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 summons of adjudication was raised by the said Richard Armstrong and the three children of his sister Margaret Armstrong or Nichol, against certain parties named therein, as the representatives of James Young *secundus*, who was a son of James Young *primus*, one of the parties to the contract of marriage, and was the debtor in the £100 bill.

The subjects against which this action of adjudication was raised consisted of a piece of land with dwelling-houses, stable, and yard, situated in the High Street of Langholm, and which piece of land James Young *primus* had, by disposition dated 20th January 1801, made over to his son James Young *secundus* in consideration of the sum of £100 contained in the bill; and the demand in the action was for payment to the pursuers of the sum of £50 and interest, being the half of the sum of £100 contained in the bill above referred to, and which they claimed as being the representatives of their mother Mrs Armstrong or Young. The pursuers Richard Armstrong and the Nichols never made up any title to the estate to which they had acquired right through the said postnuptial contract of marriage. The pursuers obtained a decree of adjudication on 8th March 1849, upon which there followed an instrument of sasine, which was recorded on 8th January 1850, and a charter of confirmation was granted by the superior, the Duke of Buccleuch, on 25th March 1850. The subjects were held by the adjudgers until 1st May 1856, in which year they were disponed by them to the now deceased John Connell, distiller, Langholm, for the sum of £100. On 18th June 1861 there was obtained a decree of declarator of expiry of the legal. This decree was in absence. Mr Connell died in 1876 survived by a widow and four children. He left a trust-disposition and settlement dated 1875, by which he conveyed his whole means, heritable and moveable, to trustees named therein. These trustees were the leading defenders in the present action of reduction, which was raised by Mrs Elizabeth Swallow or Hinton and Mrs Ann Swallow or Lovick, who claimed to be the nearest heirs-portioners of James Young *secundus*, and as such in right of the subjects adjudged. The defenders, other than Mr Connell's trustees (who alone appeared), were the heirs of the pursuers of the adjudication. The deeds sought to be reduced were, 1st, the decree of adjudication of 8th March 1849; 2d, the instrument of sasine following thereon; 3d, the charter of confirmation by the superior in favour of the adjudgers; 4th, 5th, and 6th, the dispositions to Connell of various portions of the adjudged lands; 7th, the decree of declarator of expiry of the legal of January 6, 1861; 8th, a notarial instrument in favour of Connell; 9th, Connell's trust-disposition and settlement in so far as it purported to convey the lands embraced in the adjudication.

The pursuers pleaded—"(1) The debt on which the said pretended decree of adjudication proceeds having suffered prescription at the date of the said decree, the pursuers are entitled to reduction of the said decree and the writs following thereon, as concluded for. (2) The pursuers of the said actions of constitution and adjudication having made up no title to the claim of debt upon which the said actions proceeded, the decrees in both actions should be reduced."

The defenders pleaded—(1) No title to sue. (2) Title to exclude.

On 15th November 1882 the Lord Ordinary pronounced the following interlocutor:—"Finds it not instructed that the citation in the actions of constitution and adjudication, referred to on record, was insufficient; and finds that the debt on which the adjudication proceeds had not suffered prescription at the date when the action of constitution was instituted: Sustains the defenders' first and second pleas-in-law, repels the reasons of reduction, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, so far as not already disposed of, &c.

"*Opinion*.—The decree of adjudication which forms the basis of the defenders' title was obtained on 8th March 1849. The infeftment following upon it was recorded on 8th January 1850. The charter of confirmation by the Duke of Buccleuch as superior was granted 25th March 1850. It was not disputed at the debate, though it is not admitted on record, that the defenders and their authors have been in possession of the subjects in question by virtue of their infeftments since that date. A decree of declarator of expiry of the legal was obtained on 18th January 1861.

"In this state of matters the pursuers' reasons of reduction are met with the plea of positive prescription, and the first question seems to be whether that plea is well founded. For, if it is, it will establish the defenders' right, and exclude all objections to the validity of the title, excepting in so far as these objections arise upon the face of the proceedings and are pleadable by the pursuers.

"It was conceded on the part of the pursuers that an adjudication for debt, such as this adjudication professes to be, if followed by infeftment and the requisite possession, is a sufficient basis of prescription. The point has long been understood to be settled.—1 Bell's Com., 5th ed., p. 707; Jurid. Styles, 1828; Signet Letters, p. 333; and the case of *Robertson* v. *Duke of Atholl*, 3 Dow's App. 108.

"But it was maintained on behalf of the pursuers that the requisite possession is forty years after expiry of the legal, and that the 34th section of the Conveyancing Act 1874 has no application to such a title. The enactment of that section applies only to 'any *ex facie* valid irredeemable title.' It is said that the title in question is not *ex facie* an irredeemable title, and therefore that even if it were *ex facie* valid, twenty years' possession subsequent to the expiry of the legal will not suffice to found a plea of prescription upon such a title.

"My opinion is that infeftment on a decree of adjudication for debt is not an irredeemable title within the meaning of this statute. Such a decree adjudges the property to the pursuer of the action. But it does not profess to do so *irredeemably*. It discloses the fact that what is done is done in payment and satisfaction of debt; and it is notorious that there remains in the debtor, notwithstanding such adjudication, a right of redemption which requires to be extinguished either by declarator of the expiry of the legal or by the combined operation of the positive and negative prescription. The law as stated in *Ormiston* v. *Hill* is 'that to convert an adjudication into an iredeemable right, and extinguish the right of the reverser, it is necessary that the adjudger shall either obtain decree in a declarator of expiry of the legal, or regularly invest himself with charter and sasine upon the adjudication, and possess thereon for forty years.' And Professor Bell explains that this means forty years subsequently to the expiration of the legal. The right of the debtor to redeem his property and to open up or challenge a decree of adjudication for debt is not limited by the Conveyancing Act of 1874, and canot be extinguished without the aid of the negative prescription, to which that enactment does not apply.

"Holding, therefore, that the pursuers' objections are not excluded, the question is as to their merits.

"The leading objection is that the debt had suffered prescription. It was conceded that an interruption had been effected by the diligence executed 9th and recorded 19th August 1805. But it was contended that forty years' prescription subsequent to that date had been suffered, because although a general charge was given on 8th August 1845, the summons of constitution raised 9th August 1845 was incompetent, being raised before the charge of forty days had expired.

"I am of opinion that the summons of constitution was competently raised, and that the decree of payment which passed on 28th January 1846 is not objectionable, on the ground that it was pronounced in an action instituted before the expiry of the forty days' charge. The execution of the summons, I was informed, took place on 9th August 1845, and it does not appear from the decree produced to have been beyond the forty years. The execution on 9th August would, in my opinion, have been sufficient if the defender had entered heir and defended. I think it was equally validated by his allowing the charge to expire and decree to be taken. I think that the expiry of the charge before decree was taken had the effect of obviating any objection that might have been urged against the action as premature.

"The second objection urged is that the pursuers of the action of constitution had made up no title to the debt. They libelled as a title the post-nuptial marriage-contract of Janet Scott and James Young *primus*, and it was not, in my opinion, shown that that title was insufficient. James Young *primus* was the creditor in the bill." . . .

The pursuers reclaimed, and argued—That the defenders could obtain no benefit to their title from the positive prescription. The present action was raised within the forty years from the date of the decree of adjudication, although more than twenty years had elapsed since the date of the expiry of the legal. There was no ground for a plea of positive prescription except under the Statute of 1874. By it twenty years was no doubt substituted for forty, but that was in the case only of "*ex facie* valid irredeemable titles" which this was not. To hold that the 34th sec. applied, would be to convert redeemable into irredeemable titles. The nature of this title was that of a security merely springing out of an adjudication—Ross L. C., vol. i., Land Rights, 147; *Cochrane* v. *Boyle*, March 2, 1849, 11 D. 908. If no possession followed upon an adjudication, the right might be lost by the negative prescription—See *Anderson* v. *Nasmyth*, 1758, M. 10,676. This result would not follow if an adjudication gave an absolute title to land. A title by an adjudication remains a redeemable title to land even after the expiry of the legal—*Ormiston* v. *Hill*, Feb. 7, 1809. Positive prescription protected rights, but could not be said to change their nature. In a question of prescription you had only to deal with publicly recorded titles. Under this Act of 1617 a redeemable title operated an irredeemable right; this could not take place under the 1874 Act —Ersk. iii. 7, 4. The short prescription of twenty years provided by the 34th section of 1874 Act could not apply in a case like the present, as being a security title, the full forty years was required. There was here a recorded redeemable title; the defender had not possessed for forty years on the adjudication, and therefore the positive prescription was not available.

Additional authorities—*Dalzell*, January 17, 1810, F.C.; *M'Lelland* v. *Cutter*, 1762, 5 Brown's Supp. 893; *Spence* v. *Bruce*, 1807, 1 Ross L. C., 206; *Buchanan* v. *Lord Advocate*, July 20, 1882, 9 R. 1218.

Argued for respondent—To determine whether the 1874 Act introduced by section 34 a twenty years' prescription in cases like the present, it was necessary to consider the class of case to which the Act of 1617 applied. It applied to an adjudger's title, and the nature of his right was one of property, while he held it; the Act of 1617 did not apply to security titles at all.—See Ross' Leading Cases (L.R), 203. As the Act of 1617 clearly applied to titles by adjudication, so does the Act of 1874, which is simply a continuation of the Act of 1617, and shortens the period of prescription. The Act 1617 gave a title to sue to one who held forty years, though his title was at first redeemable, provided he possessed for forty years; the Act of 1874 did the same, only it shortened the period to twenty years. The intention of the Statute of 1874 was that twenty years' possession, following upon a decree of expiry of the legal, should make the title irredeemable even though that decree was obtained in absence. In 1861, the date of the declarator of expiry of the legal, the right became irredeemable.—*Donald* v. *Nicol*, December 12, 1866, 5 Macph. 146.

At advising—

LORD PRESIDENT—The object of this action is to reduce a decree of adjudication which was pronounced in absence on 8th March 1849, and which was preceded by a decree of constitution, which was also pronounced in absence.

The Lord Ordinary has assoilzied the defender, but the pursuer has reclaimed, and while he does not insist on all the grounds of reduction first stated, he maintains that one which is expressed in his second plea-in-law, and which is in these terms:—"The pursuer of the said actions of constitution and adjudication having made up no title to the claim of debt upon which the said actions proceeded, the decrees in both actions should be reduced." While this was the ground upon which the reclaimers proceeded, they were met by a plea upon the part of the defender which was not sustained by the Lord Ordinary, and which is stated in two forms—First, that the adjudication is fortified by positive prescription, and second, that being so fortified it became a title to exclude.

Now the decree of adjudication was obtained on the 8th of March 1849, and the infeftment following upon it was recorded on the 8th January 1850. A charter of confirmation was granted by the superior on the 25th of March of the same year, and on 18th January 1861 there was obtained a decree of declarator of expiry of the legal. The present action was raised in October 1881, and it was clear therefore that if forty years possession is necessary in order to found a prescriptive title, then the period during which this property has been held is not sufficient for that purpose; but if the defenders are right in their contention, that under the Act of 1874 twenty years' possession is sufficient, then clearly they are entitled to our judgment on that point.

The whole question therefore depends upon the construction which is to be put upon section 34 of the Conveyancing Act of 1874, which is in these terms:—"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines shall be sufficient foundation for prescription, and possession following on such recorded title for the space of twenty years continually and together, and that peaceably, without any lawful interruption made during the said space of twenty years, shall for all the purposes of the Act of Parliament of Scotland, 1617, cap. 12, anent prescription of heritable rights, be equivalent to possession for forty years by virtue of heritable infeftments, for which charters and instruments of sasine or other sufficient titles are shown and produced according to the provisions of the said Act." . . . . Now the foundation of a prescriptive title under this section is "any *ex facie* valid irredeemable title to an estate in land," and the question comes to be whether the title of the defender is such an "*ex facie* valid irredeemable title to land." But the decree of adjudication and its infeftment, the charter of confirmation, and the decree of declarator of expiry of the legal, all bear to be in security for debt and redeemable, and therefore they obviously do not constitute an "*ex facie* valid irredeemable title to land." It seems to me that this section of the statute can only be read in one sense, and that the Legislature did not mean the provisions of this section to be applicable in any case of a redeemable title. I am therefore against the defender upon the question that the title founded on the adjudication was fortified by positive prescription.

But we must next consider the position of the pursuer of the action of adjudication. The right which he had to the debt upon which the adjudication was led depended upon a postnuptial contract of marriage entered into between James Young, wheelwright, Langholm, and Janet Scott or Young, his wife, dated 15th April 1812. The effect of that contract was that the survivor of the spouses was to get all the property of both parties, and at the death of the survivor it was to be divided equally between the respective children of James Young and his spouse. Now the adjudication in question was led upon a portion of James Young's estate consisting of a bill for £100, and the interest of the pursuers of that action in the said bill amounted to £50. No title was made up to this debt, and the pursuers' right to this document depended solely on their character as residuary legatees. All this appears from the fourth article of the condescendence, and the statements which are there made are not denied by the present defenders. But the interest of the pursuers of the action of adjudication was merely a residuary interest arising out of the postnuptial contract between Mr and Mrs Young. The pursuers, then, of that action of constitution had clearly no title to sue. A legatee in a specific bequest may sue the party who holds the subject of it if he calls the executor as well, but that rule does not apply in the case of a general or of a residuary legatee; on the contrary, it is quite clear that the debtor of the deceased does not become the debtor of a residuary legatee. That settles the question here, for the right of the pursuers in the action of adjudication was just that of residuary legatees, and I see nothing to take their case out of the general rule of law. I am therefore for sustaining the second plea-in-law for the pursuers, and for reducing the adjudication and all that has followed upon it.

Lord Deas—I cannot resist the argument that the initial step taken in the proceeding was bad, and that the effect of that being so is to vitiate all that has followed upon it. With regard to the 34th section of the Conveyancing Act, which is in these terms—[*His Lordship here read the above-quoted section of the Act*]—the only question to be considered is, whether that section makes twenty years' prescription sufficient for the kinds of writs which we have here to deal with? There can be no question that before the Act was passed forty years' possession on a prescriptive title was necessary in all questions relating to redeemable titles to land, and in that respect I do not see that the Act has made any change. The distinction between redeemable and irredeemable titles is easily seen, and it is one thing to say that twenty years' prescription shall do for a title that is on the face of it irredeemable, and another to say that a twenty years' prescriptive title is to convert a redeemable into an irredeemable right. We had a question in some respects similar to this under our consideration in the case of *Buchanan* in 1882, but no opinion was there expressed on the distinction that rises so clearly here. As to the other matter to which your Lordship adverted, there can be no doubt that some hardship will arise from the course which I understand your Lordship proposes should be followed, but looking to the authorities to which we have been referred, I cannot dissent, as I do not see that any other course is open to us.

Lord Mure—I agree with the Lord Ordinary and your Lordships upon the first question, that the 34th section of the Conveyancing Act of 1874 does not apply to a case like the present. It was intended by that section that the twenty years' prescriptive possession should apply only in cases where there was an *ex facie* irredeemable title to the lands. The case we have here before us does not fall within its scope at all, for what we are here dealing with is a security title; on that ground therefore I concur. I also agree with your Lordships' decision on the second plea in law for the pursuers. It is clear, I think, that they made up no title to the debt upon which the decree of constitution proceeded, and on that account, on the authority of the cases of *Park* and *Malcolm* v. *Dick*, where, as I read it, the rule is absolute that the party must have made up his title to the debt prior to the raising of the action. In the present case no title had been made up at the time when the decree was taken out. I therefore concur.

LORD SHAND—The title of the defender to the property in dispute rests upon a decree of adjudication followed by infeftment, along with a charter of confirmation which was granted by the superior. Each one of these documents appears on the very face of it to be a redeemable and not an irredeemable title to land; and that being so, it is quite clear that the 34th section of the Conveyancing Act of 1874 can have no application in the present case, because the provisions of that clause relate only to *ex facie* valid irredeemable titles to land, which the present clearly is not. As to the case of *Buchanan*, it is enough to say that the Court were there dealing with *ex facie* valid irredeemable titles to land, and the opinions in these cases must be read with reference to that class of title. In these circumstances the defenders cannot resist the present action by a plea of the positive prescription. But can the decree in absence which was taken in 1859 be maintained? It certainly can be challenged any time within the forty years. It is, however, maintained that the pursuers in the action of constitution had no title to sue. Now they derived what title they had from the postnuptial marriage-contract of James and Janet Young. Part of the property conveyed by this contract consisted of a bill for £100, and by the terms of the deed James Young appointed his wife his sole executrix. But this document, in addition to being a postnuptial marriage-contract, was also a will, for by it he "assigned, disponed, conveyed, and made over" to his wife "all goods, sums of money, and furniture, ... which may belong to me at the time of my death;" and also a sum of £100 contained in a bill dated 1801, and at the death of the longest liver the goods in communion were to be divided equally among the children of the spouses. It was under this provision that the action of adjudication was raised, and the pursuers in that action assumed that they had a right to one-half of the £100 contained in the bill conveyed to their mother. They accordingly raised the action. But they clearly had no right to sue upon that bill. What they were entitled to was the residue after payment of the testator's debts. Somebody was needed for the office of executor, and confirmation also was required; but there was no executive title in the pursuers of that action, and they had no right to sue upon that bill. The initial step in the proceedings was bad, and what followed upon that falls therefore to be reduced. I think therefore that the Lord Ordinary's interlocutor should be recalled to that extent. It is possible also that the debt upon which these proceedings took place may have been ere this extinguished by intromission with the rents of the heritable property.

The Court sustained the second plea-in-law for the pursuers, and reduced the decree of adjudication and all that had followed upon it.

Counsel for Pursuers—Gloag—Low. Agent—R. H. Christie, S.S.C.

Counsel for Defender — Trayner — Goudy. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF HAMILTON *v.* GUILD (POTTER'S TRUSTEE).

Superior and Vassal—Entry—Casualty—Right of Trustee on Sequestrated Estate of Last Entered Vassal—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

The last-entered vassal in lands, the entry of singular successors in which was untaxed, having died bankrupt, the superior raised against his trustee, whose only title was his act and warrant, an action of declarator and for payment of a casualty of one year's rent in terms of sub-sec. 4 of sec. 4 of the Conveyancing (Scotland) Act 1874. The vassal's heir offered to complete his title and enter with the superior. *Held* that the personal right of the trustee interposed no obstacle, formal or substantial, to the entry of the heir, and that the superior was therefore not entitled to the casualty.

Lewis Potter, merchant in Glasgow, was the vassal last vest and seised in the lands of Netherhouses, and part of the lands of Whistleberry, in the parish of Lanark, conform to instrument of sasine in his favour dated 28th November 1865. He was entered with the superior, the Duke of Hamilton. The entry of singular successors was untaxed.

In November 1878 Potter's estates were sequestrated, and James Wyllie Guild, chartered accountant, Glasgow, was confirmed as trustee, conform to act and warrant of the Sheriff of Lanark, dated the 16th and recorded in the Register of Abbreviates of Adjudications the 20th day of November 1878.

Lewis Potter died on 11th June 1881, and upon the 18th November 1882 an action of declarator and for payment was raised by the Duke of Hamilton, in terms of sec. 4, sub-sec. 4, of the Conveyancing (Scotland) Act 1874, against Guild as his trustee, concluding that in consequence of the death of Lewis Potter, who was the vassal last vest and seised in the lands, a casualty, being one year's rent of the lands, became due to the pursuer as superior of the lands on the 11th June 1881, being the date of Lewis Potter's death; that the rents from and after the date of citation belonged to the pursuer till the casualty and expenses should be paid; and that the defender as trustee should be decerned and ordained to make payment to the pursuer of £2000, or such sum as should be ascertained to be a year's rent of the said lands.

The defender denied that he was successor of Potter as vassal in the lands, and averred that he possessed the said lands on a personal and unfeudalised title, viz., his act and warrant as trustee, and that John Alexander Potter, the only surviving son of Lewis Potter, was his heir in the said lands, and that he was ready to enter with the pursuer as his vassal, and had offered to do so.

The pursuer pleaded—A casualty of one year's rent of the lands described in the summons having become due to the pursuer, as superior thereof, by the defender as trustee upon the death of the said Lewis Potter, the previous vassal, the