On the 24th of June 1882, as it appears from the process, a decree of removing was pronounced against the pursuers, ordaining them to remove from the premises on seven days' notice to that effect. That order of the Sheriff-Substitute was on 21st December 1882 affirmed in this Division. Therefore from the 24th of June 1882 the pursuers were under orders to remove as having no legal right to be there. On the 8th of February 1883 the pursuers were charged to remove within seven days, the days of charge being the same as the time fixed by the Sheriff, and on 16th February, not having obeyed the order, they were ejected.

They have now raised an action of damages on a technical ground, not on the ground that they had a right to be there, but on the ground that they were charged in the Court of Session decree instead of in the decree of the Sheriff Court, and it is said that their ejection was illegal because of the mistake of the officer in narrating the judgment. I cannot hold that to be an illegal act on the part of the defender in this action, because I agree with your Lordships that in order to give a party the right to bring an action of damages he must be legally on the premises. The pursuers had no legal right to be there, and I do not think that they are entitled to bring an action of damages on this technical ground.

Lord Shand—I agree with your Lordships that there has been here no legal wrong which can be the ground of a claim of damages. The ground of the action in the Sheriff Court was that the pursuers here were without any title to possess; the Sheriff took that view, and accordingly granted decree, subject however to this qualification, that reasonable notice should be given by the proprietor, and fixed the period of such notice at seven days. In these circumstances, while it may be maintained that the pursuers had a right to remain in undisturbed possession for seven days, they could not possibly remain longer. Now, however, they raise an action of damages founding on an alleged informality in the proceedings which were subsequently taken for the purpose of ejecting them. I do not think that service by a messenger or execution was necessary at all; I think that if the notice had been given by letter that would have been quite sufficient. But it certainly does not make it worse that a more formal notice was given, and therefore the pursuers' claim of damages on technical grounds cannot be sustained.

I may further add that I concur with your Lordship in thinking that the case of *Macdonald* v. *The Duchess of Leeds* applies to the present, for there was in that case just as little title as there is here.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuers — Brand — Salvesen. Agent—D. Barclay, Solicitor.

Counsel for Defender—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Thursday, July 5.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

BEATTIE *v.* MACGREGOR.

Arbitration—Contract—Clause of Reference.

The clause of reference in a contract for plumber-work was in these terms—"Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to B, whom failing to C, whose decision shall be final." After the completion of the contract the employer disputed the accuracy of the measurement which the contractor had obtained, and denied that any proper measurement had ever been made. The contractor then raised an action to have it declared that the dispute fell within the clause of reference. *Held* (following *Kirkwood* v. *Morrison*, 5 R. 791) that such a clause of reference included and was intended to apply only to disputes arising during the execution of the contract, and requiring to be immediately disposed of, and that therefore the present dispute, which related to the completed work, did not fall within it.

This was an action at the instance of Robert Purves Beattie, plumber and gasfitter, 19 Castle Street, Edinburgh, against Donald Macgregor, Royal Hotel, Edinburgh, to have it declared that a difference arising between them in regard to the labour and material supplied and work done by the pursuer under a contract for making additions and alterations on the defender's hotel, was included in the reference clause of the contract, and that the defender should be ordained to enter into a valid deed of submission, or otherwise for decree against the defender for £46, 9s. 8d., the balance of the contract price.

The contract was one for the plumber-work of alterations which the defender was executing upon the Royal Hotel, and was entered into on 25th February 1876 between the pursuer and George Beattie & Son, as architects for the defender. The clause of reference was in these terms—"Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to the determination of William Beattie, Esquire, whom failing John Lessels, Esquire, both architects in Edinburgh."

The present dispute arose after the completion of the contract, the pursuer maintaining that his work had been measured up by William Hamilton Beattie, that according to his measurement the amount due was £2119, 13s. 10d., and that after crediting payments to account there remained a balance of £46, 9s. 8d. The defender, on the other hand, denied that Mr Hamilton Beattie had in point of fact ever measured the work, and maintained that the amount so brought

out included a jobbing account for £400, 14s. 10¾d. relating to work professedly not falling under the pursuer's contract. He stated that he had employed Mr Andrew Laurie, ordained surveyor, Edinburgh, to measure up the whole work done by the pursuer, and further averred—"The result of Mr Laurie's measurements showed that many of the items in the jobbing account rendered by the pursuer were included in the account for work done under the contract, that much of the work included in the jobbing account was overcharged, that the time employed was overstated, and that in some instances the charges were so generally stated that it was impossible to check them. Applying the pursuer's schedule prices, and allowing all doubtful entries to stand, it was, as the result of Mr Laurie's measurements, found that the value of the work done under the pursuer's contract with the defender was £1660, 6s. 1d., that the value of the work not falling under the contract was not more than £79, 18s. 8d., and that adding to these two items the fees for the original measurements, plans, &c., viz., £11, 9s., and the surveyor's fees for measuring up the completed work, to which, had he really measured it, Mr Hamilton Beattie would have been entitled, viz., £17, the utmost amount due to the pursuer was £1768, 13s. 9d. Deducting the last-mentioned sum from the total amount paid to the pursuer as stated in the condescendence, viz., £2070, 13s. 7d., there remains a balance of £301, 19s. 10d. by which the pursuer has been overpaid. The defender duly informed the pursuer of the above facts, and called upon him to make repetition of the sum overpaid. For recovery of that sum which was paid by the defender in error, in reliance on the certificates granted by the pursuer's cousin, the said Mr Hamilton Beattie from time to time, upon the pursuer's statements, and during the progress of work, the defender is about to raise an action against the pursuer."

The Lord Ordinary (M'Laren) found that the questions in dispute did not fall within the scope of the clause of reference, and allowed a proof.

The pursuer reclaimed, and argued that the clause was sufficiently comprehensive to bring the case under *Mackay* v. *The Parochial Board of Barry*, June 21, 1883, *supra*, p. 697; *Tough* v. *Dumbarton Water-Works Commissioners*, December 20, 1872, 11 Macph. 236; *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 79, 15 Scot. Law Rep. 51; *Howden & Co.* v. *Dobie & Co.*, March 16, 1882, 9 R. 758.

Defender's authority—*M'Cord* v. *Adams, &c.*, November 22, 1861, 24 D. 75.

At advising—

Lord President—The nature of the dispute between the parties here is shown on the defender's part of the record rather than on the pursuer's, in consequence of the action being raised by the contracting party, who wishes the question to be settled by means of a reference. The defender's case is not that the work was not done, or that it was improperly done, but that the sum sued for is claimed on the footing that the measurement is correct, and properly applied to the schedule, whereas in point of fact the measurement is incorrect. It is only if he is able to establish this that the defender can prevail, or that his counterclaim for over-payment made on the faith of Mr Hamilton Beattie's certificate can be entertained. That being the nature of the case, I find it impossible to distinguish it from that of *Kirkwood* v. *Morrison*. The general rule is there stated in my opinion thus—"The general rule established by these cases is, that the matters comprehended in such clauses of reference are disputes arising in the course of the execution of the contract, or it may be even before the execution of the contract has in one sense been begun. The questions included are questions arising in the course of the execution of the contract, and requiring to be immediately disposed of, in order to prevent delay and consequent loss to one or both parties." The question in dispute there was very much the same that we have here, and I must say it is remarkable that with a series of cases extending over twenty years, dealing with clauses of reference like this, parties have not yet learnt to express their meaning more distinctly if they wish to extend the reference beyond the limit fixed by the cases which have been cited to us. There is one example of a case in which the parties evidently intended the clause to have a wider function than that which the clause now before us can possibly have. I refer to the case of *Mackay* v. *The Parochial Board of Barry* [*supra*, p. 697, 21st June 1883] as presenting a marked contrast to the present. This case is not like that of *Mackay*, but is much the same as the case of *Kirkwood* v. *Morrison*, for the clause of reference is thus expressed—"Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to the determination of William Beattie." I am unable to distinguish that from the clause in *Kirkwood's* case; indeed, I think this is a more unfavourable case for the pursuer than some of these prior to *Kirkwood* which were decided in the same way. In the case of *Mackay*, however, we have a clause in these terms:—"Should any dispute arise as to the nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the work, the same shall be submitted" to an arbiter named. And referring to that clause Lord Rutherfurd Clark in his very careful and able judgment says—"The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more, and extend it to the decision of any claim which may arise out of the contract." If parties would only keep in view that there are two kinds of reference, the nature of the one kind being that it includes only disputes arising in the execution of the contract, while the nature of the other is to refer to arbitration every claim and obligation arising out of the contract, there would be an end to cases of this class.

I think the judgment of Lord Rutherfurd Clark in the case of *Mackay* is quite sound, because the words there were extensive enough to cover the question raised, namely, whether money was

due in respect of something done under the contract. Here, however, we have that kind of reference which is confined to questions arising in the execution of the work.

I hope there will be an end to this class of cases, for a very little attention would prevent any ambiguity. Let the words of the clause be that the reference is meant to cover every claim and obligation under the contract, and this Court cannot interfere. But if parties continue to express their meaning in the language of the clause of reference in this contract, let them understand that it is settled law that such a clause covers only questions arising during the execution of the contract. I am therefore for adhering.

Lord Deas concurred.

Lord Mure—I am of the same opinion, and I find that in the case referred to—the case of *Kirkwood* v. *Morrison*, as reported in the Scottish Law Reporter, vol. xv., p. 52—I proceed in my opinion on the broad ground that in consequence of the decided cases I felt bound to hold that a clause in these terms does not exclude the Court.

I have not had an opportunity of seeing Lord Rutherfurd Clark's opinion in *Mackay's* case; the case I go upon is that of *Kirkwood*, which, as well as the case of *Tough*, settles the law in regard to this matter.

Lord Shand—The clauses of reference in contracts such as this have usually been framed so that the architect of the employer is the referee, and the Court in interpreting such references have always construed them strictly. It is quite settled that if parties do not signify the contrary such clauses include only disputes arising in the course of the execution of the work, such as questions as to the true meaning of the drawings, plans, and specifications; unless the words used plainly cover something more than that, the Court will hold that the clause was only intended to apply to that. If parties wish to include disputes regarding money payments arising after the completion of the contract, that can only be safely done by inserting words which will clearly cover such questions. That was done in the case of *Mackay* v. *The Parochial Board of Barry*. But on the cases which have been decided we have no alternative in this case but to adhere to the judgment of the Lord Ordinary.

The Court adhered.

Counsel for Pursuer — Dickson. Agents—Curror & Cowper, S.S.C.

Counsel for Defender — Mackintosh — Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, July 6.

FIRST DIVISION.

[Lord Lee, Ordinary.

HINTON AND OTHERS *v.* CONNELL'S TRUSTEES.

Adjudication—Decree in Absence—Decree of Expiry of the Legal—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 34—*Positive Prescription—Title to Sue.*

Held that a decree of adjudication for debt duly recorded in the Register of Sasines, and followed by decree of expiry of the legal, being only in security for debt is not an "*ex facie* valid irredeemable title to an estate in land," sufficient under the 34th section of the Conveyancing Act of 1874 to found prescription, and therefore that possession for twenty years in virtue thereof is not effectual to give a prescriptive title under that statute.

A postnuptial contract was executed by spouses containing a mutual conveyance by them of all the property of which they might die possessed, the longest liver to have the whole for his or her life, and the whole to be divided equally after the death of such longest liver between the respective children of the spouses, both of whom had children by previous marriages. Among the effects of the spouses was a bill for £100, and after the death of the survivor of the spouses the children of one of them, without making up any title to the estate to which they had become entitled under the contract, founded on the one-half of the bill in raising an action of constitution against the debtor in it, and in a subsequent action of adjudication of heritable subjects belonging to him in which they obtained decree in absence. A decree of expiry of the legal was subsequently obtained. *Held*, in action of reduction of the adjudication and the infeftment following thereon, that the adjudgers being merely entitled to a residuary interest under the postnuptial contract, and having made up no title to the debt contained in the bill, had no title to sue in the action of adjudication, and that the adjudication must therefore be reduced.

By postnuptial contract of marriage entered into by James Young, wheelwright in Langholm, and Janet Scott or Young, his wife, and dated 15th April 1812, the said James Young assigned and disponed to his wife, in case she survived him, his whole goods and gear, and, *inter alia*, a sum of £100 contained in a bill dated 24th February 1801, and accepted by James Young *secundus*, and which had been protested and registered. Mrs Young made a similar conveyance of her whole estate to her husband. The contract also provided that at the death of the longest liver of the spouses the goods in communion were to be divided equally amongst the respective children of the spouses in two equal shares or halves. Prior to her marriage to James Young, Mrs Young had been married to a man named Armstrong, by whom she had two children named Richard Armstrong and Margaret Armstrong. Mrs Young survived her husband.

In 1848, after the death of both spouses, a