or either of them. In these circumstances, and even supposing that the case of *Craig* v. *Richardson* must be considered as conclusive authority so far as it went, although the Lord Ordinary cannot help entertaining some doubt as to that, there does not seem any sufficient ground for holding that the execution of the deed in question is exposed to any fatal irregularity."

The pursuer reclaimed.

SCOTT and M'LEAN for reclaimer.

CLARK and LAMOND for respondents.

The Court unanimously adhered.

LORD ARDMILLAN—The question here raised is one of great importance, though probably of rare occurrence. I shall not again repeat what has been already so well explained, but shall merely say in a word that I do not think that the objection here taken is really an objection of statutory nullity. It appears to me that the Statute 1579, cap. 80, is satisfied, if the writ was subscribed for each party by two notaries before four witnesses duly denominated. This was, I think, done in the present case. The names of James Græme and Catherine Græme are not subscribed to this writing by themselves, in consequence of James' defect of sight, and Catherine's inability from paralysis, but the deed is signed by two notaries, who attest that on the mandate of each they signed for each in presence of four witnesses subscribing. This attestation is to be credited in respect of their official position as notaries. This, I think, satisfies the requirements of the statute, which does not bear that the notaries who subscribe for one of the parties shall be different from the notaries who subscribe for the other. If there had never been a decision on the subject, I do not think that we could now, as matter of construction, enforce as a statutory nullity the want of separate notaries and separate witnesses for each of the parties subscribing.

In the case of *Craig* v. *Richardson*, 27th June 1610, briefly reported in Morrison 16,829, the decision does not appear to me to involve necessarily the view that the writ was void in respect of statutory nullity. It may rest, and I think does rest, rather on a principle of common law, that in a contract, the parties contracting should be separately represented, and that one notary, or, as in this case, two notaries, shall not subscribe for both parties, since, in a contract their interests are viewed as adverse. The decision so understood is quite intelligible, and in accordance with the practice of the court to protect persons defenceless from their years or their infirmities; and, so viewing the decision, I am not disposed to disturb it, nor do we disturb it by repelling the objection in the present case. We have here a mutual settlement by two aged persons, brother and sister, with a clause reserving power to both and each of them, and to the longest liver of them, to alter and cancel the same in whole or in part. This deed is in my opinion testamentary, ambulatory, revocable, and not a contract. It is not so in words, and there are no counterpart obligation. It is true, however, that a deed may possess to some effects the character of a contract in respect of its mutuality, even though there be no words of contract therein. Such an effect was given to the mutuality of a deed in the case of *Campbell* v. *Campbell's Trustees*, 1 Macpherson 647, where a mutual settlement, though testamentary *quoad* the beneficiaries, was considered pactional *quoad* the granters. But the contract which may thus arise from the mutuality of the deed is just a contract not to alter or revoke it. That is the only contract implied in its mutuality. The power to revoke a testamentary deed is in such a case excluded by the contract implied from its mutuality. But here that implied exclusion of power to revoke is met by express reservation of the power, reservation not only to each of the parties, but to the survivor, and thus the only contract which can be implied from the mutuality of testamentary writings is shut out by express words. There is no contract here. I take the case put by the Lord Ordinary. Suppose that there had been two other by Catherine Græme, to the same effect as in separate writings, the one by James Græme, and the this mutual deed. It is plain that if each writing was signed by two notaries and four witnesses, the requirements of the statute would be fulfilled, and the fact that the notaries and the witnesses were the same in both writings would have created no statutory nullity. If, however, the writings were relative, and were executed *unico contextu* as mutual and counterpart settlements, it may well be that the power to revoke, which is incident to testamentary writings would be held excluded by the mutuality. A contract not to revoke would be accordingly implied; and in respect of the character of contract thus given to the mutual settlement, it may even be that the principle of the decision in *Craig* v. *Richardson* might apply, and the Court might be of opinion that the same notaries ought not to subscribe for both parties.

Here there is no other contract but that which may be implied from mutuality; the contract implied from mutuality is simply a contract not to alter or revoke; no contract can be implied where the contrary has been expressed; the power to alter or revoke is here expressly reserved to both parties and to the survivor; and the contract not to alter or revoke, which might otherwise have been implied, is excluded. Therefore there is no contract here; and as there is no statutory nullity, the objection stated in the first two pleas for the pursuer has been rightly repelled.

Another part of the case remains for investigation, and it may be that the fact on which this objection is founded may there be of some importance. On that point it would be premature now to offer any opinion.

Agent for Pursuer—A. K. Morison, S.S.C.

Agent for Defenders—James Webster, S.S.C.

Wednesday, October 21.

BARCLAY *v.* GLENDRONACH DISTILLERY CO.

Bankruptcy—Expense of Litigation by Trustee—Mandate. A trustee on a sequestrated estate without funds having engaged in an expensive litigation (in which he was unsuccessful) under directions from a creditor's mandatory, *held* (1) that the general mandate to vote and act in the sequestration did not *per se* authorise the mandatory to bind his constituent for the expenses, but (2) that the mandatory's authority to do so was to be inferred from the terms of certain correspondence.

William Barclay, trustee on the sequestrated estate of the late Andrew Johnston, spirit merchant in Banff, sued the defenders for payment of £113, 9s. 2d., being their proportion of certain expenses which he had incurred, and in which he had been found liable in a litigation in which he had engaged for the purpose of recovering funds thought

to belong to the bankrupt estate, but in which he had been unsuccessful.

The bankrupt was sequestrated in 1852. The defenders claimed as creditors for a debt of £39, 6s. 5d. Attached to their affidavit and claim there was a mandate in favour of Mr William Coutts, dated 16th August 1852, authorising him "to act and vote at all meetings in the sequestration," with the same powers as belonged to them. In April 1853 an interim dividend of 2s. 9d. per pound was paid to the defenders and the other creditors.

At the date of the sequestration the bankrupt seemed entitled to participate in certain succession under his father's trust-settlement, but the trust-estate was not divisible until the death of a person who liferented the whole estate. This liferenter survived until 1863, but the bankrupt having predeceased the liferenter, dying also in 1863, a question arose as to whether the bankrupt estate was not cut out by his predecease. This question depended upon whether, under the father's settlement, vesting had taken place *a morte testatoris* or on the liferenter's death.

In consequence of this supposed claim the sequestration was not brought to a close as it otherwise probably would have been. Betwixt 1853 and 1864 there was correspondence betwixt the defenders and Mr Coutts, from which it appeared that the bankrupt had applied for his discharge, and that the defenders had given Mr Coutts authority to oppose his application, which, if granted, "would prevent the creditors getting their just rights from Johnston's prospects."

After the death of the liferenter, the defenders, on 16th February 1864, wrote to Mr Coutts "there is another long delayed matter, and which the death of the late James Johnston was to decide," and asking him to push on a settlement without delay. On 23d April 1864 the pursuer issued a circular to the creditors calling a meeting for 11th May 1864, for the purpose "of instructing the trustee in regard to an action of multiplepoinding and exoneration, which has been raised against him and others in the Court of Session relative to the bankrupt's interest under his late father's trust-disposition and deed of settlement." The defenders, when they received this circular, enclosed it to Mr Coutts by letter dated 2d May 1864, in which they said "as you have been looking to our interests in this estate, and as we presume matters are now to be finally wound up," we have to request that "you will look after matters, and if you want a mandate for meeting at Banff on the 11th instant it will be sent to you."

There was no evidence of any farther communication to or from the defenders on the subject. But it appeared that Mr Coutts had attended the meeting of 11th May as mandatory for the defenders and other creditors, and stated that he thought the opinion of counsel should be taken, and that if the opinion was that the bankrupt's interest had vested *a morte testatoris*, a claim should be lodged in the multiplepoinding, "and he was prepared for those for whom he acted to pay his share of the expense, and he moved accordingly; it being understood that if other creditors shall refuse, on being applied to, to join in the said appearance, they should be held to give up any claim to any part of the fund that may be realised, and this proviso it is the more necessary to make, because the trustee declines, for want of funds belonging to the estate, to move or pursue the claim." This motion was agreed to and the trustee was instructed to send an excerpt from the minutes to the creditors not represented at the meeting. The meeting was adjourned till 25th May, when the trustee was authorised to take the opinion of counsel; and at a subsequent meeting, a favourable opinion having been obtained, the trustee was directed to lodge a claim. The claim, however, was not sustained, the Lord Ordinary and the Inner-House having held that vesting did not take place *a morte testatoris*. The trustee was found liable in expenses, and these and his own expenses amounted to £338, 12s. 2d. The defenders' proportion was said to be £113, 9s. 2d., the amount now sued for.

The defenders denied liability, on the ground that as creditors they were not liable unless they undertook an obligation to pay the expenses; and that they had never done so, or authorised Mr Coutts to do so on their behalf.

The parties renounced probation, resting the case on the correspondence and other documents in process.

The Lord Ordinary (JERVISWOODE) held that Mr Coutts "held authority from the defenders, under and in virtue of the writings in process, to instruct and authorise the pursuer to take and follow forth the proceedings in the process of multiplepoinding."

The defenders reclaimed.

CLARK and BURNET for them argued:—Under section 57 of the Bankruptcy Act a creditor is not liable for expense incurred by a trustee, merely because he has lodged a claim and voted in the sequestration. In this case it is not said that the defenders themselves authorised this litigation to be conducted at their expense, and if Mr Coutts undertook any such obligation for them he had no authority to do so,

SHAND and MACLEAN for the pursuer replied:—1. The mandate granted in 1852 was sufficient to authorise Mr Coutts to do anything, not illegal, which the defenders themselves might have done. 2. The correspondence showed that the defenders meant to give their mandatory the fullest authority.

The following authorities were cited—1 Bell's Com. p. 413; *Morrison* v. *Balfour*, 11 D. 653; *Ewing* v. *Watson*, 22 D. 354.

At advising—

LORD ARDMILLAN—In this case I concur in the opinion of the Lord Ordinary; and I take very much the same view of the question as that expressed by Lord Deas. It does not appear to me that there is any difference of opinion, or any ground for difference of opinion, in point of law. The action is brought by the trustee on the sequestrated estate of Andrew Johnston, now deceased, against the defenders as creditors of the estate. The conclusion is for personal liability; and it was stated at the bar, as it is also stated though not so clearly as could be wished on record, that the trustee was obliged to enforce personal liability, since there were no funds available of the sequestrated estate.

The expenses, of which the trustee thus seeks payment, were incurred in an action of multiplepoinding, in which the trustee lodged and supported a claim for behoof of the sequestrated estate to recover sums supposed to have fallen to the bankrupt by succession. In this action the trustee did not succeed; but he acted according to the advice of counsel, and for the purpose of recovering and distributing the fund. In the sequestration, William Coutts held a mandate from the Glen-

dronach Distillery Company, dated 16th August 1852, authorising him "to act and vote at all meetings in the sequestration of Andrew Johnston, &c., with the same powers as belonged to" the said Company. Now, looking to the provisions of the Bankrupt Statute, it is obvious that personal liability is not involved in the sequestration procedure, and that these creditors are not liable personally to the trustee for expenses incurred by him in the action of multiplepoinding merely in respect of their appearing, voting, being ranked, and being paid a dividend in the sequestration. For such personal liability, special and separate ground must be established.

In the next place, I am of opinion that the mandate given to Coutts in 1852 to act and vote in the sequestration is not *per se* a sufficient authority to entitle him to enter or to instruct the trustee to enter on a separate litigation several years afterwards. But then, I am also of opinion, that these defenders, the creditors for whom Coutts acted as mandatory, could effectually extend their mandate; or, in other words, could ingraft upon the original mandate to act in the sequestration, a further mandate to Coutts, authorising him to instruct the trustee to present and support the claim in the multiplepoinding on the footing of their liability for expenses. I have read the whole correspondence, beginning in July 1852 and extending down to 1864, and I have arrived at the conclusion, 1st, that Mr Coutts, the original mandatory, did undoubtedly authorise the trustee to present and support the claim in the multiplepoinding, and to incur the expenses now sued for; 2d, that Coutts did this in the knowledge that there were no available funds in the sequestration to meet these expenses, and that it was a matter beyond the sequestration—a matter, the entering on which involved personal liability for expenses; and 3d, that the partners of the Glendronach Distillery Company, and more particularly Walter Scott, the leading partner of the Company, did know that this procedure in the multiplepoinding involved separate personal liability, and that there were no available funds in the sequestration, and did authorise Mr Coutts to appear and act for them at the meeting for instructing the trustee in regard to the multiplepoinding. This he did accordingly. At that meeting, and subsequent meetings which Coutts attended, and in the sederunt of which he is entered as "mandatory for the Glendronach Distillery Company," instructions were accordingly given to the trustee to lodge a claim in the multiplepoinding, and to conduct the proceedings in which these expenses were incurred.

The question raised now is precisely the same as if Coutts had paid these expenses, and were claiming ralief from the creditors in whose name he had acted.

In point of law, there is no doubt that in such a case Coutts must have proved his mandate, and there is as little doubt that in the present case the trustee can only enforce personal liability against these creditors in respect of Coutts' authority to him, by proving, just as Coutt's himself must have proved, a sufficient mandate by these creditors authorising Coutts to act for them. He is not bound to produce a formal mandate, but is bound to instruct authority.

On this question of fact, I have arrived at the conclusion that a sufficient mandate to Coutts has been proved; and if he were suing for relief the partners of the Glendronach Company, these partners could not in fairness and justice refuse to relieve him of the expenses which he had disbursed in an attempt, though unsuccessful, to bring a fund into distribution among the creditors of Johnston. Then, if they could not have refused to relieve Coutts, they must, I think, be liable in this action. Although I have the misfortune to differ, as I understand, from your Lordship in the chair, it is satisfactory to me to think that I do not differ on any point of law, but only on the question of fact, whether, by the correspondence read with reference to the facts and circumstances of the case, a sufficient mandate to Coutts has been instructed. On that point I agree with the Lord Ordinary and Lord Deas in thinking the evidence sufficient.

The LORD PRESIDENT dissented. The question, he said, was no doubt one of fact, but it involved the well known and most important principle of bankruptcy law laid down by Professor Bell (1 Com. 413) that no creditor can be made to pay any expenses out of his own pocket without his concurrence. The correspondence founded on instructed, no doubt, that the defenders authorised Mr Coutts to oppose the bankrupt's application for discharge, but that was a litigation of a very limited and inexpensive kind, and not the litigation referred to in this action. So far as could be seen from the correspondence, the defenders, although they knew of the bankrupt's claim under his father's estate, never heard of the nice question in the law of vesting which arose only in 1863 on the bankrupt's death, and he could not, therefore, see how it could be held that they authorised that question to be litigated at their personal expense. The letter from the defenders of 2d May 1864 was the chief evidence founded on, but it did not prove authority to do what Mr Coutts did. Again, there were thirty-two creditors on the estate, only a few of whom were said to have authorised the litigation. Had Mr Coutts authority to undertake the expense of the whole litigation? If the decision to be pronounced was a good one, then he had; but to hold that he had such authority was not warranted by the evidence.

The Court by a majority (LORDS DEAS and ARDMILLAN) adhered to the Lord Ordinary's interlocutor.

Agent for Pursuer—William Millar, S.S.C.
Agent for Defenders—Alex. Morison, S.S.C.

Wednesday, October 21.

GLEN *v.* CALEDONIAN RAILWAY CO.

Railway Company—Dividend—Interdict. A proprietor of railway stock applied for interdict against the Company—(1) paying dividend for the previous half-year, and (2) applying certain monies, raised under special acts, for other than the specified purposes. Note passed, but interdict *refused*, the complainer having been offered caution for any loss he might suffer by such refusal, while the Company might suffer great damage by the interdict being granted.

Alexander Glen, proprietor of £500 Caledonian Railway (General Terminus) Guaranteed Stock, presented this note of suspension and interdict against the defenders, craving the Court (1) to interdict, prohibit, and discharge the respondents from declaring or paying any dividend or dividends on any of the ordinary stocks or shares of the said Caledonian Railway Company for the half-year ending 31st July 1868, and from carrying any sum