has that effect. Whichever spouse survived was prevented by the existence of that clause from claiming his or her legal rights. The effect of it in fact was, that neither could have claimed any part of the fee of the other's estate. Upon this point the mutual settlement became a mutual contract, and irrevocable upon the death of the first deceaser. But it must be observed that the settlement upon the children are counter parts of each other, and I think we must assume that the husband's settlement upon the children was made in consideration of the corresponding settlement of the wife, and *vice versa*. I think, therefore, notwithstanding this reserved power of revocation, that on the death of the first deceaser these provisions came into operation as matters of mutual contract, and the children became vested in a right with which the surviving spouses could not interfere.

In a mutual settlement such as this it is not unusual to find that part of the deed contains matter of contract, while the other part is testamentary merely. Now, it does appear to me that part of this deed is purely testamentary, but that those parts which I have narrated are matters of contract. To proceed—Failing the children the fee of the husband's estate is settled on his own relations, and so with the wife's. These provisions are purely testamentary. Now, keeping the substance of the deed in view, there is no great difficulty in reading the clause of reservation consistently with the rights of parties as we see them settled in the previous part of the deed. This clause is as follows—"and we reserve to ourselves, not only our own liferent of the heritable and moveable estates and effects above conveyed"—that is to say, each spouse reserves to him or herself the liferent of his or her own estate. The expression is a joint expression, but the meaning is several. "But also full power to us during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we or either of us may see cause." That is, to alter, innovate, or revoke so much of this settlement as is revocable by each spouse. They might have altered or revoked the whole by a joint act during their joint lives; but when one of them had predeceased, and the deed had come into effect as a contract in some of its provisions, though remaining testamentary in others, the natural effect of that clause is to make that portion only revocable by the surviving spouse which as to that spouse is testamentary. Observe, too, how the words used consist with this interpretation. The power given to the spouses and the survivor is not a power conferred, it is one reserved. It is one which either could have exercised but for the existence of this deed. And when that power is one of revocation, it shows that the power to revoke applies to something which the revoker has already done. I have therefore no difficulty in defining the powers conferred by this clause of reservation; and it appears to me that the surviving spouse had not power reserved to her to interfere in any way with the distribution or administration of her husband's estate.

A difficulty has been raised in the first clause of the deed, which nominates new trustees to act for both parties. It nominates certain persons "and the acceptors or acceptor, survivors and survivor of them, as trustees for the ends, uses, and purposes hereinafter written, and the heir of the last survivor, and such other person or persons as may hereafter be nominated by us or the survivor of us, by any writing under our hands, or shall be assumed into the trust in virtue of the power hereinafter given," &c. Now, in the clauses of conveyance of the several estates of the spouses, the constitution of the trust is not in exactly the same terms. The conveyance in each case is to the persons named and their assignees or disponees, but not to any trustees to be afterwards named by the spouses, or the survivor of them. And it is said that this shows that it was contemplated that the constitution of the trust might be altered by the survivor, and that therefore the exercise of her reserved power here attempted by Mrs Welsh was perfectly legitimate. This is, however, rather a jump in reasoning. Power to name new trustees is not the same as power to revoke the original nomination of trustees, and appoint a totally new set. But I go farther than this—I think what is meant by the words "and to such other person or persons as may hereafter be nominated by us, or the survivor of us," is this, that if the spouses chose thereafter to name new trustees, they had power to do so. And that the survivor might also nominate and add new trustees; but that, in accordance with the view I take of the whole deed, only to his or her own individual estate.

I therefore propose to answer the first question in the negative, and the second and third follow as matter of course.

Lord Ardmillan—I concur with your Lordship in answering all these questions in the negative. The principal point is that adverted to by your Lordship, namely, the separability of the different provisions of the deed, some of which are mutual, and create a contract, and some of which do not come within that category. With regard to those provisions which are mutual, the surviving wife could make no alteration; she could in no way, for instance, affect her child's rights. Both spouses thus created certain rights affecting their estates, and at the same time created a trust for the protection of those rights. Now, if the widow could not alter the deed so as to affect those provisions which, being mutual, are subject of contract with the husband, neither could she revoke the trust reared for the protection of those rights and purposes. The trusts are just as separable as the purposes themselves.

Lords Deas and Kinloch concurred.

Agents for Dr Welsh's Trustees—J. & H. Cairns, W.S.

Agents for Mrs Welsh—Millar, Allardice & Robson, W.S.

Tuesday, October 24.

NORTH BRITISH RAILWAY COMPANY *v.* BEXFIELD.

Process—Appeal under § 40 of the Judicature Act—No Appearance for Respondent. Action dismissed.

In this action of damages before the Sheriff-court of Glasgow, certain important preliminary pleas were taken by the defenders the Railway Company, and repelled by the Sheriff, who there-

upon, on the merits, and before answer, allowed the parties a proof of their respective averments. An appeal to the First Division of the Court of Session, under the 40th section of the Judicature Act, and the 73d of the Court of Session Act, 1868, was lodged against this interlocutor. When the case came into Court no appearance was made for the respondent.

Solicitor-General (CLARK) and BALFOUR, for the appellants the Railway Company, moved the Court, that in respect of no appearance for the respondent, the appeal should be sustained, and the action dismissed, with expenses.

LORD PRESIDENT—If this had been a final judgment of the Sheriff, the practice of the Court might be to sustain the appeal for want of appearance, but I am a little doubtful whether we can follow that course where the judgment is interlocutory merely. The respondent, though unwilling to be dragged into this Court, and probably into the House of Lords, might be very willing to follow out his action were the Sheriff's interlocutor sustained. I am not sure whether we can grant this motion without hearing you on the merits of your appeal. We will let the case stand over for a day or two to let you consider the matter, and see if you can afford us any farther information on the subject.

When the case was again called, Counsel stated that they had no farther information to give, and the Court, intimating that they had considered the matter, without calling on Counsel to support the appeal, pronounced an interlocutor to the following effect:—"On the motion of the appellant, and in respect of no appearance, sustain the appeal and dismiss the action, with expenses."

Agents for the Appellants — Hill, Reid, & Drummond, W.S.

Friday, October 27.

FOULIS *v.* DOWNIE AND OTHERS.

Process—Reduction—Competency—Bankruptcy Act, 1856, §§ 71 *and* 170. Where a reduction was brought of the minutes of meeting of creditors held for the election of a trustee, together with all the deliverances of the Sheriff thereon, upon the ground that the said minutes were not the true minutes of meeting of the creditors held as appointed for the election of a trustee, whereas certain other minutes produced were *—held* that the rival minutes, and the facts connected therewith, having been before the Sheriff, it was clearly within the competency of his jurisdiction to determine between them, in proceeding to decide which party was trustee-elect, and that his judgment was final under § 71 of the Act of 1856.

Opinion, that even if it had been a question of competency, the proper procedure for the pursuer was by appeal under § 170; and that in the ordinary case reduction was incompetent.

This was an action of reduction at the instance of Mr Foulis, a creditor on the sequestrated estates of Messrs M'Cartney & Bairnsfather, oil manufacturers, Eskside, Musselburgh, seeking to reduce the minutes of meeting of creditors held, as appointed by the Lord Ordinary, on Monday, 26th December 1870, for the purpose of electing a trustee on the said sequestrated estates, together with all that followed thereon—namely, the interlocutors or deliverances of the Sheriff-Substitute, declaring the election of the trustee, confirming him in his office, and granting act and warrant in his favour.

The circumstances, as stated by the pursuer, were, that at the said meeting there were present Mr Kilgour, as mandatory for the pursuer, and also certain other creditors; that the pursuer was creditor to the extent of £650, while the whole debts of the other creditors only amounted to about £240; that at the said meeting Mr Kilgour, as mandatory for the pursuer, and on the principle that the preses and clerk of the meeting shall be elected by the majority of the creditors in value, proceeded to nominate himself preses of the meeting, and Andrew Morrison, writer in Edinburgh, as clerk thereof. Whereupon, and on the said Mr Kilgour maintaining that he was entitled to act as preses of the meeting, and have the minutes written out by the clerk nominated by him, Mr M'Caul, a mandatory for certain other creditors and at the same time law agent for the bankrupts, suggested to the meeting to adjourn into another room. That the rest of the creditors present did go into another room, where they proceeded to elect the defender Mr Downie as trustee on the estate, and to approve the said James M'Caul as his cautioner. Minutes of the said pretended adjourned meeting were written out, and lodged with the Sheriff-clerk in due form. In the meantime Mr Kilgour proceeded to elect Mr Wm. Mackay to be trustee on the sequestrated estates of the bankrupts, and to approve of Mr James Barton as his cautioner. Minutes of the meeting were written out by the clerk appointed by Mr Kilgour, and also lodged with the Sheriff-clerk in due form. That when parties came to be heard before the Sheriff on these rival minutes, he "was pleased, most erroneously and contrary to law, to proceed on said pretended minutes, and he accordingly pronounced, on 30th December last, an interlocutor, in which he declared the defender the said Alexander Downie to have been duly elected trustee on said sequestrated estates, in terms of the statutes. Further, on or about 30th December last, the said Sheriff-Substitute, in respect of a bond of caution, in terms of the said pretended minutes, and of the statutes, having been lodged for the said defender, as trustee on the sequestrated estates, confirmed the election of the said defender as trustee, and allowed an act and warrant to go out and be extracted accordingly, and which act and warrant was accordingly extracted."

The pursuer's pleas in law were, *inter alia*—"(1) The said pretended minutes, setting forth that the defender the said Alexander Downie had been elected trustee on said sequestrated estates, and that the other defenders had been elected commissioners thereon, not having been the minutes of the meeting appointed to be held by said interlocutor or deliverance of 15th December 1870, and advertised in the *Edinburgh* and *London Gazettes* as aforesaid, they ought to be reduced. (2) The said interlocutors or deliverances of the Sheriff-Substitute, declaring and confirming the defender the said Alexander Downie as said trustee, and the said act and warrant in his favour as such trustee, and the said interlocutor or deliverance declaring the election of the said other defenders as said commissioners, having proceeded on said pretended minutes, they ought also to be reduced."