Crum Brown, 1908 S.C. (H.L.) 3, 45 S.L.R. 335, where he said—"All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator"—a rule which has since been approved, for example, by Lord Kinnear in the case of *Allan's Executor* v. *Allan*, 1908 S.C. 807, 45 S.L.R. 579, and in this Division in the case of *M'Phee's Trustees* v. *M'Phee*, 1912 S.C. 75, 49 S.L.R. 33; and I do not suppose that trustees of common sense would have any serious difficulty in carrying out the directions the testator has here expressed.

Mr Brown, in addition to contending that the description of the beneficiaries was unintelligibly vague, presented an argument to the effect that upon a proper construction of the language used no power of selection was left to the trustees, because the institutions or societies were to be such charitable institutions or societies of the kind specified which exist, namely, all existing societies coming within the region of the words which follow. I think it is idle to contend that by implication the trustees here are not given a discretion, and I think an argument very similar to Mr Brown's has been put forward and rejected by the Court in several of the cases, notably perhaps in *Allan's Executor* v. *Allan*. I think it would approach the ridiculous to affirm that the trustees would be bound to accept, and, if I may so phrase it, to put upon their list all such societies or institutions, or any such society or institution, which might claim to be put thereupon, or that the trustees are not free to vary the amount of their donations when making the distribution among such institutions or societies as they may put upon their list. That argument therefore seems to me to fail, and without further amplifying the matter I propose that we should answer the question by finding that the direction quoted in the question is a valid and effectual bequest, capable of receiving effect, and is not void from uncertainty.

LORD MACKENZIE—I am entirely of the same opinion.

LORD CULLEN—I also concur.

The Court answered the first alternative of the question in law in the affirmative and the second in the negative.

Counsel for the First Parties—Cooper, K.C.—Paton. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Macmillan, K.C.—C. H. Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Friday, January 15.

FIRST DIVISION.

CAMERON'S TRUSTEES *v.* MACKENZIE AND OTHERS.

Succession—Testamentary Writings—Validity — Holograph Writing on Paper Pinned to Deposit-Receipt—Intention.

On a lady's death there were found in her repositories two deposit-receipts for £450 and £300 respectively. The deposit-receipts were taken in name of the deceased and were endorsed by her. Attached by a pin to the deposit-receipt for £450 was a slip of paper bearing the words "£150 to Mrs A., £150 to Mrs B., £150 to Mrs C.—MARY CAMERON" (deceased's signature). Attached by a pin to the deposit-receipt for £300 was a slip of paper bearing the words "John Cameron for annuity—MARY CAMERON." These writings were holograph of the deceased. *Held* that the holograph writings did not show testamentary intention, and were not valid testamentary bequests of the sums in the deposit-receipts.

Succession—Charitable Bequests—Trust—"Such Charitable Institutions, Persons, or Objects as my Trustees may Think Desirable"—Uncertainty.

A testatrix bequeathed the residue of her estate to her trustees "with power to them to distribute the same amongst such charitable institutions, persons, or objects as they may think desirable." *Held* (*dub.* Lord Skerrington) that the bequest was not void from uncertainty.

On 17th March 1914 a Special Case was presented to the Court by George Duncan Collie and another, the testamentary trustees of the late Miss Mary Cameron (*first parties*), Mrs Elizabeth Rachel Mackenzie, who was mentioned in certain writings of the testatrix (*second party*), John Cameron, a brother of the testatrix mentioned in certain writings (*third party*), and Miss Annie Elizabeth Cameron, a niece who with the said brother was the next-of-kin of the testatrix (*fourth party*).

The Special Case stated, *inter alia*—"1. Miss Mary Cameron, who resided in Crown Street, Aberdeen, died upon the 2nd of August 1913, leaving a trust-disposition and settlement dated 14th September 1904 and a relative codicil dated 12th June 1911.

"2. By her said *trust-disposition and settlement* Miss Cameron, on the narrative therein stated, and in implement of certain conditions set forth in the said narrative, disponed and conveyed her estate, both heritable and moveable, to the first parties as her trustees in trust for the following purposes, viz.—(1) for payment of debts; (2) to allow her brother John Cameron the liferent use of her whole heritable and moveable means and estate; (3) on the death of the said John Cameron or her own, should he predecease, she directed her

trustees to realise her said means and estate and to make payment of certain legacies free of all Government duty; (4) 'With reference to the residue of my moveable means and estate, I leave the same to my trustees, with power to them to distribute the same amongst such charitable institutions, persons, or objects as they may think desirable, the time of distribution and the amount to be given to be entirely in the discretion of my said trustees'; and she declared the provisions therein conceived in favour of her said brother John to be irrevocable because of their contractual nature, and she revoked all former deeds of settlement made by her. By a later clause the testatrix reserved her own liferent, with full power at any time during her lifetime to alter or revoke the said settlement in so far as the disposal of the fee of her estate as therein above mentioned was concerned.

"3. By her said codicil dated 12th June 1911 the testatrix made certain specific bequests of articles of furniture and personal belongings.

"4. There was found in the testatrix's repositories (enclosed in her desk, which was in a press in her bedroom) after her death, *inter alia*, two *deposit-receipts* issued by the National Bank of Scotland, Limited, Aberdeen, for £450 and £300 respectively, and both dated 19th May 1913. The said deposit-receipts are taken in the name of the testatrix, and both are endorsed by her. Attached by a pin to the deposit-receipt for £450 when it was found in the said repositories was a slip of paper bearing the following words in deceased's handwriting, viz.:—

'£150 to Mrs Mackenzie, Dunkeld.
£150 to Mrs H. Croll, Stocket.
£150 to Mrs Thomson, Ancrum.
MARY CAMERON.

The words 'Mary Cameron' were the usual signature of the testatrix. Attached by a pin to the deposit-receipt for £300 was a slip of paper bearing the following words in deceased's handwriting, viz.:—

'John Cameron '
for annuity. MARY CAMERON.'

The words 'Mary Cameron' were the usual signature of the testatrix. . . .

"5. The amount of the estate left by the testatrix is about £2600, of which about £200 is heritable and about £2400 moveable.

"6. Questions have now arisen (first) as to what writings constitute the testamentary dispositions of the testatrix; (second) as to the validity and effectiveness of the said fourth purpose of the said trust disposition and settlement. . . .

"7. The second party is one of the three persons named in the said writing attached to the said deposit-receipt for £450, opposite whose names sums of money were written. The third party is the brother of the testatrix referred to in said trust-disposition and settlement, and is the person named in the writing attached to the deposit-receipt for £300. The fourth party is the daughter of a deceased brother of the testatrix. The third and fourth parties are her whole heirs *in mobilibus*.

"8. The first parties *maintain* that the fourth purpose in the said trust-disposition and settlement, namely, that disposing of residue, is valid and effectual.

"9. The second party maintains that the said writing attached to said deposit-receipt for £450 forms part of the testamentary disposition of Miss Cameron, and constitutes a valid bequest of the sum contained in said deposit-receipt to her to the extent of £150. . . .

"10. The third party maintains that the said writing attached to the said deposit-receipt for £300 forms part of the testamentary dispositions of Miss Cameron, and constitutes a valid bequest of the sum contained in the said receipt in his favour, either absolutely or conditionally on said sum being applied by him in the purchase of an annuity, or alternatively that it constitutes a valid direction to the first parties to purchase with the said sum of £300 an annuity for the third party. . . . He also maintains that the residue clause is void from uncertainty, and that the residue falls to the heirs *in mobilibus* of the testatrix.

"11. The fourth party maintains that the said writings attached to the said deposit-receipts do not constitute valid testamentary bequests of the sums contained in the said deposit-receipts, and that the said sums fall into and form part of the general residue. She also maintains that the fourth purpose of the said trust-disposition and settlement, namely that disposing of revenue, is void from uncertainty, and that the residue accordingly falls to be paid to herself and the third party in equal parts as heirs *in mobilibus* of the testatrix."

The *questions of law* were—"1. Does the holograph writing attached to the said deposit-receipt for £450 constitute a valid testamentary bequest of that sum to the second party to the extent of £150? 3. Does the holograph writing attached to the said deposit-receipt for £300 constitute a valid bequest of the sum contained therein in favour of the third party—(*a*) absolutely, or (*b*) under the condition that he shall expend the amount of said bequest in the purchase of an annuity for himself, or (*c*) under the condition that the first parties shall purchase said annuity for his behoof? 4. Does the fourth purpose of the said trust-disposition and settlement validly and effectually dispose of the residue of the trust estate? or is the said fourth purpose void from uncertainty?"

The third party argued—The holograph writing attached to the deposit-receipt for £300 was a valid testamentary bequest of the sum in the receipt. No special words of gift were necessary, nor need the words used form a complete sentence—*Colvin* v. *Hutchison*, May 20, 1885, 12 R. 947, *per* Lord President (Inglis) at p. 955, 22 S.L.R. 632, at p. 635. Testamentary intention was shown here by the words used, and by the circumstances in which the writing was found—*Mitchell's Trustees* v. *Pride*, 1912 S.C. 600, 49 S.L.R. 452. The deposit-receipt and the writing were attached, and found where testamentary writings would be kept. He was entitled to the fee—*Lawson's Trustees* v. *Lawson*,

July 17, 1890, 17 R. 1167, 27 S.L.R. 899. The fourth purpose of the settlement was void from uncertainty. If "charitable" qualified "institutions" only and not "persons" and "objects," then testamentary power was delegated to the trustees and the bequest was void. If "charitable" qualified all three words, "charitable persons" as the object of a bequest was unintelligible and the bequest was void—*M'Conochie's Trustees* v. *M'Conochie and Others*, 1909 S.C. 1046, 46 S.L.R. 707.

The second party argued—The holograph writing attached to the deposit-receipt for £450 was testamentary, and contained valid bequests of the sums mentioned. A verb of bequest was not needed—*Colvin* v. *Hutchison* (*cit.*). This writing contained the word "to," and was more clearly testamentary than the other. The receipt was later in date than the will, it was endorsed, the docquet was fastened to it, and the papers were found where testamentary writings would be. These circumstaces sufficiently disclosed testamentary intention. The intention was not necessarily gift *inter vivos* —*Mitchell's Trustees* v. *Pride* (*cit.*).

The first parties argued — The residue clause was not void from uncertainty. The testatrix intended to give her trustees a discretion to distribute among certain purposes, all charitable. "Charitable persons" meant persons in need of charity. A benignant construction of the clause must be taken—*Macduff* v. *Spence's Trustees*, 1909 S.C. 178, *per* Lord M'Laren at p. 184, 46 S.L.R. 135, at p. 139. By so doing a reasonable result could be arrived at, and the clause was therefore valid — *Weir and Others* v. *Murdoch's Trustees*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335.

The fourth party argued — The writings attached to the deposit-receipts were not testamentary. Testamentary intention must be clearly shown. In this case the intention to benefit the parties named was clear, but the circumstances pointed to an unfulfilled intention of gift *inter vivos* and not to bequest *a morte*. The endorsement of the receipts pointed to gift *inter vivos*, for which it would be essential. Endorsement was not necessary in donation *a morte*. The docquets were mere lists of figures and names—in one case with the word "to," in the other with a purpose. Such informal writings as the docquets had never been sustained as testamentary unless there was reference in the will to informal writings—*Lowson* v. *Ford and Others*, March 20, 1866, 4 Macph. 631, 1 S.L.R. 227; *Colvin* v. *Hutchison* (*cit.*), *per* Lord President on pages cited; *Waddell's Trustees* v. *Waddell and Others*, December 2, 1896, 24 R. 189, 34 S.L.R 142; M'Laren on Wills and Succession, p. 350. There was no such reference here. The residue clause was void from uncertainty, on which point the argument of the third party was adopted.

LORD PRESIDENT—Miss Mary Cameron died on 2nd August 1913 leaving a trust-disposition and settlement and relative codicil which purports to dispose of her whole means and estate. But there were found in her repositories after her death two deposit-receipts—the one for £450 and the other for £300—both dated 19th May 1913, both taken in the name of the testatrix, and both endorsed by her. Attached by a pin to the deposit-receipt for £450, when it was found in the repositories, was a slip of paper bearing the following words in the deceased's handwriting, namely, "£150 to Mrs Mackenzie, Dunkeld. £150 to Mrs H. Croll, Stocket. £150 to Mrs Thomson, Ancrum," and it was signed "Mary Cameron." The words "Mary Cameron" were the usual signature of the testatrix. Attached by a pin to the deposit-receipt for £300 was a slip of paper bearing the following words in the deceased's handwriting, namely, "John Cameron for annuity Mary Cameron." The words "Mary Cameron" were the usual signature of the testatrix. The question we are asked to decide is whether these two writings found pinned to two deposit-receipts form part of the testamentary dispositions of Miss Mary Cameron, and constitute valid bequests. I am of opinion that they do not. The two writings undoubtedly indicate an intention on the part of the testatrix to benefit the persons whose names are written upon them to the extent of the sums set opposite their names in the case of one of the receipts, and to the extent of the full sum in the deposit-receipt in the case of the £300 deposit-receipt. But how? Whether by gift *inter vivos* or by bequest I am unable to say. I may conjecture, but, as Lord Cowan observed in the case of *Bell's Trustees* v. *Ford*, 4 Macph. 631, 1 S.L.R., 227, "Conjecture will not make the writings testamentary if they are not so in themselves." And I am unable to find in either of these two writings words clearly indicative of testamentary intention.

It is, no doubt, true that it is unnecessary to find in the words of a gift a verb indicating the intention to transfer or bequeath or convey, and it is equally true that the words do not need to form part of a proposition or a completed sentence. I adopt without qualification the words of the Lord President in the case of *Colvin* v. *Hutchison*, 12 R. 947, 22 S.L.R. 632, when he says—"I do not think it matters how inelegant or how imperfect grammatically a testator's language may be, if it can fairly be construed to mean that he bequeaths certain sums of money to certain individuals, sufficiently designed in the writing itself." But we must find in the writing itself words indicative of an intention to bequeath. In the case before us the only word which is pointed to as indicative of a testamentary intention is the preposition "to" prefacing the names on the slip of paper. I am of opinion that the word "to" prefacing these names is not sufficient to indicate testamentary intention. It may indicate an intention to give *inter vivos* or to bequeath. And it is just as easy, I think, to infer from a schedule of names, with sums set opposite each name, testamentary intention as to infer testamentary intention from a similar schedule with the preposition "to" prefacing the names. There must be, I think, some-

thing more in order to indicate testamentary intention. What one may call the irreducible minimum necessary to be added to the preposition "to" will, I think, be found indicated in the opinion of the Lord President in the case to which I have just referred where he says—"I do not mean to say that a paper of this kind, consisting of a mere schedule, as the Lord Ordinary calls it, may not be effectual if you can extract from it a testamentary intention and act of the will. Supposing the paper had been headed 'This is the will of A—to B, £100; to C D, £200,' &c., &c., and that it had been regularly subscribed, I am not disposed to say that I should not have given effect to it if the persons to whom the legacies were left were sufficiently ascertained and identified." Similarly Lord Shand says—"Accordingly, if . . . . the writing had contained an explicit enumeration of legacies, if the names of the persons favoured with the sums bequeathed to each had been clearly designated, and the writing had then concluded with the words 'the will of' with the signature appended, my impression is that that would have been a good testamentary document though without any words of conveyance. If in addition the word 'to' had been prefixed to the names of the legatees, I cannot doubt that it would have been so."

Now I have no doubt myself that if either of these two learned Judges had thought that the addition of the preposition "to" to the names of the persons on the list had been sufficient to indicate testamentary intention they would have said so, but if they had said so then their opinions would have been contrary, as I think, to the decision of the Second Division in the case of *Lowson* v. *Ford*, for I remind your Lordships that in that case two of the writings which were held to be not testamentary did contain words added to the mere list of names with figures. In one instance the words were—"Margaret to get my clothes, a bed and . . . bedding"; and in the other instance—"The Walkers 100 to be divided amongst them." The addition of these words to the list of names and figures was held to be insufficient to indicate testamentary intention.

The conclusion which I reach, therefore, is that while we may conjecture, we are unable to affirm that these writings are testamentary.

The next question we have to consider is whether the residuary clause in the trust-disposition and settlement is void on the ground of uncertainty. It runs as follows —"With reference to the residue of my moveable means and estate, I leave the same to my trustees, with power to them to distribute the same amongst such charitable institutions, persons, or objects as they may think desirable."

I am of opinion that this residuary clause is not void from uncertainty. As I read the clause, the grammatical construction requires me to qualify the three words "institutions, persons, and objects" with the adverb and adjective "such charitable." And it is certain that if "such charitable institutions" had stood alone, or if "such charitable objects" had stood alone, or if both expressions had been used, either copulated by "and" or disjoined by "or," the bequest would have been valid. It is urged, however, that the interposition of the word "persons" renders the clause void on the ground of uncertainty. I cannot think so. Of course, according to the ordinary, usual, and natural meaning of the English language "charitable persons" indicates persons who are given to dispensing charity, and not persons in need of charity; but I have no doubt whatever that the testatrix intended, in the connection in which we find it, the adjective "charitable" to be interpreted as meaning, when prefacing the noun "persons" in need of charity.

I cannot conjecture any other meaning which the testatrix could have had. I see no other or alternative interpretation; and it is not without importance to observe that the adjective "charitable" as qualifying "objects" must be read in the same sense —"charitable objects" means objects in need of charity. The introduction of the word "persons" indeed appears to me to be superfluous. The object would have been sufficiently well achieved if it had been omitted altogether. But I have no doubt whatever—I do not feel that I am here in the region of conjecture—I have no doubt whatever that the testatrix meant by "charitable persons" persons in need of charity; and therefore, giving it that interpretation—which I concede is unusual, probably unprecedented—the residuary clause is effectual.

If these views are sound, then we ought to answer the first question in the negative; the second question is superseded; the third question will be answered in the negative; the first alternative of the fourth in the affirmative, and the second alternative in the negative.

LORD JOHNSTON—If the small jotting signed and pinned to the deposit-receipt for £450, with or without the indorsation of the deposit-receipt itself, is a valid testamentary disposal of the sum contained in the deposit-receipt, then the bequest must be taken subject to the universal liferent conferred by Miss Cameron's general settlement upon her brother, because to that extent the settlement is admittedly in implement of a contract. The question therefore regarding this deposit-receipt is one in which the parties interested are the second party claiming under the said jotting and the testator's trustees as representing the residuary estate. Her brother is not practically concerned in the matter of this deposit-receipt.

I think this question is a narrow one, for the natural inference is that Miss Cameron intended the second party and the two other ladies mentioned in the jottings, each to have £150 out of the deposit-receipt, and that would have exhausted its contents. But did she intend a *mortis causa* disposal of the sum contained in the deposit-receipt, or an *inter vivos* gift? For if the latter, it was uncompleted for want of delivery. The fact that the date of the

deposit-receipt was nine years later than that of the settlement may indicate that in the interim Miss Cameron had made certain savings which she thought herself at liberty to dispose of without trenching upon her obligation to her sister, does not assist us, because it would have been just as natural to dispose of such savings *inter vivos* as *mortis causa*. The only other fact relevant is that the jotting and the deposit-receipt to which it was pinned were found in her repositories, but are not said to have been put up with her settlement.

While therefore I do so with some hesitation, I concur with your Lordship that there is not enough to indicate a testamentary and not an *inter vivos* intention. Regarded with strict technicality, the fact that the deposit-receipt was indorsed supports the view of *inter vivos* intention, because indorsation was an appropriate step in *inter vivos* donation and not in testamentary bequest. But I do not like to rest upon this consideration in determining what is really a question of intention, because it is hardly to be supposed that the testator was aware of the technicality to which I advert. I base my judgment entirely upon this, that the testator has failed to indicate with sufficient clearness a testamentary intention.

If the jotting attached to the deposit-receipt for £450 was not a good testamentary document, the case of that attached to the deposit-receipt for £300, in which the testatrix's brother is the party interested, is weaker, and the same conclusion must be reached.

There remains the question whether the power conferred upon the trustees to dispose of residue is void from uncertainty. The question is one of impression, but personally I do not have any difficulty. The trustees are empowered to distribute the residue after the expiry of Miss Cameron's brother's liferent "amongst such charitable institutions, persons, or objects as they may think desirable, the time of distribution and the amount to be given to be entirely" in their discretion. I have no doubt that this is a power to distribute in charity to such institutions, to such persons, or to such objects as the trustees might select. I agree that the adjective "charitable" when applied to persons is not in its ordinary and natural meaning indicative of individuals who are suitable recipients of charity, and had "persons" alone been mentioned, and institutions and objects omitted, I could not have given to the words "to such charitable persons" this or, indeed, any other intelligible meaning. But I must read the words in the collocation in which they stand, and I must ask myself what was the intention of the testator, and I cannot for a moment conceive that she intended to empower her trustees to distribute her residue among such charitable institutions or among such persons or among such objects, the two latter without qualification, as they might select. Had she done so, I quite admit that the bequest would have been void. But regarding the terms of the power, as I feel sure that Miss Cameron's trustees as reasonably intelligent men would do, I cannot have any doubt that they would understand the words used to give them power to distribute her residue in charity, but at the same time to import that she thought that she was making her authority comprehensive as well as specific by enumerating the directions in which charity flows, viz., institutions, individuals, and objects. By so doing she has, like many another testator, given an opportunity for questions as to the effect of her words. But I think that it is a question which can be resolved easily and only in one way, viz., as your Lordship proposes.

LORD SKERRINGTON—I concur with your Lordships in thinking that the two holograph writings do not contain any language which entitles us to affirm that the testatrix intended to dispose testamentarily of the two deposit-receipts. Further, when we go outside the writings themselves and look at the circumstances in which they were found I do not think that the case is in any way helped but rather the other way, because the attachment of these writings to the endorsed deposit-receipts rather indicates to my mind that the lady's intention was an inchoate intention to make the donation *inter vivos* in favour of the persons whose names are mentioned in the writings. In this connection I think it proper to draw the attention of the parties who framed this Special Case to an irregularity which occurs only too frequently, and it is this—Presumably the parties attached importance to the fact that the deposit-receipts were attached to the holograph writings by means of a pin, but we are not told that it was the lady herself who pinned the deposit-receipts to the two documents. It may be said that that is a very simple inference of fact, but the Court in special cases is not entitled to draw inferences of fact, and I decline to assume unless the parties so inform me that it was Miss Cameron who pinned the documents together. I refer to the case of *Lowson* v. *Ford*, 4 Macph. 631, 1 S.L.R. 227, and Lord Kinnear's observations in *Blyth's Trustees*, 7 F. 799, at p. 808, 42 S.L.R. 676, at p. 681, as illustrating the rule that the Court is not entitled to draw inferences in fact, and that it is the duty of the parties to supply the Court with all the facts relevant in the case.

Upon the question of the testamentary or non-testamentary character of these two holograph writings I may refer by way of contrast to a case which is in many respects similar to the present one, but which was not quoted at the debate. I refer to the case of *Panton* v. *Gillies*, (1824) 2 S. 632. The writing in that case was a holograph writing signed by the testator, and it began as follows:—"The bill within this paper you will give Miss Panton, £100," and then follow various names of persons with sums of money which amounted exactly to the sum of £208, which was the amount of the deposit-receipt which was pinned to the holograph writing. The Court held that there was there a good bequest of the contents of

the deposit-receipt in favour of the various persons whose names were mentioned in the holograph writing. But there, it will be noticed, that one had the language "you will give," and if the Court interpreted these words as a direction to the testamentary executors, which probably was the only reasonable interpretation which could be placed upon them, then there was a clear intimation of a testamentary intention. Now that is entirely absent in the present case. And then the other important feature is that the testatrix identifies the subject-matter of the bequest by saying "the bill within this paper," and the Court held that she meant by these words the deposit-receipt pinned to the paper. Here again there is a marked distinction, because there is nothing in the holograph writings here to identify the subject-matter of the supposed bequest.

With regard to the fourth question, I am bound to say that I feel a very great difficulty. I have great difficulty in attributing to the testatrix the use of an expression which seems to me to be not merely unprecedented but nonsensical in its collocation, namely, "charitable persons." As, however, your Lordships feel no difficulty as to what the lady really meant, I do not feel it necessary to dissent.

LORD MACKENZIE was not present.

The Court answered the first and third questions of law in the negative, and the first alternative of the fourth question in the affirmative.

Counsel for the First and Second Parties—A. M. Mackay. Agents—R. C. Gray & Paton, S.S.C.

Counsel for the Third Party—Mitchell. Agents—Douglas & Miller, W.S.

Counsel for the Fourth Party—Carmont. Agents—W. & T. P. Manuel, W.S.

Tuesday, January 19.

EXTRA DIVISION.

[Lord Hunter, Ordinary.

BURRELL *v.* BURRELL'S TRUSTEES.

Trust—Husband and Wife—Purchase of Shares Belonging to the Trust by Wife of Trustee.

There is no absolute rule of law that the purchase of trust estate from the trustees by the wife of one of them is illegal.

Henry Burrell, shipowner, residing at 4 Devonshire Gardens, Kelvinside, Glasgow, *pursuer*, brought two actions against George Burrell and William Burrell, shipowners, 54 George Square, Glasgow, and another, trustees of the deceased Mrs Isabella Guthrie or Burrell acting under her trust-disposition and settlement dated 10th December 1901, with codicils, *defenders*. In the one action George Burrell and his wife Mrs Anne Jane M'Caig or Burrell, as also certain steamship companies, were also called as defenders, and in the other, William Burrell and his wife Mrs Constance Mitchell or Burrell and the said steamship companies. The pursuer sought reduction of certain offers to purchase certain shares in the steamship companies which formed part of the trust estate, acceptances of the offers in the one action by Mrs George Burrell and in the other by Mrs William Burrell, transfers of the shares, and the share certificates.

The pursuer pleaded, *inter alia*—"*Separatim*—Said shares having been transferred by the trustees to the said Mrs Burrell, who acted with the consent and concurrence and under the advice of the said George Burrell, [William Burrell] the pursuer is entitled to decree of reduction as concluded for."

The defenders pleaded, *inter alia*—"(4) The shares in question having been validly sold and transferred to the defender Mrs Anne Jane M'Caig or Burrell [Mrs Constance Mitchell or Burrell], the defenders should be assoilzied from the conclusions of the summons."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 11th March 1914 pronounced an interlocutor by which he repelled the pleas-in-law for the pursuer and assoilzied the defenders in both actions.

Opinion.—". . . It is now maintained for the pursuer that the purchases fall to be set aside upon the ground that they were made by the wives of two of the selling trustees. There is no doubt that it is an absolute rule of law that a trustee upon a trust estate is not entitled to purchase the trust estate, and if properly challenged a purchase of that sort would be set aside without any inquiry into the question of whether full or more than full or adequate value has been given.

"The ground for this rule of law is very obvious. It is simply this, that a person is not entitled to occupy a conflicting position—that is to say, a position where his interest is in conflict with his duty. If a trustee sell to himself it is manifest that while his duty as a trustee is to get the largest price he possibly can, his interest as an individual is to purchase at the lowest price. That rule applies, I think, where the trustee purchasing is only one of several selling trustees, and it also applies where the purchasing trustee is only a member of a firm, there being several other members of the purchasing firm. But it has never been held, so far as I know, in any decision either in Scotland or in England, that this absolute rule applies where the real purchaser is not a trustee but a trustee's wife.

"The only case that the pursuer's counsel referred to was a case decided by an American Judge—I believe of very great distinction—Chancellor Kent. I was referred to the opinion of that Judge, which is found in the first edition of Mr Menzies' work on Trust Law, vol. i, appendix. That decision is, of course, not authoritative and not in any way binding, but the opinion is naturally entitled to very great respect. I think, however, that the circumstances