appointed to execute the purposes of the will; and (2) uncertainty as to the objects of the testator's bounty. All I shall say at present as to these grounds of reduction is, that *prima facie* they appear to me to be insufficient, and that in all probability the reduction would not have been brought to a successful issue. But be that as it may, certainly the reduction was never finally determined. In these circumstances, it appears to me that no party had any existing title to Agnes Hamilton's estate when this agreement was entered into, and no one could obtain anything under it until it was fortified by Act of Parliament. All who take her estate take it under this Act of Parliament, and have no other title. Therefore the date at which this estate came to Mrs Turner, and vested in her husband, is 1866, and that being after the date of the bankrupt's discharge, this petition falls to be refused.

LORD DEAS—The way in which this property stood originally was, that Mrs Turner was excluded by a formal probative deed. That deed was challenged in a reduction, and decree was pronounced, but that decree was brought under review, and when matters were in that position, before any final decree of reduction, this agreement was made. But it could have no effect without an Act of Parliament. An Act was obtained confirming the agreement. Apart from that it has never been decided that that formal deed should be set aside, and in so far as it is set aside it is by Act of Parliament, and, of course, only from the year 1866. Now, what the trustee says is, that before the bankrupt's discharge this right had come to the bankrupt's wife. That discharge was in 1863. Can we hold that this right had come to her before that? We may hold speculative views as to the greater or less probability of having that deed set aside. But it never was set aside, it was superseded by an agreement. I am clearly of opinion that the date whenthis property must be held to have come to MrsTurner was the date of the Act of Parliament.

LORD ARDMILLAN—I have no doubt in this case. These heirs of Agnes Hamilton had no right to her estate, standing the deed. They had a right to sue a reduction of the deed; but a right to sue a reduction of a settlement is no right to the property conveyed by the settlement, until they succeed in the reduction. A decree of reduction was obtained; but it appears to me to have been to some extent a decree in absence, and it was re-opened, and the whole matters were in suspense. I think the true position of the case is, that the proceedings in the reduction stood suspended, and it was agreed that on the passing of the Act there should be a certain distribution of the estate. I have no doubt that the date when the property came to Mrs Turner was the date of the Act of Parliament.

Interlocutor recalled, and petition dismissed.

Agent for Trustee—R. Pasley Stevenson, S.S.C.

Agent for Respondents—J. F. Wilkie, S.S.C.

Wednesday, October 21.

GRÆME *v.* GRÆME'S TRUSTEES.

Probative Deed—Mutual Settlement—Subscription—Testamentary Witness—Notary-Public—1579, c. 80. *Held* that a mutual settlement subscribed by two notaries and four witnesses was validly executed.

Robert Græme, heir-at-law of the deceased James Græme and Catherine Græme, sought in this action to reduce a mutual disposition and deed of settlement executed by these parties, and subscribed for them by notaries public, the attestation running thus:—"We, James Hamilton and William M'Lean, notaries-public and co-notaries in the premises, at the special request of the before-named and designed James Græme, who declares he cannot write from being unable to see, in consequence of inflammation of the eyes; and also at the special request of the before-named and designed Catherine Græme, who declares that she cannot write by reason of paralysis in her hands; and the said parties respectively having touched each of our pens, in token of their warrant and authority to us to subscribe for them respectively, in presence of the subscribing witnesses, do subscribe these presents for each of them before and in presence of the subscribing witnesses, these presents having been duly read over to the said parties in presence of us and the subscribing witnesses. (Signed) *Fides*, Jas. Hamilton, notary-public. *Veritas Vincit*, William M'Lean, notary-public. Arch. Macdonald, witness; David Gardiner, witness; Hugh Jackson, witness; R. Sinclair, witness." The ground of reduction now insisted in was that the deed was not legally executed, the same notaries-public having subscribed for each of the parties to the deed.

The Lord Ordinary (ORMIDALE) repelled the plea, adding this note:—

"The only point raised before the Lord Ordinary under the pursuer's first two pleas in law now repelled, is that referred to in the second plea, viz., that the same notaries-public subscribed for each of the two parties to the deed in question, which it was maintained for the pursuer was a fatal irregularity, as appears to have been found in the old case of *Craig* v. *Richardson*, 27th June 1610, Mor. 16,829. But in that case the deed was a contract, and although no detailed explanation either of the facts of the case or of the opinions of the judges is given, it may, the Lord Ordinary thinks, be assumed that the two parties to the contract had adverse or antagonistic interests. The deed in the present case can scarcely be held to have any such characteristic, or to be of the nature of the contract at all. Although it bears to be a mutual settlement by two persons, a brother and a sister, it partakes as little as possible of the nature of a pactional engagement. It is substantially little more than a *mortis causa* settlement by two persons respectively, written in one in place of two separate instruments. It could hardly be doubted that the same two notaries might have acted for both the parties in the execution of their respective settlements if engrossed as separate deeds or writings, and accordingly the Lord Ordinary, keeping in view the peculiar nature of the settlement in question, has been unable to see sufficient ground, either on authority or principle, for holding that it was irregularly executed. There is nothing in the words of the statute, relating to the intervention of notaries in the case of persons unable to write, which can be held to require that for every party to a deed there must be different notaries; and there is nothing here in the nature of the deed itself, or in the position of the notaries, who are public functionaries, that can reasonably be held to render that indispensable. The two parties to the deed in question had not opposing or antagonistic interests as in a proper contract, and it is not said that the notaries had any interest whatever in the matter, either as beneficiaries under the deed or from relationship to the parties

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