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.

Authorities—(1) On the competency—*Catton* v. *Mackenzie*, March 16, 1870, 8 Macph. 713; *Rintoul*, Dec. 20, 1862, 1 Macph. 214; *Campbell* v. *Campbell*, June 27, 1863, 1 Macph. 991. (2) On the merits—*Pringle Elliot* v. *Scott and Others*, March 27, 1843, 5 D. 1075; *Catton* v. *Mackenzie* (*supra*); *Thoms* v. *Thoms*, March 27, 1865, 3 Macph. 776.

At advising—

Lord President—There are two questions raised for your Lordships' consideration here, viz.—(1) As to the competency of this petition; (2) whether on the merits the prayer of the petition should be granted? On the question of competency I think there is no room for doubt. The petitions which by the Act 20 and 21 Vict. cap. 56, sec. 4, are appropriated to the Junior Lord Ordinary, do among others, without doubt, include petitions for the appointment of judicial factors. Whether this petition answers to that description or not I do not intend to say a word. It is enough to observe that from the petitions appropriated by that Act to the Junior Lord Ordinary are excepted those which are "incident to actions or causes actually depending at the time of presenting the same." That this petition is included under the exceptions under the statute I cannot doubt, and therefore the petition I hold is competent. The action of reduction has been "called," and is now "actually depending" in the sense of the statute.

The circumstances of the case are peculiar, but yet they exactly resemble a previous case decided in this Division of the Court—the case of *Pringle Elliot*, May 27, 1843, 5 D. 1075. There Mr Pringle was heir of entail in possession of two entailed estates, and uniformly acted as such, when on his deathbed he made a general and special trust-disposition and settlement which had for its direct end the breaking of the deed of entail. Upon this trust-deed infeftment was taken on the day of the testator's funeral.

In the present case the testator left a letter of instructions to the trustees enjoining them to take infeftment before his funeral. He died on 23d July, and the trustees, in fulfilment of his orders, took infeftment, and had the conveyance recorded upon the 26th July, being before the funeral. Now, I need hardly say that the heiress of entail could not anticipate this action, especially as she seems to have had no knowledge of the existence of the conveyance, and she now presents this petition on the ground that possession obtained in this way by the trustees can go for nothing, and that the estate passes by force of the destination in the entail to the petitioner unless a flaw be found to justify the trust-disposition. The petitioner therefore claims that he has a right to have the estate put under judicial care until she has had an opportunity of setting aside the new disposition.

It appears to me that these circumstances correspond exactly to the case of *Pringle Elliot*. Mr Elliot and his advisers were not perhaps as ingenious as Mr Speirs and his, but they were shrewd enough to see that if they took infeftment as fast as possible it would be a good point in their favour if any question arose, and accordingly they took infeftment on the day of the testator's funeral, or, as it was said, they took infeftment "upon his grave." In short, in this case, as in *Pringle Elliot's* case, the alleged possession can go for nothing, and I do not see that anything further is said. The two cases are identical; and what did the Court do in the former? It granted the petition, and the remarks which fell from the Court in that case are very appropriate to the present case. I am for following that precedent, and think we ought to grant the prayer of the petition.

Lords Deas, Mure, and Shand concurred.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the petition, with the answers for Mrs Speirs and others, No. 9 of process, and heard counsel, Repel the objection to competency: Sequestrate the lands and estates contained in the deeds of entail mentioned in the petition, and the rents and proceeds of said lands and estates, as prayed for: Nominate and appoint the Honourable Francis Jeffrey Moncreiff, chartered accountant, Edinburgh, to be judicial factor upon the said lands and estates, with the usual powers, he always finding caution before extract; and decern."

Counsel for Petitioners—M'Laren—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents—Lord Advocate (Watson)—Kinnear—Keir. Agents—A. & A. Campbell, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, November 8.

WOOD *v.* CAMPBELL.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Adam.)

Justiciary Cases—Public-House—Breach of Certificate—Keeping Open House—Public-Houses (Scotland) Act Amendment Act (25 *and* 26 *Vict. cap.* 35).

Held that to open the door of a public-house for the purpose of cleaning before eight o'clock in the morning is not "keeping open house" in the sense of Schedule A of the Public-Houses (Scotland) Act Amendment Act 1862, and conviction therefor quashed.
