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

of that case, so far as disclosed, are entirely different from the circumstances of this case, because it appears that the Judge bases his judgment upon the ground that the husband was selling and purchasing —selling as a trustee and purchasing on behalf of his wife.

"In the present case the circumstances are, I think, totally different. It is proved that the trustees upon the late Mrs Burrell's estate advertised the shares belonging to the estate for sale. That was a proper course, because there was no Stock Exchange market for the shares, as the companies were of a private proprietary character. After advertisement a certain number of offers were procured by the trustees. Meantime it appears that Mrs George Burrell, who gave evidence in this case, and who is a lady of substantial independent means and interested in shipping shares, observed that there was to be a sale of these shipping shares on her mother-in-law's estate. She already had shares in these companies, which were managed by her brother and her brother-in-law. She consequently desired to purchase some of the shares. She spoke to her husband about the matter, but I am satisfied upon the evidence that it was not in any way in respect of the husband's initiative that she proposed to make the purchase. I am also satisfied that she did not make the purchase in consequence of any advice given to her by her husband, or because she was prompted or instigated in any way to make the purchase by him. All that the husband said was this—I think it was quite a proper thing for him to say—that if she wished to make a purchase of shares—he did not dissuade her from doing so—she would require to purchase at the highest price that any person was offering for the shares.

"The position of Mrs William Burrell, as explained by Mr William Burrell in the witness-box, was practically similar.

"What happened was this—The highest offer for the shares was made by Lord Rowallan, who offered £90 per share. The shares that had to be sold were ten shares in ten different companies, and Lord Rowallan offered the sum of £90 for five of the shares in each of the companies. A number of other people and companies offered to purchase shares, but at considerably lower figures than £90. The resolution come to by the Messrs Burrell, acting as they did not only as trustees upon the trust estate but as managers of the shipping companies, was to give Lord Rowallan two sets of shares, and to offer the other shares to the other shareholders of the company at the same price as Lord Rowallan was giving. Consequently Mrs George and Mrs William Burrell each got an offer of a set of shares at £90. That was exactly the position in which every other shareholder was put.

"It turned out afterwards that two of the shareholders to whom the shares were offered did not desire to make the purchase, and these sets of shares were then taken over by the two ladies. I think there is a sufficiently good explanation of why that was done without in any way suggesting that Lord Rowallan suffered in consequence of what was done. Besides, there is no one here representing him, and it would certainly not in any way have benefited the pursuer that the shares had been sold to Lord Rowallan at the same price as they were sold to the two ladies. One of the shareholders who had refused to take the set of shares offered to him was a brother of Mrs William Burrell, and the ground on which he refused to take the shares was that he considered the price at which they were offered excessive.

"The circumstances of this case appear to me to take the case entirely outwith any fair application of the rule of law whereby a transaction is set aside upon the ground that the person purchasing has acted contrary to a fiduciary duty. That being so it is sufficient for the decision of the case. . . ."

The pursuer reclaimed in both actions, and argued—A trustee could not purchase trust estate either on his own account or as agent for another, and if he did adequacy of the price was no defence to an action for reduction of the sale. A trustee's primary duty was to the trust, and he must not place himself in such a position that his personal interest conflicted with his duty as a trustee. Actual conflict was not required; possibility of conflict was enough—*Aberdeen Railway Company* v. *Blaikie Brothers*, July 20, 1854, 1 Macq. 461, Lord Cranworth's opinion at p. 471, 17 D. (H.L.) 20, 26 Sc. Ju. 622. The relationship of husband and wife necessarily implied a perpetual possibility of conflict, for the husband was the wife's curator, and it was for the defenders to rebut the presumption that in any transaction the husband was exercising his *jus administrationis*—*Pepperell* v. *Chamberlain*, February 20, 1879, 27 Weekly Rep. 410, Fry, J., at p. 411; Lewin, Trusts (12th ed.), p. 575, sec. 15; *Davoue* v. *Fanning*, December 3, 1816, 2 Johnston's Ch. Rep. 252. In any event transactions between trustees and their relatives relating to trust estate were always to be regarded with strong suspicion, and it was for the defender to prove the fairness of the transaction if it was challenged. That had not been done here. *Ferraby* v. *Hobson*, June 2, 1847, 2 Phillips 255; *Templeton* v. *Burgh of Ayr*, 1912, 1 S.L.T. 421; *Bennett*, February 4, 1805, 10 Ves. 380; *Nicol* v. *Magistrates of Aberdeen*, December 20, 1870, 9 Macph. 306, 8 S.L.R. 231, were also referred to.

Argued for the respondents (defenders)—It was an absolute rule that a trustee could not enter into transactions with the trust either for himself or as agent for another, but the rule was strictly limited to these two cases and was not to be extended to others—*Templeton* v. *Burgh of Ayr* (*cit. sup.*). In all the cases cited for the reclaimer the trustee was acting either for himself or as agent for another—*Aberdeen Railway Company* v. *Blaikie Brothers* (*cit. sup.*); *Hickley* v. *Hickley*, March 14, 1876, 2 Ch. D. 190; Lewin (*op. cit.*), pp. 568. *Pepperell's* case (*cit.*) depended on the English law at the time, by which the husband of a woman who was a trustee was himself con-

sidered to be a trustee. *Davoue's* case (*cit.* was no authority for the proposition that a sale to a wife of trust estate belonging to a trust in which her husband was a trustee was *ipso facto* void. The husband's rights as curator were excluded in the share transfers, and as he might discharge these antenuptially or postnuptially he was not bound, and was not to be presumed to have exercised these rights in all cases—*Laing* v. *Provincial Homes Investment Company*, 1909 S.C. 812, 46 S.L.R. 616 (*vide* opinion of Lord Kinnear). Even if the exercise of such curatorial powers were enough to vitiate the transaction, such exercise had not been proved here, and in the circumstances the *onus* of proof was on the reclaimer. If this case was not within the absolute rule, the only question was the adequacy of the price, and there was no evidence of inadequacy of price here.

LORD DUNDAS—We have here reclaiming notes by the same pursuer in two actions which were heard and disposed of together in the Outer House. The reclaiming notes have similarly been heard together at our bar and will be disposed of together now. In each case the pursuer seeks to set aside the purchase of certain ship shares forming part of the trust estate of his deceased mother, the purchase in each instance having been made from the trustees by the wife of one of the trustees. [*His Lordship questioned if the evidence which had been taken in the Outer House fell within the allowance of proof, but in the circumstances came to the conclusion that the Court might take it into consideration*]—I shall state in brief words what I consider to be the gist of the evidence. I think it is clear enough upon the proof in each case that there was no bargaining of any sort between the wife and the trustees; that the wife made her purchase on her own initiative, and neither at the instigation nor under the advice of her husband; that both ladies were capable business women accustomed to manage their own ample means; that payment was made in each case out of the wife's separate estate, and that the price was an adequate and even a full one. It further appears that the transfers bore *ex facie* the exclusion of the husband's *jus mariti* and right of administration. I do not say that the production of the transfers in itself must be conclusive proof of that as a fact, but in the absence of counter evidence of any sort I do not see how the pursuer can maintain that the contrary is the fact. If these be the facts of the case I cannot see how the pursuer can succeed unless we are to lay down as an absolute principle or rule of law that the purchase of trust estate from trustees by the wife of one of the trustees is illegal. No authority for such a proposition has been cited and I know of none, and I am not prepared to lay down any such broad proposition. The circumstances of the present case are all adverse to the pursuer's contention. [*His Lordship then referred to a question of title to sue with which this report is not concerned.*]

LORD MACKENZIE—I am of the same opinion. The pursuer challenges the sale of trust property to the wives of two of the trustees simply and solely on account of the relationship of husband and wife. He was unable to produce any authority to warrant that as an absolute proposition in law. When one considers the facts one finds that each of these ladies was in the enjoyment of a considerable independent estate. They both appear to have been well qualified to form an independent judgment in regard to the investment of their separate means; it is conclusively established in regard to the shares in question that they did so. They had already invested portions of their fortunes in the purchase of shares in shipping concerns, and apparently followed the course of such investments with judgment. The price was fixed not by the trustees but by an outside bidder—a person quite unconnected with the trust—who offered to pay the sum of £90. The wives obtained a portion of the shares at that price, and the money was paid out of their own funds.

The proof is throughout quite bare of any evidence that the husbands intervened in the way of counselling either of the wives as regards the investment being a good one or not. The transfers that were executed bore that they were exclusive of the *jus mariti* and right of administration. In that state of the facts, unless it is to be laid down as a rule of law that a wife cannot under any circumstances buy trust property which is being sold by a trust upon which her husband is a trustee, I am unable to see how the pursuer can succeed.

The two cases that were founded on were the cases of *Pepperell* v. *Chamberlain*, (1879) 27 W.R. 410, and *Davoue*, (1816) 2 Johnston's Chancery Reports, 252. It is plain from the explanation given both in Lewin on Trusts and Williams on Executors that the decision in the case of *Pepperell* depended upon the state of the English law as it stood prior to the Married Women's Property Act 1882, under which law the husband of an executrix was himself in a fiduciary capacity; and this was the reason of the judgment of Mr Justice Fry in that case. The judgment in the American case of *Davoue* in Johnston's Reports, especially at pages 256 and 257, contains a very clear exposition of the general rules, and lays down the propositions which Mr Constable enunciated in his speech. One was that a purchase by a trustee as an individual is bad, and that there is no necessity for any proof of prejudice. Mr Constable admitted that he could not bring the present case under that category. It also lays down that a purchase by a trustee as an agent for a third party cannot stand. Again Mr Constable admitted that the facts would not enable him to maintain that the case fell under that category. The category under which it apparently falls is the category which is referred to by Lord Justice Cottenham in *Ferraby* v. *Hobson*, (1847) 2 Phillips, 255, at p. 261, in terms to which every Court must subscribe—"Trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that

circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove." Therefore I venture to remark that in all cases of this class the Court will seek to be certain, by vigilant security, of the true nature of such a transaction, because one can readily see that the close relationship between husband and wife may, unless explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case, and that not without benefit to himself. Subjecting everything that was done in this case to that scrutiny I am unable to imagine any case which could well be stronger for sustaining the transaction which the pursuer seeks to challenge.

LORD CULLEN—I concur.

The Court adhered.

Counsel for the Reclaimer—Constable, K.C.—C. M. Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—A. O. M. Mackenzie, K.C.—D. P. Fleming. Agents—Webster, Will, & Co., W.S.

Thursday, January 28.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

BANNERMAN'S TRUSTEES *v.* BRODIE AND OTHERS.

Succession—Trust—Faculties and Powers—Validity—Uncertainty—Direction to Liferenter to Dispose of Fee by Mortis causa Deed.

A testator by trust-disposition and settlement gave to the survivor of his children the liferent of a portion of his estate, with power to dispose of half of the same by *mortis causa* deed "in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles, or of any person or persons whom such survivor may appoint, or partly in favour of such institution or institutions and partly in favour of such person or persons." The liferenter by deed of directions bequeathed one-half of the fee absolutely to his wife. *Held* (*diss.* Lord Johnston) that the direction of the testator was not void from uncertainty, and had been validly carried out by the liferenter; *per* the Lord President on the ground that the objects to be benefited had been sufficiently specified; *per* Lord Skerrington on the ground that the liferenter having both a fiduciary and a proprietary power of disposal had validly exercised the latter.

Observations per Lord Skerrington on the relation of fiduciary and proprietary powers of disposal.

Expenses—Multiplepoinding—Action not Timeously Raised—Attempt to Upset Trust Administration—Liability of Unsuccessful Claimants.

A trust-disposition which came into effect in 1879 conferred upon a liferenter a power of disposal *mortis causa* of the liferented fund. He exercised the power by a deed of directions, and died in 1903. In February 1913 a multiplepoinding was raised by a beneficiary of the trust who had been paid his interest, the trustees being nominal raisers, questioning the validity of the power. He was successful in maintaining the competency of the action, but unsuccessful in his claim. The Lord Ordinary found the real raiser entitled out of the fund *in medio* to the expense of raising the action and bringing it into Court, those challenging the competency, including the nominal raisers, liable jointly and severally for the expense thereby caused, and the unsuccessful claimants liable jointly and severally for the expense of the competition. The Court, in refusing a reclaiming note, on the ground that the action had not been raised at the beginning of the trust with the view of helping the trust administration, but was directed against the trust administration, *adhered* and found the real raiser liable in the further expenses of the cause.

On February 14, 1913, Mrs Mary Woods or Bannerman, 1 Crown Circus, Glasgow, widow of the late Robert Bannerman, 16 Blythswood Square, Glasgow, and others, the testamentary trustees of the late Walter Bannerman, 13 Jane Street, Blythswood Square, Glasgow, *pursuers and nominal raisers and respondents*, brought an action of multiplepoinding in the Court of Session against Mrs Jessie Bannerman or Brodie, wife of and residing with William Brodie, 23a Old Ballygunge, Calcutta, India, and the said William Brodie as her curator and administrator-in-law; Mrs Isobel M'Alpine Davidson or Bannerman, 41 Keir Street, Pollokshields, Glasgow, the executrix of the late Walter Bannerman *tertius*, sometime residing at Pollock House, Kemishead, near Glasgow; Stanley Cyril Forster Bannerman, 1 Crown Circus, Glasgow; Mrs Mary Ramsay or Bannerman, widow, 25 Montgomerie Drive, Kelvinside, Glasgow; and Robert Bannerman junior, 26 Port Street, Stirling, *defenders*, the said Robert Bannerman junior being also *real raiser and reclaimer*. The questions upon which the case is reported are whether a bequest of a power in Walter Bannerman's trust-disposition and settlement was valid, and incidentally the question of expenses.

The *facts* in the case appear from the opinion (*infra*) of the Lord Ordinary (ORMIDALE), who, on 20th January 1914, pronounced the following interlocutor:—". . . Ranks and prefers the claimants (*a*) Mrs Mary Woods or Bannerman and others (Walter Bannerman's trustees), and (*b*) Mrs Jessie Bannerman or Brodie, in terms of their claim: Ranks and prefers the claimant Mrs Mary Ramsay or Bannerman in terms of her claim: Repels the claim