The Court recalled the interlocutor reclaimed against, and found and decerned in terms of the conclusions of the summons.

Counsel for the Pursuers and Reclaimers—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—Gunn. Agents—Mackay & Young, W.S.

Tuesday, June 9.

SECOND DIVISION.

[Lord Pearson, Ordinary.

MOORE *v.* M'COSH.

Arbitration — Interdict of Arbiter before Decision—Order Claimed ultra vires of Arbiter—Objection to Form of Claim—Claim for Damages.

A claim having been lodged in an arbitration, the respondent, before the arbiter had considered the claim or pronounced any decision thereon, presented a note for interdict against the arbiter proceeding with the reference, on the ground that the form of the claim was such that the arbiter was asked to pronounce an order which would be *ultra vires*. *Held* (*reversing* judgment of Lord Pearson) that although it might be the claim as stated could not be competently sustained, yet, as the matters in question fell *prima facie* under the clause of reference, and the claim might be amended so as to be competent, the objections raised resolved into a question of pleading, which fell primarily to be dealt with by the arbiter; that it could not be assumed that the arbiter would pronounce incompetent orders; and that in these circumstances the complainer was not entitled to have the arbitration interdicted *ab ante*.

A note of suspension and interdict was presented by Alexander George Moore, coalmaster, 142 St Vincent Street, Glasgow, against Andrew Kirkwood M'Cosh, ironmaster, Cairnhill, Airdrie, and James M'Creath, civil and mining engineer, Glasgow, in which the complainer sought to have the respondent M'Cosh interdicted from in any manner of way following up and proceeding with pretended references to the respondent James M'Creath.

The complainer had been tenant under two leases of certain minerals and of a tramway connected therewith which belonged to the respondent M'Cosh.

Each of these leases contained an arbitration clause in the following terms:—"Further, it is hereby specially agreed that in the event of any misunderstandings or disputes arising in regard to the true intent and meaning of these presents, or any of the terms and provisions hereof, or the rights or obligations of either party, or in any way in relation to the premises, all such are hereby referred to the amicable decision and final sentence of . . . James M'Creath, civil and mining engineer in Glasgow, as sole arbiter in the premises, whose decision both parties bind themselves to implement and abide by."

The leases also contained provisions by which the tenant was taken bound (1) to leave a body of solid coal under a farmsteading; (2) to make up and pay all damage occasioned by sits or sinks; and (3) before the expiry of the lease to restore the land occupied by him, and to render the same fit for purposes of agriculture.

After the expiry of the complainer's leases, and after he had finally quitted possession, the respondent M'Cosh made certain claims founded upon the tenant's said obligations under the leases. In 1902 he called upon Mr M'Creath to act as arbiter with regard to these claims. Thereafter he lodged two condescendences and claims referring to the obligations in the two leases respectively.

In his condescendences M'Cosh alleged failure on the part of the tenant to implement his said obligations under the leases.

The claim relating to the lease of the minerals was as follows:—"That the respondent should be ordained to perform the operations necessary to restore the several areas of land before referred to, and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as they were before being originally interfered with by the respondent or his predecessors, as also to restore the drains and watercourses, to securely and properly fence the open pit shafts, and to make good to the claimant the loss and damage occasioned by sits, and by the working out of the whole coal under and around the farmsteading on Garrockhill; and in the event of the respondent failing to do so within a limited period, to find that the respondent is liable in the cost of such restoration, &c., as the loss and damage occasioned to the claimant's property by the workings of the respondent."

The other claim was to the same effect, and the concluding alternative claim was in identical terms.

In the present note of suspension and interdict the complainer pleaded—"The complainer is entitled to interdict as craved, in respect that (*a*) the questions submitted by the respondent Andrew Kirkwood M'Cosh to the respondent James M'Creath do not fall within the scope of the clauses of reference in the said leases, (*b*) even if they do fall within the scope of the clause of reference, they cannot be insisted on in respect that the complainer had yielded up possession of the subjects let before the claims were made, and (*c*) the claims made by the respondent Andrew Kirkwood M'Cosh are for damages, and the said clauses of reference do not authorise the respondent James M'Creath to assess damages."

The respondent M'Cosh pleaded—"(2) The action should be refused, in respect the matters submitted to the arbiter fall

within the clauses of reference in the said leases. (3) All disputes under the said leases, as defined by the clauses of reference, having been referred to the arbiter, it is his duty to proceed *intra fines compromissi*, and the action should accordingly be refused."

On 20th December 1902 the Lord Ordinary (PEARSON) pronounced an interlocutor in the following terms:—"Meantime interdicts, prohibits, and discharges the compearing respondent from following up and proceeding with the references mentioned in the prayer of the note so far, but only so far, as regards the respondent's claims lodged therein."

"*Opinion.*—. . . . The complainer in moving that the note should be passed asked for interim interdict in terms of the prayer against either of the references being proceeded with. The respondent maintained that the note should be refused on the ground that both references are *prima facie* good under the respective leases, and that in any view this application is premature, seeing that the arbiter has had no opportunity of applying his mind to the subjects submitted. . . .

"I see no reason for stopping the references generally, for although the statement of the disputes on the part of the respondent is open to criticism, I think it may be quite capable of being brought within the scope of the arbitration clause when it comes to be formulated in a claim. But the respondent has tabled a condescendence and claim in each reference, and on these claims he insists, and as in my judgment these claims are outside the respective reference clauses, I think the complainer is entitled meanwhile to have the respondent interdicted from proceeding with the references so far as regards these claims as set forth in the documents produced."

The respondent reclaimed, and argued—The arbiter had not yet considered the claim submitted to him, and the Court would not assume that he would entertain a claim which was not in form, but would leave him to consider whether it was so—*Farrell* v. *Arnott*, July 14, 1857, 19 D. 1000. The case was one in which the Court would be slow to interfere, the question being one under the contract between the parties, and not under statutory provisions—*Sinclair* v. *Clyne's Trustee*, December 17, 1887, 15 R. 185, 25 S.L.R. 172; *Bennet* v. *Bennet*, January 31, 1903, 40 S.L.R. 341; *Dumbarton Water Commissioners* v. *Lord Blantyre*, November 12, 1884, 12 R. 115, 22 S.L.R. 80. All that the arbiter was asked to do was to assess the cost of fulfilling the tenant's obligations, and the respondent could, if necessary, raise an action for the recovery of the cost so ascertained—*Allan's Trustees* v. *Allan & Sons*, December 1, 1891, 19 R. 215, 29 S.L.R. 180.

Argued for the complainer—The leases under which the reference was made being at an end the arbiter could pronounce no order *ad factum præstandum*, and the respondent's only remedy was the recovery of damages—*Sinclair* v. *Caithness Flagstone Company*, March 4, 1898, 25 R. 703, 35 S.L.R. 541. The arbiter could not assess damages; the arbitration proceedings would therefore be useless, and the Court would interfere, *ab ante*, to interdict them—*Glasgow and South-Western Railway Company* v. *Caledonian Railway Company*, November 3, 1871, 44 Scot. Jur. 29, Lord Neaves, p. 31; *Dumbarton Water Commissioners* v. *Lord Blantyre*, *cit. sup.*, Lord President, 12 R. 119. An arbiter could not assess damages unless he was expressly empowered to do so—*Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919.

At advising—

LORD TRAYNER—The Lord Ordinary has granted interdict to a limited extent against the reclaimer prosecuting his claim before the arbiter. The statement of facts made by the reclaimer in the condescendence and claim lodged in the submission appears relevant enough, and no objection is taken to it on that ground. But the respondent maintains that the claim appended to the condescendence is such as the arbiter cannot give effect to, and that the Court should not allow to proceed a submission in which the only claim made is one with which the arbiter has no power to deal. *Prima facie* it would appear to be for the arbiter to say in the first place whether the claim is one which he will entertain, and it is somewhat hard to enforce an amendment of pleadings in an arbitration—for that is really what it comes to—by means of an interdict. If it was obvious that there was no claim with which the arbiter could deal, he might be interdicted from proceeding. But that is not the kind of case presented here. There is a good clause of submission, and under it the respondent may make good some claim against the complainer, although he may not be successful in getting his claim as stated sustained. He will consider, either now or at a later stage, whether he will amend his claim. Meantime I think we should recal the interlocutor of the Lord Ordinary *in hoc statu*, and remit to him to continue the cause. This will enable the complainer to come back and ask interdict if the proceedings of or before the arbiter afford ground for doing so.

LORD YOUNG—The interdict granted by the Lord Ordinary here appears to me to be quite erroneous. My opinion is distinct that the reference is a lawful reference, and that it ought to be proceeded with. Of course if the referee decides anything that is not submitted to him in the reference, his judgment will be subject to be altered and put right by a judgment of this Court, as judgments of arbiters sometimes are. But the reference being lawful, and the case being presented to the arbiter for his decision, whether he decides it rightly or wrongly, I think there is no ground for suspension at all. I am not disposed to remit to the Lord Ordinary to hold this suspension in abey-

ance until the proceedings before the arbiter are concluded. There is no need for that. I think the suspension should be put out of Court now, leaving it to either party if he thinks that he has suffered from an erroneous decree of the arbiter to take the remedy which the law gives in such a case. I should therefore refuse the note of suspension, and refuse it with expenses.

LORD MONCREIFF—I am also of opinion that interdict should be refused. The particulars or heads of the claim made by the respondent Mr M'Cosh, or the greater part of them at least, are *prima facie* such as fall to be submitted to arbitration under the leases. The complainers' objections which the Lord Ordinary has sustained are confined to the formal prayer with which the claim concludes, and in which the orders which the claimant asks the arbiter to make are set forth. It is said that the orders asked are incompetent, and perhaps they are, but we cannot assume that the arbiter will make incompetent orders. If the prayer of the claim is out of shape the arbiter will no doubt allow the claimant an opportunity of amending it. This is really a matter of pleading, and I do not think that the Court should at this stage interfere with the functions of the arbiter. The recent case of *Bennet* v. *Bennet*, decided by the First Division, January 31, 1903, 40 S.L.R. 341, seems to be in point.

The LORD JUSTICE-CLERK concurred with Lord Young and Lord Moncreiff.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to refuse the note.

Counsel for the Complainer and Respondent — Campbell, K.C. —C. D. Murray. Agents—Drummond & Reid, W.S.

Counsel for the Respondent and Reclaimer—Dundas, K.C.—Younger. Agents —Webster, Will, & Co., W.S.

Wednesday, June 10.

FIRST DIVISION.

BARCLAY'S TRUSTEES *v.* WATSON.

Succession — Marriage-Contract — Testamentary or Pactional—Revocability of Destination to Strangers in a Marriage-Contract.

In an antenuptial marriage-contract the wife conveyed the whole estate which should belong to her during the subsistence of the marriage to trustees, for payment of the free income thereof to herself during her life, and to her husband during his survivance of her while he should remain unmarried, and for retention of the capital of her estate after her death and the expiry of her husband's liferent right for behoof of the children of the marriage or their issue, and payment thereof to them, and failing such children surviving her, for payment to her brothers and sisters *nominatim* equally among them. The deed contained a clause declaring that it should not be revocable by her, even with her husband's consent, on any ground or in any form whatever.

The marriage was dissolved by the death of the husband, and there were no children of the marriage. Subsequently the wife executed a trust-disposition and settlement by which she revoked the marriage-contract in so far as regards the destination of the funds which came from or through her.

Held that the wife was entitled to revoke, and had by her trust-disposition and settlement effectually revoked, the destination of her estate in the marriage-contract to her brothers and sisters.

By antenuptial contract of marriage, dated 26th and 27th July 1848, entered into between Robert Barclay, Montrose, and Robertina M'Culloch Watson, afterwards Mrs Barclay, Robert Barclay conveyed to his intended wife in liferent upon her survivance, and to the children of the intended marriage in fee, whom failing to his own heirs and assignees whomsoever, the whole estate belonging or that should belong to him at the dissolution of the marriage, with the exception of a policy of assurance upon his own life for the sum of £499, 19s., and further conveyed to the Rev. Jonathan Watson and others, as trustees, the said policy of assurance, to hold the same for his intended wife in liferent and the children of the marriage, whom failing his heirs and assignees whomsoever, in fee; and, on the other part, the said Robertina M'Culloch conveyed to the Rev. Jonathan Watson and others, being the persons nominated by her husband as aforesaid, as trustees, the whole estate then belonging to her or which should belong to her during the subsistence of the marriage, and in particular her interest as beneficiary under the last will of her granduncle William M'Culloch, in trust for the purposes and with and under the powers, conditions, and declarations therein specified. These trust purposes were as follows:—(1) for payment of the free income of Mrs Barclay's estate during the subsistence of the marriage to herself; (2) for payment of the said income to her during her survivance of her husband; (3) for payment to her intended husband, during his survivance, and while he should remain unmarried, of the free income of all estate vested in her or in trustees for her behoof, or to which her right had emerged during the subsistence of the marriage; and (4) for retention of the capital of her said estate after her decease and the expiry of her intended husband's liferent rights, for behoof of the child or children of the marriage, or their issue, and payment thereof to them at the following periods, viz., if the said child or children or the said issue should have previously attained the age of twenty-one years complete, or being daughters should have been married, immediately after the