spouses may assume a new trustee if they wish that the destination should be protected, but nothing of the kind was done in this case.

But here the trust is in its inception a trust in which the spouses, being a majority of the trustees, are virtually the acting trustees having the control of the trust funds, with a power to advance capital without restriction, and such a marriage-contract trust cannot in my opinion be regarded as effectual against creditors. It follows that the pursuer is entitled to have the obligations of the spouses made effectual.

LORD KINNEAR—I agree with Lord Adam upon the grounds stated by him. I wish to add only, that I think the point is settled by authority. I assume that the Lord Ordinary is right when he says that the declaration in this marriage contract, that the income is not to be affectable by the debts or deeds or the diligence of the creditors of the wife herself or her husband, has the same effect as if the income had been declared to be alimentary. I assume this to be correct for the purpose of the argument, but on that assumption I hold the law to be that no one can settle property in such a way as to give himself the full beneficial enjoyment of it and at the same time to protect it against his creditors. That is settled by the case of *White's Trustees* v. *White*, June 1, 1877, 4 R. 786. In that case it was proposed to wind up a trust where all the trust purposes had been fulfilled except payment of an annuity which was declared by a trust settlement to be an alimentary provision and not arrestable nor assignable by the annuitant. For the purpose of winding up the trust it was proposed that the trust property should be made over to the truster's heir and residuary legatee on condition of his granting a bond of annuity over the heritable property which formed the residue of the trust estate, in favour of the annuitant, in precisely the same terms as provided in the trust-deed. It was held that this was perfectly incompetent, and the reason given in the Lord President's opinion is decisive of this case. The Lord President says—"No man can tie up his own property so as to exclude the diligence of his own creditors, and I do not think that anybody by a mere conveyance to an individual can exempt that individual from the diligence of his creditors as regards the property conveyed. But if a settler desires to provide an alimentary payment to some person in whom he has a want of confidence . . . and desires to make a provision which the party recipient shall not have the power to discharge or assign or give up in any way, he may do this—he may place a sum of money in the hands of trustees, and may direct them to use that money in such a way that without a breach of trust they could not possibly listen either to an assignee or an arresting creditor, because the directions of the truster would be . . . 'You shall pay over term by term a certain sum of money to the beneficiary whom I have named; you shall not pay it to anybody else. The trust is created for the purpose of the money getting into her hands, and I forbid and restrain you from doing anything else with it.' I apprehend a truster can do that. This has been recognised for a long time as an effectual way of creating such a restrictive alimentary right, and I know of no other way in which it has ever been supposed that it can be done." I think this is conclusive of the whole matter. It is obvious that a restraint imposed upon trustees must be futile if the beneficiary can relieve the trustees of the restriction at pleasure and require the trust fund to be made over to himself or his assignees. The attempt to protect the funds against the deeds of the beneficiary or her husband here was, I think, quite ineffectual. For this and the other reasons expressed by your Lordship I concur in the judgment proposed.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to proceed.

Counsel for Pursuer and Reclaimer—C. N. Johnston, K.C.—Kemp. Agent—Robert White, Solicitor.

Counsel for Defenders and Respondents—Watt, K.C.—Morton. Agent—W. A. Hislop, W.S.

Wednesday, December 21.

SECOND DIVISION.

MAILLER'S TRUSTEES *v.* ALLAN.

Trust—Charitable Trust—Administration—Trustees ex officio—Petition for Settlement of Scheme—Bursaries for U.P. Church Students Held Available for U.F. Church Students after Union—Ministers of U.P. Churches Trustees under Settlement—Ministers of Corresponding U.F. Churches after Union Held to be Trustees.

A minister of the United Presbyterian Church, who died in May 1869, by deed of settlement appointed certain trustees to hold and administer the residue of his estate for the purpose of founding bursaries for students for the ministry of the United Presbyterian Church, to whom the bursaries were expressly restricted.

Among the trustees appointed were the ministers of certain churches all belonging to the United Presbyterian Church, and their successors in these several churches *ex officio*.

Held, in a petition for a settlement of a scheme presented after the union of the United Presbyterian Church and the Free Church into the United Free Church, (1) that under the truster's settlement ministers of the churches named by the testator, and now belonging to the United Free Church and their successors, were entitled to act as trustees; (2) that the trustees might competently confer the bursaries

on students for the ministry of the United Free Church, the United Free Church being, so far as concerned the truster's intentions, practically identical with the United Presbyterian Church.

Opinions that the decision of the House of Lords in *The General Assembly of the Free Church and Others* v. *Lord Overtoun and Others*, August 1, 1904, 41 S.L.R. 742, did not affect the question.

The Rev. James Whyte Mailler, minister of the United Presbyterian Church at Huntly, died on 1st May 1869, leaving a holograph deed of settlement by which he conveyed his whole estate, heritable and moveable, to the trustees therein mentioned. The nomination of trustees was in the following terms:—"I . . . do appoint and constitute the following persons as trustees to carry out the provisions of my will or testament, and I hereby nominate the same, namely, Mr John M'Neill, of William Frew & Sons, Perth, Mr Forrest Frew, of William Frew & Sons, Perth, Mr David Fleming, surgeon, Bridgend, Perth, the Rev. James M'Cowan, minister of North U.P. Church, the Rev. Thomas Millar, minister of South U.P. Church, the Rev. Alexander Henderson, minister of East U.P. Church. The above three clergymen have their charges in Perth, and their successors in their several charges shall be trustees *ex officio*. Along with the aforesaid I also nominate the Rev. Scott, U.P. minister, Logiealmond, the Rev. William Marshall, D.D., U.P. minister in Coupar-Angus, and clerk of the U.P. Presbytery of Perth, and his successors in said clerkship shall be a trustee *ex officio*."

After bequeathing certain legacies the testator directed the residue of his estate to be held and administered by the trustees for the purpose of founding bursaries in connection with the United Presbyterian Church. The directions of the settlement were in the following terms:—"After paying off these legacies the trustees above mentioned shall hold all my property for the purpose of founding or forming a bursary, which shall be called the 'Mailler Bursary.' This bursary shall be open to competition only to students studying for the ministry, and the competition shall be restricted to students born in the counties of Perth and Kinross. . . . No student shall be qualified to compete unless he belong to the United Presbyterian Church, and by the term 'students' I hereby understand and declare that they must be young men studying for the ministry of the United Presbyterian Church."

In 1900 a union was entered into between the United Presbyterian Church and the majority of the ministers and members of the Free Church, the United body being known as the United Free Church.

In March 1903 the trustees acting under the holograph deed of settlement presented a petition to the Court for the settlement of a scheme. Of the petitioners, two—Mr M'Neill and Mr Frew—were original trustees. Of the others Mr Carruthers was the successor of Mr M'Cowan in the North United Presbyterian Church, since the union of the United Presbyterian and Free Churches, known as the North United Free Church, Perth; Mr Addie was the successor of Mr Millar in the South United Presbyterian Church, now the Wilson United Free Church, Perth; and Mr Crawford was the successor of Mr Henderson in the East United Presbyterian Church, now the East United Free Church, Perth. The union of the United Presbyterian Church with the Free Church into the United Free Church had made considerable changes in the constitution of the United Presbyterian Presbytery of Perth. At the date of the Union it consisted of twenty-three charges, but by the Union seven of these were transferred to other presbyteries, while the remaining sixteen were united with twenty-two charges formerly belonging to the Free Church to form the United Free Church Presbytery of Perth. At the date of the Union the clerk of the United Presbyterian Presbytery of Perth was the Rev. John C. Ingles, Crieff United Presbyterian Church, whose charge was transferred to the Presbytery of Auchterarder, and thereafter the petitioner Mr Rainnie was appointed clerk of the United Free Church Presbytery of Perth, and had since acted as a trustee.

The object of the petitioners, in addition to obtaining the authority of the Court to certain modifications in the scheme of administration, was to have it judicially determined that the persons who as successors in the charges and offices mentioned by the testator were now acting as trustees were, although ministers and officers of the United Free Church, entitled to act, and also that the bursaries might be given to students of the United Free Church born in the counties of Perth and Kinross.

They accordingly appended to the petition an amended scheme of administration, which they craved the Court to approve, and which contained, *inter alia*, the following provisions:—

Trustees.—"The following parties, hereinafter called 'The Trustees,' shall act as trustees under the said Deed of Settlement:—John M'Neill, Esq., Balhousie House, Perth; Forrest Frew, Esq., 2 King James Place, Perth; the Rev. James W. D. Carruthers, Minister of the North United Free Church, Perth, and his successors as ministers in said church; the Rev. John Addie, M.A., Minister of the Wilson United Free Church, Perth, and his successors as ministers in said church; the Rev. Thomas Crawford, B.D., Minister of the East United Free Church, Perth, and his successors as ministers in said church; the Rev. John Rainnie, M.A., Clerk of the United Free Church Presbytery of Perth, and his successors as clerk of said presbytery. On the death or resignation of the said John M'Neill or Forrest Frew the vacancy thus occasioned among the trustees shall not be filled up."

"*Bursaries.*—The trustees shall establish bursaries to be called 'The Mailler Bursaries,' to be awarded to students for the ministry in the United Free Church of Scotland born in the counties of Perth or Kinross."

A minute of compearance was lodged on behalf of Margaret Paton Allan and others, who stated that they were the heir-at-law and next-of-kin of the testator. The minuters opposed the petition, and maintained that the purposes of the trust had failed, and that the trust funds accordingly devolved upon them by intestacy.

A report by Charles Young, Esq., W.S., was before the Court.

Argued for the petitioners—The United Free Church ministers and students were, for the purposes of the testator, identical with the ministers and students of the United Presbyterian Church. It was not really a case of extending trust purposes to a wider class, but if it were, it was just a case where the doctrine of cy pres was applicable—*Governors of Mitchell's Hospital*, February 27, 1902, 4 F. 582, 39 S.L.R. 440; *Trustees of the John Reid Prize*, July 11, 1893, 20 R. 938, 30 S.L.R. 821; *Trustees of the Carnegie Park Orphanage*, March 12, 1892, 19 R. 605, 29 S.L.R. 489. The decision of the House of Lords in *The General Assembly of the Free Church and Others* v. *Lord Overtoun and Others*, August 1, 1904, 41 S.L.R. 742, did not affect the question.

Argued for the respondents—The United Presbyterian Church had lost its identity and was no longer in existence, and the trustees were not entitled to apply the funds for the benefit of a class not contemplated by the truster—*Grigor Medical Bursary Fund Trustees*, July 15, 1903, 5 F. 1143, 40 S.L.R. 818; *Young's Trustees* v. *Deacons of Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, 30 S.L.R. 704.

At advising—

LORD JUSTICE-CLERK—Having considered this petition I have come to the conclusion that there is no good reason why a scheme for the carrying out of the testator's wishes should not be adjusted at the present time. It is true that the amalgamation of a part of the Free Church with the United Presbyterian Church has led to differences and litigation as between the different parts of the Free Church. But the United Presbyterians have not by taking others into union with them and varying their name given up any of their principles or done anything to render the carrying out of this trust impossible in accordance with the desires of the truster. I think, therefore, that the scheme should be considered. That will not, of course, preclude the minuters from taking any action by declarator if they are advised to do so.

LORD YOUNG—The petitioners are the testamentary trustees of the Rev. James Whyte Mailler, United Presbyterian minister, Huntly, who died on 1st May 1869, and the only purpose of the trust which we need consider is to provide bursaries to students for the ministry of that Church. The prayer of the petition is for judicial sanction of a scheme of administration prepared by the trustees and submitted to us as in their opinion necessary, or at least desirable, in consequence of changes which have taken place since the testator's death.

The chief of these changes, and indeed the only one which I propose to consider, is the union of the United Presbyterian Church and the Free Church, effected, or at least enacted and declared by their respective governing bodies, in October 1900.

When the petition was presented on 5th March 1903 that union was, by the judgment of this Court in the case, which for brevity I may refer to as the Church case, held to be legal and valid in all respects, the legal rights, proprietary or beneficial, of the respective Churches as existing prior to the union not being thereby affected, although, of course, and necessarily as we thought, the tenure and administration passed to the governing body of the United Church.

The name given to the United Church was the "United Free Church," and the view of the petitioners (Mailler's trustees) was and is that this Church now comes in place of the United Presbyterian Church, and that the purpose of the trust under Mailler's testament will be legally and properly executed by making such provision as existing circumstances require for awarding bursaries to students for the ministry of the United Free Church. On the other hand, the nearest of kin, including the heir-at-law of the truster, contend in a minute of compearance which they have lodged as respondents to the petition that the United Free Church is not the United Presbyterian Church specifed in the truster's testament, and that the truster's estate, now in the hands of the trustees, must as intestate succession be transferred to them.

On 24th May last, when the question between the petitioners and minuters was first argued before us, our judgment in the Church case was under appeal to the House of Lords, and after a brief argument by counsel it was thought expedient to delay consideration of it until the decision of the House of Lords. It was delayed accordingly with the approbation of both parties, it being understood that the parties should have an opportunity of stating further argument if they thought fit. That opportunity was accordingly given on 1st November last (the judgment of the House of Lords having been pronounced), when after some further argument we took time to consider our judgment.

The question and the only question now before us is, whether or not, having regard to the judgment of the House of Lords, and upon a just construction of Mr Mailler's testament, we can hold that the United Free Chureh and students for its ministry are in the same position as were the United Presbyterian Church and students for its ministry before the union, and on that footing deal with the petition before us.

In dealing with this question we are of course concerned only with the effect, if any, and if so what, of the House of Lords' judgment upon the position of the United Presbyterian Church. But there being no suggestion, or room for any, that anything

has occurred to affect the position of that Church other than its union with the Free Church, the legality of which was disputed by a few members of the Free Church who in the Church case (as I shall continue to call it) sued for its reduction, it is, I think, impossible to exclude from consideration the effect of the judgment upon the position of the Free Church as it existed before the disputed union in October 1900. This Court when affirming the legality of the union, and therefore refusing reduction of it, necessarily held that it must subsist with respect to both churches, it being plain that if illegal and invalid with respect to one of them, it must be so with respect to the other also. It is not and never was suggested that there was any other union than of these two churches made in October 1900. If that union was legal, as we held, the result is that the United Free Church is a legal body, there being no suggestion of illegality in the name. The judgment of the House of Lords must import this result or the reverse, there being no mean between these extremes. If it import this result, that is, the legality and validity of the United Free Church composed of the Free Church and the United Presbyterian Church lawfully united into one, I see no ground for the contention that the rights of the United Presbyterian Church and the students for its ministry as theretofore existing were thereby extinguished or in any way prejudicially affected.

On the other hand, should we, in respect of the judgment of the House of Lords, or on any other satisfactory ground, hold that the disputed union was illegal—what would be the result? Necessarily that the resolutions for and consequent enactments of such union by the governing bodies of the respective churches were null and inoperative—as were of course also any enactments by the governing and legislative body of the erroneously supposed to be United Church for carrying it into effect.

The House of Lords certainly in terms reversed the judgment of this Court whereby the legality of the union in question was affirmed, and the demand made for its reduction refused, but I do not read that as a reduction by that House of the union. If so read, the consequence would, as I have pointed out, be that there was no union—the proceedings whereby any union could be effected being reduced as null and void. I say "could be effected," because two churches can be united only by the churches themselves—or of course by Parliament—an event which has not hitherto occurred.

The minuters (the heirs *ab intestato* of the testator Mailler) base their claim and consequent opposition to the petition on their averment that in 1900 the United Presbyterian Church went into union with the Free Church, and is in such union now, the United Church being called the "United Free Church." It is thus, and only thus, that we are in the dispute between the petitioners and minuters, the only parties before us, concerned with the judgment and views of the House of Lords regarding the Free Church. Is that judgment, and are the views of the noble and learned Lords who expressed it, favourable or adverse to that averment of union? The judgment seems to import that in the General Assembly of the Free Church sitting in October 1900 the 650 members of the Assembly who voted for the union thereby—that is to say, by so voting—ceased to be members of the Free Church and necessarily of the General Assembly thereof. This is probably perplexing to some and even to many, and that whether the union approved of and voted for by these 650 members was legal or not. The judgment seems also to import what may be thought equally perplexing, that all who were members of the Free Church when this vote was given, and who subsequently signified their approval of the union (amounting to hundreds of thousands), thereby ceased to be members of that Church, and so went out of the union if lawful, as clearly perhaps as that they were never in it if it was from the first unlawful, and so never existed. I have thought it my duty to notice this perplexing topic, but do not pursue it further.

I am clearly of opinion that the union of the Free Church and the United Presbyterian Church into one was lawful, and was regularly and effectually made without transgressing any statute or rule of the common law which we administer. It follows that in my opinion the United Presbyterian Church now exists as one of the two Churches thus lawfully united and called the United Free Church. At and prior to the death of the testator (Mailler) it (that is, the United Presbyterian Church) existed as a Presbyterian Church formed, as its name distinctly expresses, by the union of several Presbyterian Churches into one. The testator, who was a minister of this United Church, knew this, and when by his testamentary trust he made an enduring provision of bursaries to students for its ministry, I am unable to impute to him the intention that the provision should cease and determine if it ever united with another Presbyterian Church. I am therefore of opinion that the position of the United Presbyterian Church now does not in any material respect differ from its position at and prior to the testator's death in 1869. It is the same Church in all respects, though increased in size as it probably is, and students for the ministry of the United Free Church are I think undoubtedly in the same position, in the sense and meaning of the testament we are construing, as before the Union in 1900 students for the ministry of the United Presbyterian Church were or would have been.

Before concluding, I ought, I think, to explain distinctly why I have made no reference to the judgment of the House of Lords in so far as it affects or may affect the proprietary or beneficial trust rights of the Free Church as existing prior to the Union, legal or illegal, of October 1900. This Court had by the judgments which the Lords reversed decided that the property held by and vested in the trustees

nominated by and on the trust constituted by the Church—that is to say, by its supreme governing body—was the property of the Church, and passed with them into the United Church constituted by their union with the U.P. Church. The House of Lords decided, and I assume rightly, that the Free Church had not in 1900, and indeed never had, any property whatever, that which was vested in their trustees being to the last shilling the property of the beneficent individuals from whom it came, who, and not the Church, were the true trusters of the trustees, who held it not as the trustees of the Church but as theirs.

In the case now before us no such question arises, and so the judgment of the House of Lords in the Church case is not in point. It is not suggested that the property in the hands of the petitioners as Mailler's trustees is or ever was the property of the U.P. Church or of the United Free Church, or that it is administrable otherwise than under the truster's settlement.

LORD TRAYNER — I agree with Lord Young in thinking that the decision of the House of Lords' case does not bear on the question we are here to consider. That judgment decided, as I understand it, that as between the two sections of the Free Church as it existed before 1900 the rights of property went to one section and not to the other. In the case we are dealing with the trust estate never was the property of the Free Church, and never was the property of the United Presbyterian Church. Even if it had been the property of the United Presbyterian Church I should still have been of the opinion, of which I am now, that the judgment of the House of Lords did not affect that, because there has been no change whatever on the United Presbyterian Church except the addition to it of a great many people who have left the Free Church and joined it. But I do not pursue that, because, as I have said, I am of opinion with Lord Young that the House of Lords' judgment does not touch the question before us at all.

Mr Mailler left certain funds to be administered by trustees under very specific directions. The trustees having some doubt as to whether they were the proper persons to carry on the administration of the trust, presented this scheme to us to ask in the first place our authority to carry it on, and in the second place to enable them by certain alterations on the trust purposes to administer it with more success in carrying out the views of the truster. Now, the first thing I notice is that there is an objector, and only one objector, to it, being the next-of-kin and heir-at-law of the truster. I think this claim is altogether untenable. I cannot see any reason whatever for supposing there is any intestacy here, but the judgment we are now to pronounce will not prevent these compearers from pursuing any claim they think they have in a proper action to try that question. The purpose for which Mr Mailler left his money was to enable certain students who were studying for the ministry to qualify themselves as clergy of the United Presbyterian Church. The amount left by the truster is not large, and the bursaries must needs be small, but there is no doubt as to the purpose for which the bursaries are designed and are to be held. I do not think it necessary to go over them in detail, because the observations I have to make on the proposed scheme will show your Lordships the views I take, so far as necessary to express them, on the trust-deed.

The second head of the proposed scheme sets forth that the following parties shall be the trustees. Now, it is upon that point that the trustees first applied to us. The difficulty they had was this, that the truster named two personal friends as trustees, and several others who may be called *ex officio* trustees —that is to say, they were not selected in respect of the truster's predilection for them but because they were incumbents of certain churches therein described, all belonging to the United Presbyterian Church in Perth or in that district. These *ex officio* members who were incumbents of these particular churches thought their trusteeship might be disputed because they were no longer members of the United Presbyterian Church but of the United Free Church. The change on the name to my mind makes no difference whatever in their character. The name may be right or the name may be wrong, but there is no doubt they are the persons indicated by the truster as the persons whom he desired to carry on and administer the trust. They are the incumbents of certain churches well defined, and their successors. I think the present incumbents of these churches (the petitioners), though called ministers of the United Free Church, are in fact ministers of the United Presbyterian Church, and are the persons to whom the truster committed the administration of the trust. Accordingly I think the second article may be approved. . . .

Then I think the trustees may competently confer these bursaries on students for the ministry of what is now called the United Free Church. These two Churches (whether they be two or one) are practically one in doctrine and government, and as it was the purpose of the testator to promote the welfare of students who were studying for the United Presbyterian Church, students of the United Free Church may very well be admitted to the benefit.

LORD MONCREIFF was absent.

The Court approved of the amended scheme in so far as it is set forth above, and found the petitioners, but not the respondents, entitled to expenses out of the trust estate.

Counsel for the Petitioners—C. K. Mackenzie, K.C.—Constable. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.