a caveat, warning them that they might expose themselves to unpleasant questions in the future. From 1873, then, to 1875 Mr Paterson, in the absence of any authority given to act, took upon himself to give the instructions necessary for the management. But the circumstances rendered it undesirable that Mr Paterson should continue to manage the estates, and in the end Sir William was appointed *curator bonis* to Mr Hay, and he raised this action against the trustee on the estate of Messrs Wilson & Dunlop, who had under these circumstances acted as agents. The accountant has gone fully into the accounts. . . .

As to the question whether Messrs Wilson & Dunlop are entitled to remuneration for their business actings, there are no doubt cases in which questions have arisen and have been decided unfavourably to the agent; but here all the business done has been done *bona fide*, and therefore I am clear the law-charges may be allowed.

Lord Young—I also think the Lord Ordinary should be affirmed, and I have some difficulty in comprehending the questions on which our judgment is asked. The action is simply one of count and reckoning, and is directed against the trustee on the estate of Messrs Wilson & Dunlop, who are described as law-agents. Before the Lord Ordinary it was pleaded that they had intromitted with the rents on Mr Paterson's employment, and that having accounted to him they were not bound to do so again to Sir William Dunbar; and if Mr Paterson had a lawful title to manage the estate, and Messrs Wilson & Dunlop were employed by him, they would have discharged themselves by simply paying to him. The Lord Ordinary accordingly allowed an inquiry in order to see if that was the footing of affairs, which, if it were, would have excluded the action of accounting altogether. The result of an inquiry was to show that Mr Paterson had no title to manage the estate, and therefore that Messrs Wilson & Dunlop must account directly to Sir William Dunbar. The accounting therefore went on, and a remit was made to an accountant on the footing that Messrs Wilson & Dunlop should not have credit for rents which they drew, "except in so far as the moneys paid to him (*i.e.*, Mr Paterson) were applied for the benefit of the ward or his estate." That was, I think, right, and I put the question early in the argument whether that was disputed? and the answer I got was, that "we don't ask credit for any sums except those paid to Mr Paterson and applied for the benefit of the ward." The accounting accordingly took place on that footing, and the plea that Messrs Wilson & Dunlop were sufficiently discharged by having accounted to Mr Paterson was repelled. The Lord Ordinary approved of the accountant's report, and I do not know that anything can be said except that perhaps he took too liberal a view of the extent of the estate, and of the reasonableness of the amount expended. The Lord Ordinary and the accountant were both satisfied that the sums expended were reasonable charges, and it is almost out of the question for a Court of four Judges to go into this kind of matter.

The only other point raised was that Messrs Wilson & Dunlop were at all events not entitled to be paid their professional accounts, because they had acted without authority. This appears a simple matter, and I concur with the Lord Ordinary. I do not know who is the proper guardian yet. If you go to the strictness of the matter, a man *non compos mentis* ought to be cognosced. But we are no great sticklers for the strict matter of procedure in Scotland, and it is common, where all are agreed, for the Court to appoint a curator. But short of it, and cases must be frequent where a man is not able to manage his own affairs, and his family do not desire to have him cognosced, or to have a curator appointed to him, if he has a brother or other relative who will be responsible for managing his estate—in such a case to say that the family law-agent, who has been applied to under such circumstances to give advice, is dealing gratuitously because he countenances the arrangement, is quite extravagant. I cannot censure Messrs Wilson & Dunlop because they countenanced Mr Paterson, even although he turned out a bad manager. I cannot say that by failure to come to this Court at the very first they acted in such a way as to forfeit their proper law charges. They were the family agents during the father's and mother's lifetime, and they were only giving their professional services.

Lord Craighill—I concur.

Lord Rutherfurd Clark—With respect to the law charges, I think they were properly incurred, were necessary for the estate, and that the agents must have their ordinary remuneration.

The Court adhered.

Counsel for the Reclaimer—Sol.-Gen. Robertson—Dickson. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for the Respondents—Gloag—Lorimer. Agents—Davidson & Syme, W.S.

Thursday, December 22.

FIRST DIVISION.

[Lord Trayner, Ordinary.

THE STEEL COMPANY OF SCOTLAND (LIMITED) *v.* TANCRED, ARROL, & COMPANY.

Arbitration—Arbiter Unnamed—Reference Invalid.

The arbitration clause in a contract for the construction of a bridge provided that any question that might arise as to the meaning and intent of the contract should be settled in the case of difference by the engineer for the time being of one of the parties. *Held* that the reference was invalid as the arbiter was not named.

Custom—Usage of Trade—Contract—Proof Inadmissible where Language not Technical.

A contract was entered into by which manufacturers of steel offered to supply the contractors who were constructing a bridge with the whole of the steel required by them for the bridge, at prices which were stated,

and subject to certain terms and conditions which were contained in the letter of offer. One of these was—"The estimated quantity of the steel we understand to be 30,000 tons, more or less." The offer was accepted by the contractors, who repeated this estimate in their letter of acceptance. In an action at the instance of the manufacturers to compel the contractors to take from the pursuers the whole of the steel required for the construction of the bridge, the defenders averred that by the custom and practice of the iron and steel trade the contract was to be regarded only as a contract for the estimated quantity. *Held* that evidence of the alleged custom or usage of trade was inadmissible.

This was an action at the instance of the Steel Company of Scotland (Limited) against Messrs Tancred, Arrol, & Company, the contractors for the construction of the Forth Bridge, to have it found and declared "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders dated 7th March 1883, and the defenders ought and should be decerned and ordained to make payment to the pursuers of the sum of £100,000 sterling, or such other sum as shall be ascertained in the process to follow hereon, as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

In their offer the pursuers wrote—"We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices." Then followed the detailed prices and a set of general conditions one of which was, "the estimated quantity of the steel we understand to be 30,000 tons, more or less."

The defenders in their acceptance wrote—"We hereby accept your offer, dated 7th February, to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices." The general conditions appended to the acceptance contained, *inter alia*, these clauses—"The estimated quantity of steel we understand to be 30,000 tons, more or less. Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge Railway Company for the time being, whose decision shall be binding upon both parties."

The pursuers averred, that "following upon this offer and acceptance, the pursuers commenced to supply steel to the defenders in terms of their contract, and up to 31st May 1887 had delivered steel to the amount of 26,230 tons, and had in all respects fulfilled the terms of their contract." They further averred that it had recently come to their knowledge that the defenders had been supplying themselves with steel for the purpose of being used in the construction of the bridge from other sources over and above the excepted amount of 12,000 tons, as to which no question was raised, and that they had been doing this at prices considerably under those specified in the contract.

The defenders in their statement of facts averred—"The work contracted to be done by the defenders was, as stated in their contract with the Forth Bridge Railway Company, 'of great magnitude, and of a special, novel, and exceptional character.' The railway company's engineer had full power to alter the plans and specification of the work, and to increase or diminish the quantities, and the limit of time and the estimate of quantity were introduced to limit and explain the general words used at the beginning of the letters. . . Stat. 4. By the custom and practice of the iron and steel trade in Glasgow, as well as elsewhere, a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described as the whole iron or steel which is or may be required for a particular purpose, and which also contains a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice, the contract libelled is a contract for 30,000 tons of steel, more or less. The words 'more or less' in said contract are, by the said custom and practice, understood to mean, and were intended by the parties to mean, that the quantity delivered should not exceed or fall short of the estimated quantity by more than 5 per cent. The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere, as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter, and when the present questions arose they endeavoured to get the defenders to amplify the contract on the allegation that there was an agreement, subsequent to that now founded on, to take all extra steel from them, however much it might exceed 30,000 tons."

Statements 5, 6, 7, and 8 for the defenders set forth special cases in which it was averred the pursuers had acquiesced in the defenders' construction of the contract by furnishing steel to the defenders outwith the contract, and also by furnishing steel to third parties in the knowledge that it was to be used for the construction of the Forth Bridge, at the market rate at the time, which was much lower than the contract price. Statement 9 set forth that the defenders had always been ready to implement the contract, but that the pursuers had repeatedly failed to make timeous delivery. "By the contract founded on by the pursuers all questions between the parties are to be referred to the engineer of the Forth Bridge Railway Company for the time being. The defenders hereby offer to take from pursuers not less than 32,000 tons as aforesaid, and also offer to take from them all such steel for such purposes and at such times as the engineer shall consider the pursuers under the said contract have right to supply."

The pursuers pleaded—"(1) The pursuers being able and willing to supply the whole of the steel

required for the construction of the Forth Bridge other than the 12,000 tons excepted as aforesaid, the defenders are bound to take the same from the pursuers in terms of the contract constituted by said offer and acceptance. (2) The defenders having committed a breach of said contract, are liable in damages to the pursuers. (3) The facts averred by the defenders, *et separatim*, the averment as to custom in statement 4, are not relevant to be admitted to probation."

The defenders pleaded, *inter alia*—"(1) This action is excluded in respect that the questions raised herein, and in particular the questions how far and under what circumstances the defenders are bound to take further supplies of steel from the pursuers, fall to be determined by the engineer of the Forth Bridge Railway Company, as arbiter under the contract between the parties; in any view, these questions fall to be remitted to the said arbiter. (5) The pursuers are debarred by their own actings under the said contract, and by *rei interventus*, from maintaining the declaratory conclusions of the summons."

By interlocutor of 26th November 1887 the Lord Ordinary (Trayner) repelled the first plea-in-law for the defenders, and before answer allowed them a proof of their averments contained in their statement of facts, Nos. 4 to 9 inclusive, and to the pursuers a conjunct probation, and granted leave to reclaim.

The defenders reclaimed, and argued—The arbiter was sufficiently designed, and no dubiety existed as to the person who was intended to act. The offer and acceptance contained the whole agreement between the parties, and it was important to keep in view that the same person was engineer of the Forth Bridge Railway Company when the contract was entered into, and when the dispute arose, in which he was to act as arbiter. No exception could be taken to the nature of the dispute; it was just one of the kind contemplated in the clause of reference. Even if the reference would have been invalid under other circumstances on account of the arbiter not being named, it was saved under the well-established exception of executorial references, or references for the purpose of clearing up difficulties arising in the execution of a contract—*Bremner* v. *Elder*, June 24, 1875, 2 R. (H. of L.) 136; *Smith* v. *Lord Fife's Trustees*, February 28, 1843, 5 D. 749; *Howden* v. *Dobie*, March 16, 1882, 9 R. 758; *Merry & Cuninghame* v. *Brown*, July 15, 1859, 21 D. 1337. The Lord Ordinary was right in allowing a proof of the custom of trade.

The respondents argued—The reference here was bad, as no arbiter was named, and as there was not such a *delectus personæ* as was required by the law of Scotland. The contention of the defenders that they were entitled to a proof of the custom of trade in order to construe a contract like the present was untenable. There were no technicalities requiring construction. This was not a matter that should be sent to proof at all; it was a question upon which the pursuers were entitled to a judgment, as the terms of the contract were clear and unambiguous—*Calder* v. *Aitchison*, June 21, 1831, 9 S. 777, and 5 W. & S. 410; Smith's Leading Cases (9th ed.), p. 577; Taylor on Evidence (8th ed.) p. 993; *M'Connal* v. *Murphy*, 5 L.R., P.C. 203; Bell on Arbitration, pp. 85 and 86; *Buchanan*, M. 14,593; *Henry's Trustees* v. *Renton*, May 28, 1851, 13 D. 1001.

At advising—

Lord President—The first question under this reclaiming-note is as to the plea-in-law for the defenders, which is to the effect that this action is excluded in respect that the questions raised therein fall to be settled by arbitration.

The contract is for the supply of steel for the Forth Bridge, and the clause relied on as being a good reference of the dispute which has arisen, is in these terms—"Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge Railway Company for the time being, whose decision shall be binding upon both parties."

There is no person named in this clause of reference, and the only description of the referee is "the engineer of the Forth Bridge Railway Company for the time being." The dispute which has arisen is, whether the sub-contractors, the Steel Company of Scotland (Limited), are entitled to supply the whole of the steel required for the Forth Bridge, and that depends upon the contract itself. If the reference is good in itself, this dispute seems to fall under it, for it is a dispute "as to the meaning or intent of this contract," but the objection taken is as to the validity of the reference. It is said there is no referee named, and therefore that there is not such a *delectus personæ* as the law of Scotland requires in an arbitration of this kind. It is not a reference of a dispute which was in existence when the reference was made, but of "any question that may arise as to the meaning or intent of the contract." Now, I hold this point as quite settled by authority, and I agree with the Lord Ordinary in repelling this plea-in-law.

What may be called the leading case on this subject goes as far back as the year 1799. That is the case of *Buchanan* v. *Muirhead and Others*, M. 14,593, and June 25, 1799, F.C. It was a unanimous judgment of the Court, and it must not be forgotten who composed the Court, which was a very strong one. It was the Court of which we know so much in the history of the law of Scotland, presided over by Sir Islay Campbell. Now, the reference in that case was to "the final determination of the chairman, deputy-chairman, and secretary, for the time being, of the Chamber of Commerce and Manufactures of the City of Glasgow, or any two of them," and the subject of the reference was "all disputes relating to the affairs of the company which should arise among the partners" of the company constituted by the contract in which this clause occurred. It was a reference of all disputes that might arise, and no doubt the chairman of the Chamber of Commerce or any of its members would have been very well fitted to determine such disputes, but it was held that the reference was bad, and the ground upon which the Court so held is thus expressed—"The difficulty in supporting the plea of the defender arises from the reference being not to an individual, but to a description of persons who, as well as the point to be decided, must necessarily have been indefinite at the date of the contract." That seems to me to express with perfect accuracy and precision the ground on which such references

are not sustained.

It is not necessary to consider the series of subsequent cases, but I may refer to one of the most authoritative judgments on this point, that of Lord Chancellor Cairns in the case of *Bremner* v. *Elder*, 1875, 1 R. 1155, and 2 R. (H. of L.) 136. In that case the reference was sustained, but it was of a different kind from this, and in dealing with the general rules of law on this subject the Lord Chancellor thus expressed himself (p. 138)—"Your Lordships have heard an elaborate argument to show that in Scotland there must, as regards the choice of arbiters be a *delectus personæ;* and you were referred to authorities which show that where there is a contract beforehand to refer to the arbitration of individuals not named, or of individuals filling an official position, or of individuals composing a fluctuating body, and where therefore at the time the contract is made to refer to arbitration future disputes which may not arise for years, there can be no *delectus personæ*, there a contract of that kind cannot be urged and founded on to oust the regular jurisdiction of the courts of law. I should be very sorry to express any opinion adverse to those decisions, or tending to throw any doubt upon the propriety of these decisions, but they appear to me to have no application whatever to the present case." I think therefore that this question is closed by authority, and that the Lord Ordinary had no other course open to him than to repel this first plea-in-law for the defenders.

An argument was attempted to be founded upon the circumstance that the engineer of the Forth Bridge Railway Company, when the contract was entered into, was the same gentleman as now fills that office, and that therefore there was a *delectus personæ*. We cannot, however, judge of the competency of the reference by what has happened, but must judge of it as it was made, and at the time it was made it was just as uncertain when any dispute would arise as it was who would be the engineer of the company when any question did arise. This fact therefore I think makes no difference whatever.

The only other matter of any difficulty is that raised by the averments in statement 4 for the defenders and reclaimers as to the custom and practice of trade. The Lord Ordinary has admitted these averments to probation, but in that respect I am sorry to say I cannot agree with his Lordship. The statement is that by the custom and practice of the iron and steel trade a contract such as that now before us for the supply of iron or steel is something different from what it expresses. Now, the terms of the contract here are very express as regards the subject-matter of the contract, for the offer of the pursuers is—"We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates." The offer is to supply the whole of the steel, and the answer to that offer—the acceptance—is in these terms:—"We hereby accept your offer to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates." The 12,000 tons of plates which are here mentioned had already been contracted for from another company, and therefore it was necessary to except that quantity from the general description of the whole steel required, but this exception only makes the language of the contract more distinct and conclusive as to what the extent of the supply was to be. It was to be the whole of the steel, less 12,000 tons.

No doubt in another part of the contract we are informed—or rather the pursuers were informed—as to the estimate the defenders had formed of what the whole quantity of the steel was likely to amount to. They say—"The estimated quantity of steel we understand to be 30,000 tons, more or less." Now, it was contended on the construction of that statement that the whole quantity was thereby limited to 30,000 tons. I consider this contruction quite untenable. We have been told that the supply of steel required is very large, and the defenders have themselves informed us in statement 3 that the work is one "of great magnitude, and of a special, novel, and exceptional character." Now, that seems to me to afford a sufficient reason why the pursuers should be informed of the estimate of the quantity of steel which would be required, which had been formed by the defenders. An estimate was essential, for unless the pursuers knew what quantity of steel they would require to have ready from time to time, they would be put to a great disadvantage. No one could have such large quantities ready at a moment's notice, and therefore it was very proper that there should be a statement of the probable quantity that would be required. I find no difficulty therefore in construing this contract without any extraneous assistance, but then the defenders say it means something different from what it says. They aver in statement 4 that "by the custom and practice of the iron and steel trade in Glasgow, as well as elsewhere, a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described as the whole iron or steel which is or may be required for a particular purpose, and which also contains a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed."

Now, I think that averment should not be admitted to probation, because it is irrelevant. It is an attempt to set up custom to contradict the plain terms of a contract, in which there are no technical words requiring to be explained, but plain words used in their ordinary signification. It is therefore impossible to admit proof of custom here, because of the technical character of the words of the contract. But it is said that proof of custom is here competent, because there is something else implied in the contract beyond what is expressed. That only disguises under a different form of words the attempt to get beyond the plain words of the contract. The law on this matter is so well settled that it is perhaps unnecessary to refer to authorities, but the result of the cases is so well summed up in Mr Dickson's book upon Evidence, that I may read section 1095 which exactly expresses my own views. "Unless," he says, "the terms of the writing are technical, the evidence of mercantile men will not be admitted to explain it, because the construction of a written contract is for the Court, not for

the jury. And if the writing is so copious and precise in its stipulations as to show that it is a record of the whole agreement relating to the point in issue, and not merely a statement of some of its heads, the rest being left to usage of trade, the Court will give effect to the agreement as recorded, and will not allow stipulations to be added to it by a proof of usage. The sphere of this kind of evidence is therefore limited to interpreting any technical words in the document, and supplying any customary conditions which the parties may be presumed to have tacitly agreed to. Aided by such evidence, the Court will construe a mercantile agreement on the same principles as they apply to all written expressions of a person's intention." I think that a perfectly accurate statement of the result of the cases. He adds in the next section (1096) what is by no means an unnecessary caution—"Little assistance can be derived from the law of England in questions of this kind, for (quoting Lord Justice-Clerk Hope) 'there can be no doubt that we we have never in Scotland gone so far as they have done in England in admitting evidence of understanding or usage in order to construe thereby a written document;'" and then Mr Dickson adds in his own words—"Nor does there seem to be any reason for abandoning our own principles for the more lax rules of English law, since among the judges and text writers of that country there is a strong feeling towards limiting the admission of this kind of proof."

I think therefore statement 4 should not be admitted to probation, but the Lord Ordinary has further allowed proof of statements 5, 6, 7, 8, and 9, and in that respect I agree with the Lord Ordinary. The import of these statements is that the pursuers in the execution of this contract have abandoned their position as sole suppliers of the steel required for the Forth Bridge, inasmuch as they have tacitly submitted to seeing other contractors supplying the defenders, and have themselves supplied steel to the defenders through other contractors at current prices, and not at the price fixed by their original contract. Now, I can quite understand that a party under a contract such as I have been speaking of may so comport himself in the execution of the contract as to bar himself from insisting upon its complete fulfilment, and I think if these averments of the defenders upon this matter are made out, the pursuers will be barred from insisting on the defenders taking delivery of the remaining portion of this steel. Therefore I am for adhering to the Lord Ordinary's interlocutor in so far as he allows proof of statements other than statement 4.

Lord Mure—I concur with your Lordship on both points. On the second point, as to whether the averments in statement 4 are to be admitted to probation, I desire to point out, that in the case of *Gordon* v. *Robertson and Others*, so far back as May 19, 1826, 2 W. & S. 115, where there was an express stipulation in a written contract between landlord and tenant to this effect, "The whole fodder to be used upon the ground, and none sold or carried away at any time, hay only excepted," the House of Lords, reversing the Court of Session, held that these plain and unambiguous words must be given effect to, and excluded all consideration of the custom of the country.

Lord Adam—I hold it quite settled in law that a reference *ab ante* to a person unnamed is not a valid reference. Now, this clause of reference is exactly in that position; it refers any disputes that may arise to "the engineer for the time being of the Forth Bridge Railway Company." No one knew or could tell who would be engineer when disputes might arise, and thus it was clearly a case of a reference to an unknown person.

The second question is quite different. According to my understanding of the law on the subject, proof as to custom of trade may be led (1) to explain technical terms, which may be either technical *per se*, or ordinary words used in a technical sense; or (2) where it is proposed to add to the contract an unexpressed term which is said to be implied by the custom of trade. This is not a case of either technical terms, for there are no terms used which the Court cannot understand and interpret without further assistance, and there is no proposal to add additional terms to the contract by implication. We shall have to apply our minds to the interpretation of this contract if it comes before us again. It is premature to consider it now, but I see no technical terms requiring explanation before we can interpret its meaning. I am therefore for refusing to admit the averment of custom to probation, although I agree with your Lordship that the other averments should be sent to proof.

Lord President—Lord Adam has drawn my attention to the fact that statement 4 contains other averments besides those relating to custom of trade. These other averments will be admitted to probation along with statements 5 to 9, the disallowance of proof referring only to the part of statement 4 alleging the custom of trade. With this exception we adhere to the Lord Ordinary's interlocutor.

The Court pronounced the following interlocutor:—

> "Recal the said interlocutor in so far as it allows a proof of the averments of custom and practice of trade contained in the 4th article of the defenders' statement of facts: *Quoad ultra* adhere to the said interlocutor, and remit to the Lord Ordinary.

Counsel for the Defenders and Reclaimers—Balfour, Q.C.—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Pursuers and Respondents—Sir C. J. Pearson—Low. Agents—Tods, Murray, & Jamieson, W.S.