other counties as may be locally situated within it. All the machinery for the registration of votes can then be obtained without supposing the repeal of the provision of the 3d section of the Reform Act of 1832.

We have been referred by the Sheriff to the 56th section of the Reform Act of 1868, but I do not see what bearing that section has upon the question.

Upon the whole, then, I have come to the conclusion that the provision of the 3d section of the Act of 1832 remains in force, and that the decisions in the various cases which have been submitted must be regulated accordingly.

LORDS ORMIDALE and MURE concurred.

The Court reversed the Sheriff's judgment, and ordered the respondent's name to be removed from the roll.

COURT OF SESSION.

Tuesday, November 6.

FIRST DIVISION.

[Lord Young, Ordinary.

KIRKWOOD v. MORISON.

Arbitration—Building Contract—Finality of Clause of Reference.

Held that a clause in a building contract whereby parties agreed to refer all disputes between them "connected with this contract or the execution of the work" to the architect of the building as arbiter, did not apply to disputes about the measurement of the work after its completion, and did not exclude the jurisdiction of the Court when such measurements were challenged as having been made without due notice to parties, and inaccurately.

This was a question as to the application of a clause of reference in a building contract. The pursuer of the action contracted with the defender in May 1875 to execute certain building operations for him, and in the contract it was stipulated that if any dispute arose between parties "connected with this contract or the execution of the work," they should be referred to Mr H. K. Bromhead, architect, who was architect of the building for which the pursuer contracted, "whose decision shall be final and binding on all parties without appeal." A prior stipulation in the contract was—"The work to be measured when finished, and priced at the schedule rates, or others in strict accordance therewith, and in proportion to the sum named in letter of offer. Contractor to pay half expense of measurements and schedules."

The pursuer executed the work. As to its sufficiency there was no dispute; but the defender complained of certain measurements which had been taken by Messrs Gavin Park & Son, Glasgow, who had prepared the estimates, after the building was completed. He refused payment of a sum of £1308, 8s. 6d., being part of the pursuer's account, upon the allegation that the measurements werei naccurate, that they had not been made by a member of the firm of Park & Son, and that they had been made without due notice to parties. On an action being raised by the pursuer for payment of his account, the defender, *inter alia*, pleaded—"The action is excluded by the clause of reference in the contract to Mr Bromhead as referee."

The Lord Ordinary found that "the action relates to work executed under the contract of May 1875, referred to on record, and that the dispute or difference of opinion which has arisen between the parties regarding the same, and the measurement thereof, as disclosed by the record, is a dispute or difference of opinion connected with the said contract or the execution of the work, and is therefore comprehended within the reference clause of the said contract." He added this note—

"*Note.*—The pursuer contended that the reference clause only comprehended disputes about the quality of the work; and that the dispute here, which regarded the measurement of work, and the regularity and proper effect of the particular measurement that had been made, did not come within it. I am of opinion that the dispute is connected with the contract on which the pursuer founds and sues, and that the reference clause comprehends it."

The pursuer reclaimed, and argued—This was not a question that fell under the cognisance of the architect any more than a question of money could be held to be. It had been held that a clause of reference in such an executorial contract as this did not comprehend any disputes except those that must be settled in order that the work be carried out without delay. There was no such urgency here.—*M'Cord* v. *Adams*, November 22, 1861, 24 D. 75; *Pearson* v. *Oswald*, Feb. 4, 1859, 21 D. 419; *Birrel* v. *Dundee Goal Commissioners*, March 9, 1859, 21 D. 640.

The defender argued—This dispute was connected with the contract. It was eminently suited for the decision of a man of skill, and it could not therefore fairly be said that parties did not intend to submit the decision of this question to Mr Bromhead, unless the case of *M'Cord* established a general rule to the contrary. Now, it was a case where the clauses of a particular contract had to receive interpretation, and one of the principal considerations that weighed with the Court was that no person was named as arbiter, but merely a firm who chanced to be architects at that time for the building—cf. Lord Neaves' opinion. The clause in *M'Cord's* case was very broad as regards the consideration of time, but not so broad as this as to the nature of the work falling under it.

At advising—

LORD PRESIDENT—In this action the summons concludes for two sums of money, but the question we have to determine relates only to the first, which is said to be the balance due for work executed for the defender by the pursuer under a contract. The averment of the pursuer is that when the work was completed it was measured

by Messrs Park & Son, who had adjusted the schedules, and that they certified that the amount due to the defender was, after certain deductions, £7208, 8s. 6d. The pursuer further avers—"To account of the said sum of £7208, 8s. 6d. the defender has made payments amounting to £5900, leaving a balance of £1308, 8s. 6d. still due, with interest from 22d September 1876, the date of the measurers' certificate," and that is the balance concluded for in the summons. The defender in his statement challenges the accuracy of the measurement on which this conclusion is based, and says the work was not measured by any member of the firm of Park & Son, "but by a person in their employment. The pursuer was present, and the measurement was made under his representation and directions, but the defender received no notice of it, and was not present nor represented, and he had no opportunity of offering any explanations or suggestions in reference to it." On the other hand, the pursuer, in answer to this statement, says—"Explained that the measurement was made by Park & Son's principal assistant, who is well qualified for the work, and does most of their measurements. Explained that, according to the custom of the trade, notice of the intended measurement was sent to the defender's architect on his behalf. The defender was well aware thereof, and was present on the first day when it was proceeding."

The pursuer, upon these statements of fact, pleads—"(3) The measurement having been regularly conducted in accordance with the established custom of trade, is binding on the defender." And, on the other hand, the defender pleads—"(2) The measurement founded on having been obtained by the pursuer in the absence of the defender, and without any notice to him, can receive no effect." And further—"(3) The measurement being in many particulars unintelligible and erroneous, cannot receive effect."

Now, it appears to me that the question thus raised is—Whether the measurement that has been made is binding on the defender? That question may depend partly on matters of fact, partly on considerations of a legal character, and, it may be, also to some extent upon a custom of trade. The dispute between the parties clearly is as to whether this measurement is legally binding on the defender, and whether therefore he is bound to pay the sum concluded for. The defender has pleaded —"(1) The action is excluded by the clause of reference in the contract to Mr Bromhead as referee." But that plea could not in any case, I think, be sustained, for this action would become necessary to enforce the payment of any sum found due by the arbiter. The Lord Ordinary has found—[*reads Lord Ordinary's finding, as above*]. The question is—Is that finding correctly founded in law? We must inquire, what is the reference clause of the contract? It is not material to refer to the other provisions of the contract, which are like those of other building contracts. The clause of reference is this—"Should any dispute or differences of opinion arise betwixt the contracting parties connected with this contract or the execution of the work, the same shall be and are hereby referred to Horatio K. Bromhead, Esq., A.R.I.B.A., whose decision shall be final and binding on all parties without appeal"—Mr Bromhead being the architect employed by the defender.

Now, clauses of reference to an architect in building contracts have formed the subject of discussion in this Court in various previous cases, and by the rules adopted in these cases our decision must be guided. The general rule that has been established is this—that the matters comprehended in such a clause of reference to an architect are disputes that may arise in the course of the execution of the contract. It may be that it may comprehend questions arising before the contract has been begun to be executed, or after it is completed, but the class of questions is such as require to be disposed of to prevent delay in the execution of the contract. Now, this dispute is not of that nature at all. The work has been finished. There is no dispute as to its quality. That is admittedly good. The contractor has done all that he undertook to do. The ground that the defender takes in refusing to pay the price is that the sum demanded is in excess of the contract price, because the measurements are erroneous, and were made in his absence without any notice having been given to him. That is quite beyond such a clause of reference as this. It is possible that in some of the points in dispute questions may arise that may require the assistance of the architect. That was so, if I mistake not, in the case of *Tough* v. *Dumbarton Water-Works Commissioners*, December 20, 1872, 11 Macph. 236, and I think that in that case reservations were made in the judgment pronounced by the Court, so that the services of the architect might be called in at any time to settle questions of which, by the terms of the reference, he was to be judge. It was not, I think, the intention of parties here to refer to the architect any question of the kind which has arisen. I could not, in short, express my opinion better than by using the Lord Ordinary's words with a negative.

LORD DEAS—If we should hold the clause of reference to be applicable in the present case, we should be proceeding directly in the teeth of several well-considered decisions of the Court in cases where the words used were as nearly as possible identical with those used in this contract. I refer particularly to the cases of *Pearson* v. *Oswald* in 1859, *M'Cord* v. *Adams* in 1861, and *Tough* v. *Dumbarton Water-work Commissioners* in 1872. In *M'Cord's* case the words were "any dispute connected with the contract." If any distinction can be taken between the words used there and those used here, the words used there are broader; and yet we held that such a clause could not cover disputes of the kind that have arisen here. Every one knows that the business of a measurer is something totally different from that of an architect. If the architect is not present while these measurements are being taken, he can know nothing of the matter, and although he may be specially sent for to settle some point while the work is being measured, such a thing is not known in practice. All the cases show that this measurement is no part of the work to be done during the execution of the contract, but something to be done after it is over, and that this clause of the contract is not meant to include them.

LORD MURE—I agree with your Lordships. The conditions as to measurement are—"The work

to be measured when finished, and priced at the schedule rates, or others in strict accordance therewith, and in proportion to the sum named in letter of offer. Contractor to pay half expense of measurements and schedules." The clause of reference in the contract occurs after the clause specifying the conditions as to measurement, and there is a great deal of force in the argument submitted by the respondent that this is a dispute involved in the contract, and therefore falling within the clause of reference. But by a series of decisions it has been held that the effect of words of this kind is not to submit questions of this kind to the decision of the arbiter, who is held to be arbiter for an executorial contract only. In these cases the words used were substantially the same. In *Pearson's* case they were—"Any disputes or differences that shall arise between the parties as to the measuring or execution of these presents;" in *M'Cord's* case—"Any dispute connected with the contract." In *Tough's* case they were stronger still. But the Court has held, and it is now settled, that such clauses do not subject to the decision of the referee such a dispute as is raised between the parties here.

LORD SHAND—I am of opinion that this case is ruled by those of *M'Cord* and *Tough*, and on that ground I think that judgment should be pronounced as your Lordship has proposed. The question is—Is this measurement binding on the defender? The ground on which it is maintained that it is, is this—that it is a practice of trade that the person who prepares the specifications is to be the person to measure the works, on giving notice thereof to both parties. He represents both, and he is paid by both. That question, on the authority of the decided cases, does not fall within the class of questions to which the clause of reference applies. Such clauses the Court has held to refer to questions arising under an executorial contract. If these questions are opened up, it may be that this clause will again receive effect, just as if questions had arisen during the execution of the contract. But the authority of the decisions precludes the argument that such questions as this fall within the reference clause.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note against Lord Young's interlocutor of 20th July 1877, Recal the interlocutor: Find that the dispute which has arisen between the parties, and the question raised on the record, is not a dispute or difference connected with the contract libelled or the execution of the work within the true meaning of the clause of reference in the said contract, and is therefore not comprehended within the subject-matter of the said clause of reference: Remit to the Lord Ordinary to proceed as shall be just, and in accordance with the above finding: Find the pursuer entitled to the expenses of discussing the question now decided, both in the Outer and Inner House: Remit to the Auditor to tax the account of said expenses and report to the Lord Ordinary, with power to his Lordship to decern for said expenses when taxed."

Counsel for Pursuer (Reclaimer)—Balfour—Lorimer. Agents—Macbrair & Keith, S.S.C.

Counsel for Defender (Respondent)—Gloag—Asher. Agents—Ronald & Ritchie, S.S.C.

Tuesday, November 6.

FIRST DIVISION.

SPEIRS *v.* SPEIRS' TRUSTEES.

Judicial Factor—Property—Sequestration of a Disputed Estate.

An heir of entail in possession of an entailed estate died leaving a disposition of the estate, under which, upon the narrative that he believed the entail was invalid, he conveyed it to trustees for certain purposes. Immediately after his death the trustees completed infeftment upon the disposition and entered into possession—*held* that the next heir of entail, who had brought a reduction of the disposition, was entitled to have the estate sequestrated and a judicial factor appointed to manage it until the question of the validity of the deed was settled.

The late Alexander Graham Speirs possessed the estate of Culcreuch, in the county of Stirling, under a deed of entail executed in the year 1780, and the estate of Colquhoun Glins under a deed of entail executed in the year 1850. He died on July 23, 1877, having executed a disposition dated 22d March 1877, whereby, on the narrative that he had been advised he was entitled to hold the said estates in fee-simple by reason of defects in the deed of entail under which he held the same, he disponed them to and in favour of his wife Mrs Mary Buchanan Murray or Speirs, Peter Alexander Speirs, and Charles Tennant Couper, but under declaration that the same was granted in trust for various ends and purposes stated in the disposition. Immediately after the testator's death, and before his funeral, the trustees, in compliance with a letter of instructions addressed to them by the deceased, took infeftment in the said lands and estates by recording the disposition in the Register of Sasines for the county of Stirling on July 26, 1877. Dame Anne Home Speirs, wife of Sir George Home, Baronet, and the heir under the said deeds of entail, immediately raised an action of reduction against the trustees, in order to have the disposition set aside and the trustees removed from the lands and ordained to deliver the writs and titles to her. She further presented this petition to the First Division of the Court, praying for sequestration of the estates, and for the appointment of a judicial factor to manage them until the question of the validity of the entail was settled.

The trustees lodged answers (1) objecting to the competency of the petition as brought before the Inner House instead of before the Lord Ordinary—cf. Act 20 and 21 Vict. cap. 56, sec. 4; and (2) resisting the application, on the ground that the appointment of a judicial factor was unnecessary for the interim preservation of the estate. They stated what the defects in the deeds were on which they relied.