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-

ter had no title to dispose of the subjects; and accordingly that the pursuer was entitled to resile from the purchase thereof.

John Stewart, West End, Dingwall, died leaving a trust-disposition and settlement dated 11th September 1889, whereby he appointed his wife, his son Kenneth, and his daughter Margaret, trustees, directing them, *inter alia*, to give to his wife during her life the liferent of his whole estate; "(Third) that as soon as convenient after the death of my wife, my trustees shall dispone and convey to my said daughter Margaret my heritable property in Mill Street, Dingwall, with the pertinents thereto belonging, but in the event of her marrying and having no issue alive at the time of her death, the same shall revert and belong to my surviving children, share and share alike: Declaring that my said daughter shall, however, be bound, as she by acceptation hereof binds and obliges herself, to pay to my daughter Ann the sum of £20 sterling; and with regard to the residue of my estate, if any, I direct that the same may be given to my said son Kenneth and daughter Margaret, share and share alike." He appointed his trustees his executors. The deed conferred no power of sale.

Upon 28th February 1893, during the lifetime of the widow, the trustees exposed to public roup and sale the heritable property in Mill Street, Dingwall, known as "Strathpeffer Inn," with entry as at Whitsunday 1893. The articles of roup included these provisions, *inter alia*—"*Sexto.* Upon payment of the price with interest and penalty, if incurred, the exposers oblige themselves to execute and deliver a formal and valid disposition to the purchaser and his heirs or assignees, under the several reservations, real burdens, conditions, and declarations specified or referred to in the title-deeds of the said subjects, which disposition shall contain a clause of entry as at the term of Whitsunday 1893, and all other usual and necessary clauses. . . *Septimo.*—Offerers shall be understood to have satisfied themselves as to the validity and sufficiency of the title-deeds of the said subjects and others, and of the right of the exposers, and shall not be entitled to object to the same after the sale upon any ground whatever, nor to require that any other titles shall be made up at the expense of the exposers."

Donald Groat, Inverness, offered £336, and was declared the purchaser of the subjects. Difficulties arose as to the conveyance of the subjects to Groat, but as he was anxious to make improvements on the property he deposited the £336 on deposit-receipt on 2nd August 1893 in bank at Dingwall in name of himself and the trustees.

Upon 6th October 1893 Groat intimated to Stewart's trustees that he declined and resiled from the transaction. On 23rd October 1893 he requested them to endorse and deliver to him the deposit-receipt, and on their refusal he sued them for this purpose in December 1893 in the Sheriff Court of Ross.

The pursuer narrated the terms of the trust-deed, and averred—"The widow is still alive, and the period of vesting being thus postponed until her death, and no power of sale being conferred upon the defenders by the said trust settlement, the pursuer declined to proceed with the purchase of the property from them."

The defenders averred—"The defenders have always been willing, and hereby offer, to deliver to the pursuer a disposition of the subjects signed by all the surviving children of the deceased John Stewart, as consenting to the sale."

The pursuer pleaded—"(1) The defenders having no power to sell the said subjects, the pursuer is entitled to resile from the purchase thereof. (2) The defenders having unreasonably delayed, and being now unable to deliver a valid disposition of the said subjects, the pursuer is entitled to resile from the purchase thereof."

The defenders pleaded—"(1) The defenders being able and willing to deliver to the pursuer a valid and sufficient disposition of the subjects purchased by him, he is not entitled to resile from the purchase. (2) No unreasonable delay due to the fault of the defenders having taken place, and the defenders being willing to implement the sale, the pursuer is not entitled to resile from the purchase."

Upon 29th January 1894 the Sheriff-Substitute (CRAWFURD HILL) found the facts as narrated, and "(5th) finds in point of law that the trustees had no right to sell, and that they are not in a position to give a good and valid title, and that in these circumstances the pursuer is not precluded by the above clause in the articles of roup from objecting to the title offered by the trustees, and refusing to fulfil his contract: Therefore decerns in terms of the conclusions of the petition, and finds no expenses due.

"*Note.*— . . . The defenders maintain further, that the sale was good, because by virtue of the third direction in the trust-deed quoted above the property vested in Margaret Stewart, one of the trustees, *a morte testatoris*, so that she herself could give a good title. The direction to the trustees is, that on the death of the widow they shall dispone and convey to Margaret Stewart, &c. It is not till the death of the widow that they are to dispone and convey to Margaret Stewart, and I think this case falls under the rule stated by Lord President Inglis in *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 'that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement.'

"I have no hesitation therefore in holding that the property has not vested in Margaret Stewart, and that her action in connection with the sale was simply as one of the trustees. In that state of matters, accordingly, I think the pursuer would

have been quite entitled to resile from his purchase.

"But at that time he did not want to resile. He was anxious to have the property, provided he could get a good title. So he entered into negotiations with the defenders with that view, and what he proposed was that the defenders should deliver to him within a reasonable time a disposition of the property, signed by them as trustees and as individuals, and also by all the remaining members of the family of the testator. He avers that this was arranged between him and the defenders, and his chief complaint and ground for resiling in the record is that there has been unreasonable delay on the part of the defenders in carrying it out.

"They, on the other hand, say that there was no completed agreement, and although parties seemed to have proceeded to act to some extent on what was proposed (for the pursuer says he lodged the purchase price in bank in terms of the arrangement, and the defenders have been taking steps to get the consents of the other members of the family, some of whom are in New Zealand and America), yet, as the terms of the arrangement were put into writing by the pursuer and sent to the defenders, but have never been signed by either party, the arrangement can hardly, I think, be looked upon as having gone further than negotiation.

"At the debate it was maintained for the pursuer that a disposition, even with the consents of all the members of the family as proposed, would not form a valid title. I think that view is sound. These are no doubt all the parties presently existing who are interested in the property in question, but it is quite conceivable that when the time arrives for executing the third purpose of the trust some of them may have given place to others who might not be bound by their present consent to a sale. So that I do not think that such consents would make up for the absence of the power of sale in the trust-deed. Whatever a private party might choose to do at his own risk, it is not for this Court to sanction what would, I think, be at best a questionable title.

"I think therefore that the pursuer is entitled to resile from his bargain, and to uplift the deposited money."

Upon appeal the Sheriff (JOHNSTON) found that the subjects sold vested in Margaret Stewart *a morte testatoris*, and that the trustees along with her had title and right to dispose of them, and recalled the Sheriff-Substitute's interlocutor.

The pursuer appealed, and argued—The question was whether this heritable property had vested in Margaret, or whether vesting was postponed until the widow's death. Vesting had not taken place. The only direction was to convey this property to Margaret after the death of the wife. That was almost identical with the terms of the destination in *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. In the case of *M'Alpine* v. *Studholme*, March 20, 1883, 10 R. 837, there was a direction to pay when the favoured persons attained twenty-one years, but there was no such direction here. There was, however, a destination-over. Even if it was held that the fee of the estate vested in Margaret, it could only be vesting subject to defeasance, because if she was to marry and die before the widow leaving no children, the vested right must be in the testator's own children—*Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709. It was therefore impossible for the widow and the other members of the family to give a good title to the pursuer, and they could not hold him to his bargain.

The respondents argued—The property vested in Margaret *a morte*. There was merely a postponement of the term of payment. Light was thrown upon that view by the use of the word "revert," which implied a return from the possession of Margaret. There was no proper destination-over, because the property was to go to the surviving children of the truster, and it would then be conveyed to them in their own right, and not as substitutes for Margaret. If, then, the right of property vested in Margaret *a morte*, she could give a good title to the subjects with the concurrence of the other members of the family interested—*M'Alpine* v. *Studholme*, March 20, 1883, 10 R. 837.

At advising—

LORD RUTHERFURD CLARK—The question is, whether Margaret Stewart took a fee in the heritable property mentioned in the third purpose of the trust-deed *a morte testatoris*, so that the trustees with the concurrence of her and the liferenter can give a good title to the purchaser.

The truster gave to his widow a liferent of his whole estate, and on her death he directed his trustees to convey the property in question to his daughter Margaret, "but in the event of her marrying and having no issue alive at the time of her death, the same shall revert and belong to my surviving children, share and share alike."

The Sheriff-Substitute has held that the case falls under the rule of *Bryson's Trustees*, and that no right vested until the death of the widow. The Sheriff, on the contrary, thinks that the deed creates a mere substitution to Margaret, but only in the event of her marrying and having no issue, and that there is "not a destination-over directed to the point of time of the liferenter's death." On these grounds he has decided that the fee vested *a morte testatoris*.

I am far from saying that the case is free from difficulty, but I have come to be of opinion that no right of fee is vested in Margaret.

There is to be no conveyance till the death of the widow, and until that event occur the person in whose favour it is to be made cannot be known. If Margaret is then alive, the conveyance will be made to her. If she is dead, it will be made to her children, and if she marries and leaves no children, to the surviving children of the truster. I do not think that any sub-

stitution is contemplated. The conveyance is to be made in favour of the person or persons who on the death of the liferenter are ascertained to have right to it.

There is no express institution of Margaret's children. It is, however, impossible to doubt that the truster meant that they should take, if their mother predeceased the period when the conveyance was to be made. For nothing is given to the surviving children of the truster except in the case of Margaret dying without issue, and the *conditio si sine liberis* is clearly applicable. Nor is it stated that in order to succeed, the children of Margaret must survive the liferenter. But this is the plain meaning of the trust-deed, inasmuch as there can be no conveyance in their favour unless they survive that event.

According to the words of the trust-deed, there is no institution of the surviving children of the truster, except in the event of Margaret's marrying and leaving no issue alive at the time of her death. It is doubtful whether we should read the words in their literal sense. It is difficult to imagine that the truster could intend that the succession of his own children should depend on the fact of Margaret's marrying or not marrying, and if they might succeed though Margaret never married, they might also succeed if she left issue who, by predeceasing the liferenter, could not be disponees. But it is not necessary to enter into that question. For however strictly we construe the trust-deed, I cannot accept the proposition that there is nothing more than a mere postponement of the enjoyment of the fee. It is at the present time uncertain who is to be the eventual fiar. If it happened that Margaret married and predeceased the liferenter without leaving issue, the conveyance must be made in favour of the truster's surviving children. They would take in their own right, and not as substitutes to Margaret. If Margaret died unmarried there would be intestacy. For nothing could vest in her while it was uncertain whether the disposition was to be in her favour, and nothing could vest in the other children of the truster if their right was conditioned on the marriage of Margaret.

The ground of the Sheriff's judgment is that there is nothing more than a postponement of the fee, with a substitution to Margaret in favour of the children of the truster who may survive her, though in one event only. He seems to me to leave out of account that no right is given except through a conveyance to be made on the death of the liferenter, and that until that event shall happen it is uncertain in whose favour it is to be made. So long as the uncertainty exists there cannot be vesting. The conveyance is withheld not merely for the protection of the liferenter, but also in the interest of the contingent disponee.

I have already said that in my opinion there is no substitution. When the liferenter dies the conveyance will be made to the person who on the occurrence of that event is ascertained to be the disponee. If Margaret survives the liferenter there will be a simple conveyance in favour of herself and her heirs. There is no direction that it shall contain a destination in favour of her children, and if they are not to be included as substitutes, there cannot be a substitution of the children of the truster who might survive her, but conditional on her marrying. It is said that the direction that the property "shall revert and belong to my surviving children" indicates that it shall pass from Margaret to them, and therefore that they take as substitutes to her. To my mind there is no force in the argument. The language is inaccurate, but I cannot read a clause the evident purpose of which is to specify the person in whose favour the conveyance is to be made as directing a substitution.

Nor do I see any ground for holding that the surviving children of the truster mean the children who survive Margaret. The whole clause is conditioned on the death of the liferenter, and just as the word "surviving" must in the ordinary case be referred to the date of distribution, so in this case it must be referred to the date at which the clause comes into operation. The surviving children of the truster are only possible disponees by reason of surviving the liferenter.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the appeal for the pursuer against the interlocutor of the Sheriff of Ross, dated 6th April 1894, Sustain the appeal and recal the interlocutor appealed against: Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-Substitute dated 29th January 1894: Find in law (1) that the fee of the subjects in question did not vest *a morte testatoris* in Margaret Stewart, daughter of John Stewart, the truster; and (2) that the defenders as trustees of the said John Stewart, in conjunction with his widow and daughter, had no title or right to dispose of said subjects: Therefore sustain the first plea-in-law for the pursuer, and decern in terms of the conclusions of the summons," &c.

Counsel for the Appellant—Guthrie—C. K. Mackenzie. Agent—Alexander Ross, S.S.C.

Counsel for the Defenders—Dundas—Fleming. Agents—Mackenzie & Black, W.S.