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

expiry of the liferent right of her husband, or the arrival of the said period of majority or marriage, whichever of these events should last arrive; "and in the event that there shall be no child or children of the said intended marriage surviving at the death of the said Robertina M'Culloch Watson, or that such as may survive her and their issue shall die before majority, or being daughters before marriage, that the said trustees or trustee acting for the time shall pay over, assign, and convey to and in favour of the said Heyworth Watson, Alexander, William, Jonathan, and Morrison Watsons, all her brothers, and to Agnes and Amelia Watsons, her sisters, equally among them, share and share alike; declaring that the share of any of her said brothers and sisters who may die before majority or marriage without issue shall devolve to the survivors or survivor of them, and that the distribution of the said trust funds shall in every event take place *per stirpes*, the whole trust funds then in their possession, and that at the periods and in manner following:—If the said Robertina M'Culloch Watson shall survive the said Robert Barclay and the children and issue aforesaid, at the term of Whitsunday or Martinmas first after her decease; if the said children and issue shall survive the said Robert Barclay and the said Robertina M'Culloch Watson, and shall afterwards fail as aforesaid, at the term of Whitsunday or Martinmas first after the failure of the last survivor of such children or issue; and if the said Robert Barclay shall survive the said Robertina M'Culloch Watson, and the said children and issue shall all before his decease have failed as aforesaid, at the first term of Whitsunday or Martinmas after the expiry of the said liferent, with interest from the foresaid term of payment during the not payment."

The marriage-contract contained certain other clauses and, *inter alia*, a declaration in the following terms:—"I, the said Robertina M'Culloch Watson, declare that these presents shall not be revocable by me, even with the consent of the said Robert Barclay, my future husband, on any ground or in any form whatever."

The marriage was dissolved by the death of the said Robert Barclay on 8th May 1896, and there were no children of the marriage.

During the subsistence of the marriage Mrs Barclay succeeded to certain sums of money, being shares of the estate of relatives, amounting at the date of her death to £8829.

The said Mrs Robertina M'Culloch Watson or Barclay survived the said Robert Barclay, and died upon 4th November 1901 without having entered into a second marriage, and predeceased by all her brothers and sisters named as beneficiaries under the said antenuptial contract of marriage, with the exception of her sister Agnes, now Mrs Agnes Watson or Black. Her brother the said Heyworth Watson died on 16th August 1851 without leaving issue. Her brother the said Alexander Watson died in 1863, survived by a son Heyworth Watson. The said William M'Culloch Watson died on 8th May 1889, survived by his wife and two daughters. The said Jonathan Pearce Watson died on 6th May 1888 unmarried. The said Morrison Watson died on 25th March 1885 intestate, without issue. Amelia Watson, afterwards Mrs Amelia Watson or Mackay, died on 23rd November 1892, survived by eight children.

Mrs Barclay at her decease left a trust-disposition and settlement, dated 25th May 1899, in which, upon a narrative of the conveyance in trust granted by her in the antenuptial contract of marriage, of the trust purposes contained therein, and of the special declaration therein contained prohibitive of revocation by her of the said antenuptial contract of marriage, and upon the further narrative that she had resolved to revoke the aforesaid antenuptial contract of marriage in so far as regarded the destination of the funds which came from or through her, she revoked and recalled the foresaid antenuptial contract of marriage, with the whole heads, clauses, tenor, and contents thereof, in so far as regarded the destination therein of the funds which came from or through her, whether vested in herself or her marriage trustees, and falling under the restrictions of the said antenuptial contract of marriage, and conveyed to trustees therein named, not only the whole funds, means, and estate which came from or through her and fell under the restrictions of the foresaid antenuptial contract of marriage between her and her said husband, whether vested in herself or in her marriage trustees or trustee for her behoof, but also the whole means and estate which should belong and be addebted to her at the time of her death, or of which she might have the disposal (excepting only a sum of £750), and that in trust for, *inter alia*, the following purposes, (2) for payment, free of duty, of certain legacies; (lastly) as regards the residue of the trust-estate, for payment at the first term of Whitsunday or Martinmas six months after her death, to all her nephews and nieces who should survive and should then have attained majority, equally between or among them, share and share alike, the issue of nephews and nieces predeceasing her being entitled equally among them to the shares which their parents would have taken if alive.

A question having been raised as to whether Mrs Barclay's trust-disposition and settlement effectually operated revocation of the destination in favour of her brothers and sisters contained in Mr and Mrs Barclay's marriage-contract, the present special case was presented for the opinion and judgment of the Court.

The parties to the case were—(1) The sole trustee under Mr and Mrs Barclay's marriage-contract, (2) the trustees under Mrs Barclay's trust-disposition and settlement, (3) Heyworth Watson, son of Alexander Watson and a nephew of Mrs Barclay, (4) Mrs Agnes Watson or Black, the surviving sister of Mrs Barclay, who was a legatee under

her trust-disposition and settlement, (5) the six children of Mrs Agnes Watson or Black, being nephews and nieces of Mrs Barclay, (6) the eight children of Mrs Amelia Watson or Mackay, being nephews and nieces of Mrs Barclay, (7) the two daughters of William M'Culloch Watson, being nieces of Mrs Barclay, and (8) the legatees under Mrs Barclay's trust-disposition and settlement.

The third, fourth, and seventh parties maintained that the destination contained in Mrs Barclay's antenuptial contract of marriage was not evacuated to any extent by her trust-disposition and settlement.

The fifth, sixth, and eighth parties maintained that Mrs Barclay, having survived her husband, and there being no issue of the marriage, was entitled to revoke, and did by her trust-disposition and settlement effectually revoke, the destination of her estate contained in her contract of marriage.

The question of law for the determination of the Court was, *inter alia*—"(1) Was Mrs Barclay entitled to revoke, and did she by her trust-disposition and settlement effectually revoke, the destination of her estate contained in her antenuptial contract of marriage?"

Argued for the fifth, sixth, and eighth parties—The destination in the marriage-contract in favour of Mrs Barclay's brothers and sisters was revocable by Mrs Barclay, and had been effectually revoked by her trust-disposition and settlement. The destination in question was purely testamentary and not contractual. The case fell under the rule that in a marriage-contract clauses of eventual destination to strangers, *i.e.*—to persons not descended of the marriage, and therefore not within the consideration of the marriage—were mere gratuitous destinations which created no obligation against the granter, and which he might therefore revoke—*per* Lord Watson in *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, at p. 94, 31 S.L.R. 279. This doctrine, which was stated by Erskine iii. 8, 39, was established by a series of cases, —*Laidlaws* v. *Newlands*, February 1, 1884, 11 R. 481, 21 S.L.R. 332; *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, 15 S.L.R. 690. The case of *Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H.L.) 10, 21 S.L.R. 465, was quite inapplicable here, inasmuch as Mrs Barclay's brothers and sisters were merely substituted upon the failure of children of the marriage, and were not directly instituted, whereas the decision in *Mackie* v. *Gloag's Trustees*, *supra*, went on the ground that the wife's children by a former marriage were directly instituted along with the children of the marriage, the mother being completely divested and a beneficial fee vested in them by a delivered conveyance to trustees for their behoof. The argument put forward on the other side, based on *Mackie* v. *Gloag's Trustees*, *supra*, had been maintained and refuted by Lord Watson in *Macdonald* v. *Hall*, *supra*. If the marriage-contract was in itself revocable, the declaration in it as to its being irrevocable was of no effect, as such a clause could be revoked equally with the other clauses of the deed.

Argued for the third, fourth, and seventh parties—The brothers and sisters of Mrs Barclay were donees under the trust-conveyance by which Mrs Barclay had divested herself. The conveyance was not merely testamentary but a *de presenti* conveyance in their favour. They were named individually, and the declaration in the deed that it should not be revocable by the granter on any ground or in any form whatever went strongly to show the irrevocable and absolute character of the right conferred on the beneficiaries existing at the time. The case fell accordingly within the decision of *Mackie* v. *Gloag's Trustees*, *supra*. Mrs Barclay's brothers and sisters were in a position similar to that of the children of the first marriage in *Mackie*, and the reasoning of the dissenting judgment of Lord Rutherfurd Clark in that case (11 R. 746, at 758), 20 S.L.R. 493, which was upheld by the House of Lords, ruled the present case.

LORD PRESIDENT—The question in this case is whether Mrs Barclay was entitled to revoke, and did by her trust-disposition and settlement revoke, the destination of her estate contained in her antenuptial marriage-contract.

This marriage-contract is a carefully-drawn instrument, which provides for all the events naturally and usually provided for in such an instrument. There are provisions of liferent interests for the spouses and provisions for the children of the marriage fully and exhaustively made in the ordinary way, and thus far there is no doubt that the provisions are contractual.

What we have to decide is as to the effect of the provision, in the event of there being no surviving children of the marriage, for payment of the estate conveyed by Mrs Barclay to the marriage-contract trustees to her brothers and sisters. The question is whether, when the event has occurred of there being no children, this destination to brothers and sisters is pactional, and therefore binding, or whether it is testamentary and therefore revocable. It is clear that the brothers and sisters were not, to use an expression frequently used in these cases, within the consideration of the marriage. It is not uncommon for persons about to marry to insert clauses in their marriage-contract disposing of their estate testamentarily in the event of all the proper matrimonial purposes having been satisfied or having failed, and it appears to me that this is the true nature of this clause. The persons benefited being neither one of the spouses nor children, but brothers and sisters of a spouse, the question is whether the fair meaning of the clause is a stipulation for her brothers or sisters or whether she by it merely made a will in their favour. I am of opinion that the latter is the true nature of the provision. This is in accordance with the authorities which have been referred to. The brothers and sisters then

being thus merely beneficiaries under a testamentary provision in their favour it can be effectually revoked by a subsequent testament.

LORD ADAM—I am of the same opinion. This marriage-contract, like many marriage-contracts, is partly a marriage-contract proper and partly a testamentary deed. So far as the provisions for spouses and the destination to the children of the marriage are concerned the deed is contractual. But it is equally clear that as regards the destination to the brothers and sisters of the wife these brothers and sisters are nothing but conditional institutes or substitutes.

The case of *Mackie* v. *Gloag's Trustees* (March 9, 1883, 10 R. 946; March 6, 1884, 11 R. (H.L.) 10), so much relied on by Mr Hunter, is not on all fours. In that case the children of the first marriage were put in the deed on precisely the same footing as the children of the second marriage. Therefore that case has no bearing on this case at all.

If, then, there is no contractual obligation on behalf of these brothers and sisters, what is to prevent Mrs Barclay revoking this testament as well as any other. It is said that there is a clause in the deed declaring that "these presents shall not be revocable" by her "on any ground or in any form whatever." But if the deed is revocable *per se*, that clause is as revocable as any other. I accordingly think that this lady had a right to revoke, and has effectually revoked, the destination in question.

LORD M'LAREN—The question we have to consider is whether Mrs Barclay had a right to revoke, and did revoke, the destination of her estate to her brothers and sisters contained in her antenuptial contract of marriage. By the marriage-contract she conveyed to trustees the whole estate then belonging to her, or which should belong to her, during the subsistence of the marriage. The provisions were of the usual character. The marriage was dissolved by the death of the husband, and there were no children of the marriage. Mrs Barclay being left a widow, made a will, and left certain legacies, and it is the legatees who now seek to have it affirmed that the provision in the marriage-contract in favour of Mrs Barclay's collateral relations is not pactional.

In such cases there are two questions to be considered—(1) Who are the parties who come within the consideration of the marriage? and (2) Whether there is an immediate and indefeasible right conferred on the persons who are outside the consideration of the marriage? It goes without saying that Mrs Barclay's brothers and sisters and their issue are not within the consideration of the marriage. I put this prominently forward, because the argument for the irrevocability of the provision in question was founded on the decision in *Mackie* v. *Gloag's Trustees*, and on the views expressed in the House of Lords, and in the opinion of Lord Rutherfurd Clark in the Court of Session. As I read the opinions in that case I rather think that the House of Lords were in favour of the claims of the children of the first marriage on both grounds—first, that they came within the consideration of the marriage, and second that they had been made the objects of an irrevocable trust by a proper legal destination. Here we have only to deal with the second of these grounds. Looking to the authorities—which on this branch of the law are perfectly consistent—I think it is established that no one who is without the consideration of the marriage can claim to have received an indefeasible right under the marriage-contract, unless (1) he takes as an institute, and (2) there is in the deed an expressed intention to create in his favour an indefeasible right. The exposition of the law by Lord Watson in *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, makes this quite plain, and the judgment in *Mackie* was, as Lord Watson pointed out, no exception to the rule, for the children of the first marriage in that case were not substitutes nor conditional institutes but the primary objects of the trust.

In the present case there is no immediate vested interest given to the brothers and sisters of Mrs Barclay, for they only come in to participate as beneficiaries in the trust funds on the failure of issue. The destination to the brothers and sisters in this marriage-contract seems to me to be a gift no more capable of supporting the argument in favour of its irrevocability than a destination to unborn children (excluding, of course, children of the marriage) would have been. I am therefore of opinion that these provisions were revocable by Mrs Barclay, and that being so, we are not called upon to decide the second question in the case.

LORD KINNEAR—Mr Hunter conceded that the provisions in favour of his clients were not pactional, but he argued that they had an irrevocable right in virtue of the out-and-out gift made to them in the marriage-contract. That argument was founded on the decision of the House of Lords in *Mackie* v. *Gloag's Trustees*. But the ground of judgment in that case was that the granter was divested and trustees for donees invested in the subject in dispute on an absolute gift *inter vivos*, and there is no absolute gift to the fourth parties in the present case. The provision in their favour is contingent, and in my opinion testamentary. It makes no difference that the persons favoured are named instead of being described as a class. It may be of importance in cases where it is disputed whether a gift in form absolute is a gift in substance to show that the donees are living persons capable of taking a gift. But a provision by way of testamentary destination will be equally effectual whether the persons who ultimately turn out to be favoured are named or described as a class. With reference to the remaining point, as to the provision in the marriage-contract declaring that it should not be revocable by Mrs Barclay even with her husband's consent, I do not

think that creates any difficulty. The meaning is perfectly clear. It means that the husband and wife together are not to defeat this contract. But if the instrument contains a purely testamentary provision which is not matter of contract at all, it makes no difference in the legal character of such a provision that the testator says he means it to be irrevocable. There is no *jus quæsitum* in anybody to prevent its being revoked, and the testator may alter his intention not to revoke, just as he might alter his intention to bequeath if nothing had been said about revocation.

The Court answered the first question in the affirmative.

Counsel for the First, Second, and Eighth Parties—Younger—Neish. Agents—W. & J. Burness, W.S.

Counsel for the Third and Seventh Parties — Craigie. Agents — Alexander Campbell & Son, S.S.C.

Counsel for the Fourth Party—Hunter. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Fifth Parties—Pitman. Agent—J. W. D. Kirkland, S.S.C.

Counsel for the Sixth Parties—Gunn. Agents—Mackay & Young, W.S.

Thursday, June 11.

SECOND DIVISION.

NEILSON'S TRUSTEES *v.* NEILSON.

Succession — Testament — Construction — Bequest of Share in Estate "Left by" Parents — Estate Falling under inter vivos Disposition by Parent to Children in Fee on Expiry of Parent's Liferent.

A testator by his last will and testament bequeathed "all my right, title, and interest, claim, and estate as one of the children and heirs of my deceased father and mother in and to the estate left by them and situated in the city of Glasgow." He did not dispose by his will of any other estate to which he was entitled.

Held (1) that the testator's will carried a share of certain heritable property to which he was entitled under an *inter vivos* disposition by his father in favour of the disponer and his wife in liferent and his children in fee, and that this share passed to the beneficiaries under the will as being property "left" by the testator's father; but that (2) the will did not dispose of a share of the same property to which the testator was entitled under the will of his brother; and that this latter share fell into intestacy and passed to the testator's heir-at-law.

William Neilson of Claddens, contractor in Glasgow, executed an *inter vivos* disposition in 1858 whereby he conveyed certain heritable subjects in Calton, Glasgow, to his wife and himself in liferent, and to trustees for behoof of his children (of whom there were eight) in fee. The principal question in the present case was whether the share of that property falling to one of William Neilson's sons fell under that son's will, which dealt solely with estate "left by" his father.

William Neilson died in 1865 possessed, *inter alia*, of heritable property in Glasgow, in addition to that which he had liferented under his *inter vivos* deed. He left a trust-disposition and settlement whereby he directed his whole estate, heritable and moveable, so far as not covered by the *inter vivos* deed, to be realised, and the residue to be divided among his whole children. He was survived by all his children, and by his widow, who died in 1881, leaving moveable estate, the residue of which by trust-disposition and settlement she directed to be divided among her whole children.

One of William Neilson's sons, Hugh Mackenzie Neilson, died in 1886, leaving a settlement under which he directed the residue of his estate, after the division of his father's and mother's estates, to be divided among his whole brothers and sisters.

Another of William Neilson's sons, John Neilson, who was resident in Galveston, Texas, U.S.A., died in 1898, leaving a will in the following terms—"After payment of all my just and lawful debts, I give, bequeath, and devise all my right, title, interest, claim, and estate as one of the children and heirs of my deceased father and mother, William Neilson and Helen Neilson, in and to the estate left by them, and situated in the city of Glasgow, Scotland, as follows, to wit—To my sister Jennett Neilson, an undivided one-eighth part thereof; to my brother James Rankin Neilson an undivided one-eighth part thereof; and the remaining three-fourths part thereof to Henrietta Magdalena Tolex and Lillie Johanna Augusta Tolex, the daughters of John Tolex of said city of Galveston, Texas, share and share alike."

All William Neilson's children survived the period of division under his *inter vivos* deed and his trust-disposition and settlement, and under his widow's settlement.

At the date of the present case the estate falling under William Neilson's *inter vivos* deed remained in the hands of the trustees thereunder in accordance with an agreement among his children. The estate falling under his trust-disposition and settlement had been divided with the exception of the share falling to his son John Neilson. The estate falling under his widow's settlement had been finally divided. Hugh Mackenzie Neilson's estate had been divided with the exception, *inter alia*, of the share to which he was entitled of the property in Glasgow falling under his father's *inter vivos* deed.

In these circumstances a special case was presented for the opinion and judgment of the Court by (1) the trustees under William Neilson's *inter vivos* disposition; (2) the trustee under Hugh Mackenzie Neilson's settlement; (3) John Neilson's immediate