that the fact which determines the tenant's joint right and interest in the plant at the same moment determines his possession, and I am unable to see what the obligation is that the arresting creditor thinks that he has attached so as to compel the tenant to perform to him instead of performing to his landlord. It turns out that in point of fact the tenant upon determination of his lease received payment of the money to which he was entitled. Now, I have already said that there is nothing in the attachment effected by the arrestments which can prevent his doing that. That was his absolute right. Well then, upon receiving that payment he goes away. But that is exactly what he was bound to do under his lease, and I do not understand how it could be supposed that any right should arise to the arresting creditor in consequence of which he could compel the tenant either

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-