plaints mainly related to damage caused or apprehended to the land occupied by the feuars. On the whole matter, I am of opinion that the Lord Ordinary's judgment in regard to the Mackinlay Park is right.

The Court adhered.

Counsel for Pursuers and Respondents —Guthrie, K.C. — Cullen — D. Anderson. Agent—H. Hume MacGregor, S.S.C.

Counsel for Defenders and Reclaimers— Lord Advocate (Dickson, K.C.)—Younger— Armit. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, December 22.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

M'CALLUM *v.* M'CULLOCH'S TRUSTEES.

Marriage Contract—Trust—Liferent Provisions to Wife—Assignability—Spouses a Majority of Trustees—Power to Advance to Husband at Discretion of Trustees—Life Interests Declared not Affectable by Deeds of Spouses.

By antenuptial marriage contract a husband conveyed certain heritable property to trustees, *inter alia*, for payment to his wife during her lifetime of the free annual income for her liferent use allenarly, "declaring that the same shall not be affectable by the debts or deeds or the diligence of creditors of either of" the spouses. The contract also contained a conveyance by the wife of her whole estate to the same trustees, with a similar provision for the payment to her of the free annual income, and a corresponding declaration that it should not be affectable by the debts or deeds of the spouses or the diligence of their creditors.

The contract contained the following clause:—"With power also to the said trustees to lend or advance (but only if both are surviving and at the joint request of said spouses) to the" husband "such portion or portions of said whole estates hereby conveyed as they may think right, and as he may desire."

The trustees were three in number—viz., the spouses themselves and the wife's father.

The spouses having assigned their whole rights under the contract to a creditor in security of an advance, the creditor raised an action to enforce his rights under the assignation, and for payment to him of the free annual proceeds of the trust estate until the debt due to him had been satisfied. The trustees pleaded that the assignation by the spouses of their life interest in the marriage contract was ineffectual.

Held (*rev.* judgment of Lord Stormonth Darling, Ordinary) that as the spouses were a majority of the trustees, and were in a position to exercise all the powers of the trustees, and as the marriage contract conferred power on the trustees to advance to the husband such portions of the estate as they might think fit, the spouses had power to make, and had made, an effectual assignation of their life interest in the trust estate.

By antenuptial contract of marriage dated 17th March 1882, and registered in the Books of Council and Session 28th July 1885, John Findlay M'Culloch, residing at 9 Binnie Place, Glasgow, disponed to Archibald Nicol (his father-in-law), Mrs Euphemia Nicol or M'Culloch (his wife), and himself, as trustees, certain heritable property in Glasgow then belonging to him, for the following amongst other purposes, namely—"(*First*) for payment to the said Euphemia Nicol during her lifetime of the free annual income and revenue thereof for her liferent use allenarly; declaring that the same shall not be affectable by the debts or deeds or the diligence of the creditors of either of us, the said parties hereto."

By the same deed Mrs Euphemia Nicol or M'Culloch conveyed to the said trustees the whole estate, heritable and moveable, belonging to her, for payment to her of the free annual income and revenue thereof for her liferent use allenarly, "declaring that the said free annual income and revenue shall not be affectable by the debts or deeds of either of the parties hereto or the diligence of their or either of their creditors."

The contract contained provisions in fee for behoof of the children of the marriage (of whom there were six), it being declared that the fee should vest in the children on the dissolution of the marriage.

The deed further contained the following clause:—"With power also to the said trustees to lend or advance (but only if both are surviving and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates hereby conveyed as they may think right and as he may desire."

The trustees accepted office under the marriage contract, and managed the marriage contract estate.

On 26th January 1897 John Bunting M'Callum, 289 North Woodside Road, Glasgow, advanced on loan to Mr and Mrs M'Culloch the sum of £200. In security thereof the spouses, by assignation dated 26th January 1897, assigned to him and his heirs, executors, or assignees whomsoever, their and each of their whole right, title, and interest, present or future, whether of liferent or fee, under their antenuptial contract of marriage, together with all their right, title, and interest in and to the annual rents, interests, and proceeds payable from the properties therein described, with power also to him or any factor appointed by him to enter into possession of the subjects and draw the rents.

The assignation was granted under the declaration that the lender should out of the rents received from the subjects pay, *inter alia*, the interest due under the assignation, and also the premiums on two life

policies assigned to him by the spouses in the assignation, and apply the balance in liquidation of the principal sum of £200, so long as that sum remained unpaid. The assignation was duly intimated to the marriage contract trustees, and a copy delivered to their agents.

On 11th January 1904 John Bunting M'Callum brought the present action against (1) the marriage contract trustees, and (2) the spouses as individuals, concluding for declarator that the pursuer had by the assignation acquired right to the whole right, title, and interest, whether of liferent or fee, of each of the spouses under the antenuptial marriage-contract, and for payment to him by the trustees of the free annual proceeds of the trust estate until the debt due to him, which amounted in all to £425, 12s. 6d., should be satisfied.

Defences were lodged by the trustees, who admitted that no part of the sum lent had been repaid.

The pursuer pleaded—"(1) The interests of the defenders Mrs Euphemia Nicol or M'Culloch and John Findlay M'Culloch under the antenuptial contract of marriage having been validly transferred to and vested in the pursuer, decree should be pronounced as craved."

The defenders pleaded—"(1) The action is irrelevant. (2) The assignation condescended on being invalid, and inoperative to transfer to the pursuer the interests of Mr and Mrs M'Culloch under the antenuptial marriage contract, the defenders are entitled to be assoilzied from the first conclusion of the action."

On 4th June 1904 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor assoilzieing the compearing defenders from the conclusions of the action.

Opinion.—"This case would in my opinion be governed by the judgment of the First Division in *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 18 R. 615, were it not for one circumstance which creates a distinction. The wife in that case had by antenuptial marriage-contract conveyed her whole estate to trustees, *inter alia*, for payment to herself of the free income during the subsistence of the marriage, such payment being made exclusive of the *jus mariti* and right of administration of her husband, and her own receipt being declared a sufficient discharge. The wife became a party to a bond and assignation granted by her husband in security of a loan, and she thereby bound herself to the extent of her own separate estate to repay the sum borrowed. In security of her personal obligation she with her husband's consent assigned to the lenders her whole right and interest, present and future, under and in virtue of the marriage-contract. In answer to an action by the lenders for declarator that they had acquired right to the whole sums of money payable to the spouses under the marriage-contract, and for payment of the income of the trust estate until the amount due to the pursuer should be paid off, the wife pleaded that her estate having been conveyed to trustees for her protection, she could not validly convey away the same *stante matrimonio* to her own prejudice. But the judgment was that she had power to make, and had made, an effectual assignation of the income of her estate, whether arising during marriage or after its dissolution.

"Here the pursuer's demand is substantially the same as in *Halkett's* case. On 26th January 1897 he lent to the spouses a sum of £200, in return for which they assigned to him the whole right and interest of each of them, present and future, whether of liferent or fee, under and in virtue of their marriage-contract, which had been entered into on 17th March 1882, and they specially assigned to him their whole interest in the annual rents and proceeds of certain house property in Glasgow, which had been put in trust by the husband. It is admitted that no part of the sum lent, or interest thereon, or expenses in connection therewith, has been repaid to the pursuer, and it is said that the sum now due to him amounts to more than double the original loan. The action is directed against the marriage-contract trustees, who are the spouses themselves, and the father of the wife, and also against the spouses as individuals. What the pursuer asks is a declarator of his rights under the assignation, and for payment by the trustees of the free annual proceeds of the trust estate until his debt shall be satisfied. I gather from the record that the trust estate consists entirely or mainly of the house properties specially conveyed by the husband. The marriage-contract also contained a conveyance by the wife of her whole estate then belonging to her or afterwards to be acquired by her during the subsistence of the marriage, but the record makes no mention of there being, as yet at least, any property of that description in the hands of the trustees.

"The trust purposes as regards the wife are for payment to her during her lifetime for her liferent use allenarly of the free annual income of the estate conveyed by the husband, and then follows a declaration 'that the same shall not be affectable by the debts or deeds or the diligence of the creditors of either of us the said parties hereto.' There is a similar provision for payment to her of the free annual income of her own estate, with a corresponding declaration that it shall not be affectable by the debts or deeds of either of the spouses or the diligence of their creditors, and there is a renunciation by the husband of his *jus mariti* and right of administration over both the estate coming from the wife and the provisions made by himself in her favour. The contract also contains provisions of fee to the children (of whom there are six), but these provisions are not material to the present question. There is, however, a clause on which counsel for the pursuer laid considerable stress, giving power to the trustees 'to lend or advance (but only if both are surviving, and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates hereby conveyed as they may think right and as he may desire.

"The decision in *Halkett's* case proceeded entirely upon the ground that the income of the trust estate had been placed by the marriage-contract absolutely at the wife's disposal without any declaration that it should be alimentary or not assignable by her. In this marriage-contract there is no declaration that the income payable to the wife shall be alimentary, but there is a declaration that it is not to be affectable by the debts or deeds or the diligence of the creditors of either herself or her husband, and the question comes to be, whether that is not sufficient to take the case out of the rule applied in the case of *Halkett's Factor*. I think it must be conceded that an alimentary declaration would have had that effect, for the case of *Cosens* v. *Stevenson*, 11 Macph. 761, shows that a wife cannot discharge an alimentary annuity secured to her by marriage-contract even where there is no trust to protect it, her position being distinguishable from that of a wife whose liferent or annuity is not declared alimentary, as in *Cowe's* case, 4 R. 695. I fail to see why the declaration which we find here should not have the same effect as a declaration that the provision is to be purely alimentary. Even as regards the income of property put in trust by herself a woman can by marriage contract make her interest non-assignable, her power to do so being an exception to the general rule that property cannot lawfully be put beyond the reach of the owner's creditors without creating some right, direct or contingent, in a third party. As regards the income of property put in trust by the husband there is still less doubt of the power of the spouses to contract that the interest of the wife shall be inalienable. Where they do so it seems to me that the declaration must receive effect, and that an attempt by her to assign her interest is one which the trustees cannot recognise. If it be said that such a result is unfair to an onerous assignee who has lent his money on the faith of the wife's deed, the answer must be that if he had examined the marriage contract he would have seen that no deed of hers could affect her liferent *stante matrimonio*.

"It is suggested on behalf of the pursuer that the clause in the marriage contract giving power to the trustees at the joint request of the spouses to lend or advance any part of the trust estate to the husband is a clear indication that the contract was not truly intended to protect either the immediate or eventual liferent of the wife, particularly as the spouses themselves formed a majority of the trustees. The clause is certainly a peculiar one, and I am not aware that anything like it is to be found in any of the cases to which the principle of protection of the wife's interest has been held to apply. I concede that the intention of the marriage contract is material, and is to be gathered from the whole tenor of the deed. I further agree that the wife's provisions under a deed containing such a clause as this must be allowed to be very precarious. But I do not think that a mere power which has not been and may never be exercised can outweigh a positive declaration that the wife's liferent shall not be assignable.

"The result must be to assoilzie the defenders from the whole conclusions with expenses, but I shall reserve to the pursuer any claims competent to him against the spouses as individuals in respect of their personal obligation under the assignation in his favour referred to in the summons."

The pursuer reclaimed, and argued — There was no express declaration that the liferent was to be alimentary. There was no effectual exclusion of the power to assign, as the spouses had virtually given themselves a power to get possession of the whole trust estate. That being so, there was no proper trust and no effective protection. In order to be effective the protection must be absolute. That was not so here, for the trustees could favour one creditor at the expense of others. The law did not recognise a partial protection. The assignation was therefore valid and should receive effect —*Rogerson* v. *Rogerson's Trustee*, November 6, 1885, 13 R. 154, 23 S.L.R. 102; *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, March 4, 1891, 18 R. 615, 28 S.L.R. 589.

Argued for the respondents—The assignation was invalid, as it was outwith the power of the spouses to assign the income of the trust. The marriage contract trust was effectual, for the wife's father was a trustee and could prevent anything improper being done. There was a power in the marriage contract to assume new trustees. The income was protected by the trust and could not be assigned — *Ker's Trustees* v. *Ker*, December 13, 1895, 23 R. 317, 33 S.L.R. 212; *Christie's Factor* v. *Hardie*, March 7, 1899, 1 F. 703, 36 S.L.R. 507.

LORD PRESIDENT—The question in this case is whether the antenuptial contract of marriage entered into between the defenders John Findlay M'Culloch and Mrs Euphemia Nicol or M'Culloch, his wife, on 17th March 1882, is effectual to secure the free annual income of the funds and estate settled under it, and in particular the free annual income of the estate settled by the wife against the creditors of the spouses or either of them.

By that contract of marriage the defender Mr M'Culloch disponed certain heritable estate which belonged to him to the trustees under it, for the purposes mentioned in it, and Mrs M'Culloch also conveyed certain property and estate belonging to her to the trustees under the contract for the purposes specified in it. The trustees were three in number—Archibald Nicol, the wife's father, and the spouses Mr and Mrs M'Culloch. The spouses were thus a majority of the trustees, and they were consequently in the position to exercise any power which might be competent to the trustees under the contract.

The first purpose of the trust was for payment to Mrs M'Culloch during her lifetime of the free annual income of the estate therein mentioned for her liferent use allenarly, it being declared that it should not be affectable by the debts or deeds or the diligence of the creditors of either her

or her husband, and after her death for behoof of the child or children of the marriage in fee, which should vest at the dissolution of the marriage. The children have thus no vested right during the subsistence of the marriage. The rights conferred upon or reserved to Mrs M'Culloch by the marriage contract were not in terms declared to be alimentary.

By the marriage contract power was conferred upon the trustees under it to lend or advance (but only if both the spouses were surviving and at their joint request) such portion or portions of the whole estate conveyed by the contract as they might think right to Mr M'Culloch, and as he might desire, with power also to the trustees to apply the annual revenue of the means and estate settled under the contract for the benefit of the children of the marriage. It would appear that the trustees could be bound to lend the whole or almost the whole trust estate subject possibly to the reservation of a nominal sum to Mrs M'Culloch, a provision which appears to me to be inconsistent with any duly protected right being secured upon the wife and children by the marriage contract.

The trustees accepted office under the marriage contract and assumed the management of the estate thereby settled, and they have intromitted with it in terms of the marriage contract.

On 26th January 1897 the pursuer advanced on loan to the defenders Mr and Mrs M'Culloch the sum of £200, and in security thereof they disponed and assigned to him all and whole their and each of their whole right, title, and interest, whether of liferent or fee, in the property settled by them or either of them under the marriage contract.

The assignation was granted under the declaration that the pursuer should, out of the rents received from the subjects held under the marriage contract, make payment of (1) the interest due under two bonds and dispositions in security over these subjects for the cumulo sum of £431, (2) the feu-duty and other ground burdens amounting to £1, 4s. 10d., (3) the taxes exigible from the subjects and necessary repairs, (4) the interest due under the assignation, viz., 10 per cent. on the sum of £200 advanced, in addition to 7½ per cent. for factorage, (5) the premiums necessary for keeping in force two insurance policies which were assigned by Mrs M'Culloch to the pursuer, and the balance was directed to be applied in liquidation of the principal sum of £200 advanced, so long as and to the extent to which that sum should remain unpaid. It was further declared by the assignation that the pursuer and his heirs and assignees should be bound on repayment of the £200 advanced, and any interest which might be due upon it, or of any balance that might be due upon it, to reconvey to Mr and Mrs M'Culloch, and to reinstate them in their full right and place in and to the property, at their expense.

The assignation was duly intimated to the trustees on 30th January 1897.

No part of the sum advanced by the pursuer to Mr and Mrs M'Culloch has been repaid, nor has any interest been paid upon it. Further, the pursuer has since December 1897 paid the premiums of insurance on two policies assigned to him by the assignation above mentioned, and no part of the money so applied has been repaid to him.

The pursuer maintains that under the assignation he is now in right of the liferent of the trust funds conveyed by both Mr and Mrs M'Culloch to their marriage contract trustees, or at all events that he is entitled to have the money arising under that right made over to him in so far as may be necessary to make repayment of the sum advanced by him to the spouses as above mentioned, and it appears to me that he is entitled to prevail in this demand.

The obligation imposed upon the trustees to lend the trust estate or any part of it to Mr M'Culloch without security is, in my judgment, inconsistent with either the wife or children having a secure provision under the contract, and if Mr M'Culloch is entitled to demand and receive such an advance, it seems to me that in a question with the pursuer he is bound or at all events entitled to use the power to enable him to repay the advance. In this connection it is to be kept in view that the wife bound herself to the extent of her own separate estate to repay the sum borrowed. If the estate is thus left open to a demand for an advance to the spouses or either of them, it cannot in my judgment be said that the rights of the children are indefeasible. It appears that Mr M'Culloch's creditors could directly or indirectly reach the trust estate as being vested with his rights, including the right to demand an advance. The spouses are a majority of the trustees—the remaining one being Archibald Nicol, the wife's father—and I think that they are thus in a position to demand and receive from the trustees an advance for the purpose of enabling them to pay the debt due to the pursuer. It appears to me that in order to become effectual the protection of a wife's rights under a marriage contract must be absolute, and that it would be anomalous if marriage contract funds were in such a position that the wife could reach them but that her creditors could not.

For these reasons I think that although the present case is not identical with that of *The Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 18 R. 615, and that it is narrow and difficult, the considerations upon which that case was decided are also applicable to this case.

LORD ADAM—On 26th January 1897 the pursuer lent to the defenders Mr and Mrs M'Culloch the sum of £200, and in security of the loan they assigned to the pursuer their whole right, title, and interest, whether of liferent or fee, under an antenuptial contract of marriage entered into between them of date 17th March 1882.

The pursuer claims, in virtue of this assignation, to be now in right of the liferent of the trust funds in the hands of the trustees conferred on Mrs M'Culloch by that contract, and to have the balance of income in their hands paid to him. As appears from article 7 of the condescend-

ence, that is the extent of his present claim.

The question in the case is therefore whether the assignation in question contains a valid assignation of Mrs M'Culloch's liferent of the trust funds in the pursuer's favour.

By the antenuptial contract Mr M'Culloch disponed to Mr Nicol, Mrs M'Culloch's father, and to Mrs M'Culloch and himself, and the survivors or survivor of them as trustees, certain heritable subjects in Glasgow therein described, as also the whole estate and effects to which he might be, or might become, entitled to as heir or otherwise of the deceased George M'Culloch, or under or in virtue of George M'Culloch's settlement in favour of his wife.

The purposes of the trust were (first) for payment to his wife during her lifetime of the annual revenue and income of the said subjects for her liferent use allenarly, declaring that the same should not be affectable by the debts or deeds or the diligence of the creditors of either of the spouses.

After the death of Mrs M'Culloch the subjects were to be held for behoof of the children of the marriage in fee, and divisible among them as therein mentioned. It was further declared that the fee should vest in the children, or the issue of predeceasing children, on the dissolution of the marriage. In the event of there being no children of the marriage, the subjects were to be reconveyed to Mr M'Culloch. Mr M'Culloch renounced his *jus mariti* and right of administration.

Mrs M'Culloch on the other part conveyed to the trustees the whole means and estate then belonging to her, or to which she might acquire right during the subsistence of the marriage.

I do not think it necessary to examine in detail the provisions of the contract with regard to this part of the trust estate. They are substantially the same as those with regard to the portion contributed by Mr M'Culloch—giving a successive liferent to the wife and husband and the fee to the children—and as regards the liferent, declaring it to be for liferent allenarly, and that it should not be affectable by the debts or deeds of the spouses or either of them, or subject to the diligence of their creditors.

To return, then, to the clause of the contract conferring a liferent of the subjects brought into settlement by Mr M'Culloch, it will be observed that it contains no declaration that the liferent is to be alimentary, but only that it is to be in liferent allenarly, and not to be subject to the debts or deeds of the spouses or the diligence of their creditors. Now, had there been no peculiarities in this deed I should probably have concurred with the Lord Ordinary in thinking that the liferent, though not declared to be alimentary, should be so considered.

But the first peculiarity in this deed is that the trustees are the two spouses themselves and the father of the wife. The result is that the two spouses alone, if they happen to be the survivors, and in any event as the majority of the trustees, are in a position to exercise all the powers conferred on the trustees by the deed. Now, the deed contains this power — "With power also to the said trustees to lend or advance (but only if both are surviving, and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates as they may think right and as he may desire." No doubt the power is only to advance such portions as the trustees may think right, but for the reasons I have stated that appears to me in this case to mean just what the spouses themselves think right. I see nothing, accordingly, in this deed to prevent Mrs M'Culloch lending or advancing, or consenting to lend or advance, the trust funds to her husband, and so it might be, and probably would be, putting an end to the fund from which her liferent is derived.

It may be that if the trustees had been entirely independent the fact that their consent was necessary to an advance might have afforded the wife some protection against her own acts. But I do not think that was the intention of the parties to this contract, and I think that was the reason why the liferent was not declared to be alimentary, which would have had that effect. I think the intention was that the husband should have the use of the trust funds during the joint lives of the spouses, but at the same time that they should not be open to the diligence of his creditors. But that the law will not permit; neither do I see how a liferent can be considered as alimentary when the liferenter has power to alienate or consent to the alienation of the fund from which it is derived.

So far as appears the trust funds in this case are entirely heritable. Had the trustees—that is in effect the spouses—had money in hand, no doubt the loan or advance would have been made direct to the husband, but the subjects being heritable it was more convenient for the spouses to borrow the money and to assign their interest in the trust estate in security. But the result as regards the trust estate is the same in either case, as, if the assignation is valid, it will now be applied in so far as necessary in extinction of the loan made to the husband. In the one case the loan would have been made directly to the husband, in the other indirectly.

On the whole matter I am of opinion that the liferent in question is not alimentary, but is assignable and has been validly assigned.

LORD M'LAREN—I concur in Lord Adam's opinion. I may add that in my opinion it is essential to the constitution of an effectual marriage-contract trust that at least one of the trustees should be a neutral person.

A trust in which the spouses are the sole trustees gives no protection to the beneficiaries against the voluntary acts of the spouses, and therefore would not be effectual against creditors.

There may be cases in which there were originally other trustees, but owing to death or resignation of some of the original trustees the spouses have come to be the sole continuing trustees. In such a case the

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