and if a removal on the footing of a removal. He was not bound to enter into speculative matters. For example, if he entered into the question of what would have been the result if instead of selling their stock, &c., the tenants had removed to an adjoining farm, he would be entering into the region of speculation. However, it is not necessary to express a concluded opinion upon these points, because in order to decide the present question it is enough to say that there is no material upon which we can hold that the arbiter has acted *ultra vires*. Therefore on the whole matter I am of opinion that we should adhere to the decision of the Sheriff-Substitute.

LORD DUNDAS and LORD GUTHRIE concurred.

The LORD JUSTICE-CLERK and LORD SALVESEN were absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Constable, K.C. — Keith. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Johnston, K.C.—C. H. Brown. Agents—E. A. & F. Hunter & Company, W.S.

HOUSE OF LORDS.

Tuesday, July 14.

(Before Earl Loreburn, Lords Dunedin, Atkinson, Shaw, and Parmoor.)

NASMYTH'S TRUSTEES *v.* NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, AND OTHERS.

(In the Court of Session, December 17, 1912, 50 S.L.R. 271, and 1913 S.C. 412.)

Succession — Testament — Proof — Designation of Beneficiary—Extrinsic Evidence.

A Scotsman, resident in Scotland, by a Scots testament left a number of legacies to Scotch charities. He also left a legacy to "The National Society for the Prevention of Cruelty to Children." This legacy was claimed by a society having its headquarters in London. It was also claimed by a Scotch society whose correct designation was "The Scottish National Society for the Prevention of Cruelty to Children," on averment that it was the society the testator meant. This it endeavoured to establish by inference from the testator's domicile, his other bequests, his knowledge of the society.

Held (*rev.* judgment of the Second Division) that in the absence of clear proof of a contrary intention the accurate designation of the London society must be given effect to, and that society *preferred*.

This case is reported *ante ut supra*.

Following upon the interlocutor of 17th December 1912, under interlocutor of 20th March 1913, a proof was taken before Lord Salvesen, the import of which appears in the opinions of their Lordships of the Second Division, who on 5th July 1913 pronounced an interlocutor preferring the Scottish National Society for the Prevention of Cruelty to Children to the fund *in medio*, with expenses.

LORD JUSTICE-CLERK — There can be no doubt that this is not a very easy question in some respects, and it is the more difficult because the circumstances of the case are highly complicated—indeed, so complicated that I doubt if any gentleman, even if he got a book and made excerpts of everything about the Society, would thoroughly understand it.

The effect of what is proposed on the part of the Society of London is that a desire for the protection of children uttered by a Scotsman, and a bequest given by a Scotsman to aid that desire, is to be of no benefit whatever to any Scottish child, or to any society that protects children in Scotland, but that the money is to be carried off to London and none of it is to be applied for any Scottish purpose whatever. Now that is rather a strong thing to ask for, but of course one always says if it is the law it must be carried out.

This Society carries on work in London, and is no doubt under its charter a National Society for the Protection of Children. But it is a National Society which recognises that it has nothing to do with Scotland. It has no duties in Scotland; it says it has none, and it does not fulfil any. But the peculiarity of this case is that in the two societies which had been formed there was a movement for affiliation; and the Scottish Society was most willing to affiliate with the English Society upon one condition, very expressly indicated, that if any Scottish testator left money to the Society it was to belong to the Scottish branch. When things were in that position this gentleman left a sum of £500 to the National Society for the Prevention of Cruelty to Children, and that sum necessarily, if he had died before 1907, must have come to Scotland. About that there cannot be a shadow of doubt. By the arrangement and the condition which the English Society agreed to that money would have come to Scotland.

Then it turned out that there was some legal difficulty about this affiliation. Apparently counsel both in England and in Scotland advised that they had no right to make it, and it was abrogated; but in no way did that alter the work that was carried on, because the work was carried on in England by the English people and in Scotland by the Scottish people. But there was nothing to indicate to the testator that any change had taken place at all. This affiliation subsisted until 1907. Now at the time that the testator made his will, could it be suggested for a moment that he did not intend the money to go to Scotland? If

that was his intention, is it to be altered by the fact that these two societies separated once more and became no longer one parent stem of two branches, each branch becoming once more a separate plant? I am unable to see it. It is no doubt perfectly true that if you take the word "national" in only one sense it applies to England in this particular case. But that is a mere question of name, and has nothing to do with real nationality at all, because in this country there is a nationality as regards the State, which nationality is neither English nor Scottish nor Irish, but is the nationality of the United Kingdom. Nevertheless there is a nationality of the individual countries, and nowhere is that more clearly shown than in this country. We have never been absorbed in another country, but we are united to another country for practical purposes, and we retain our own laws. Therefore questions about nationality cannot be interpreted in every case in the same way.

I am not sure that even if it had been brought home to the knowledge of this gentleman that the affiliation had been broken up there might not have been considerable ground for saying still that upon the face of his proceedings he did intend to benefit Scotland and not to benefit England. That this bequest is mixed up with a number of other bequests is significant. He gave instructions to his solicitor to draw up his will in a particular form, and he gave instructions and notes. In note 22 we have a string of bequests, and each of these is a bequest for the purpose of helping some institution in Scotland except this one, if the contention of Mr Constable is sound. Practically in the middle of the list you have—the National Society for the Prevention of Cruelty to Children £500.

If there is room for interpretation at all in such a case, I should say that if there is a National Scottish Society for the purpose of preventing cruelty to children it would be reasonable to read his bequest as meaning that it is that Society he desires to favour. But I do not think there is any necessity to go upon that in the special circumstances of this case, where most undoubtedly at the time he gave these instructions the instructions meant that the £500 was to go to Scotland and not to England. That being so, I think it is vain to say that he must have seen—because he was a Scotsman—that some alteration had taken place as regards affiliation and that that made a difference. There is no evidence that he had seen it; and there is no evidence either of any desire on his part whatever to benefit the Society in England, whereas he did indicate an interest in the prevention of cruelty to children in his neighbourhood, and knew that there was a society and that it had officials for the purpose of carrying out the work of the society.

On the whole matter, and really without difficulty, I come to the conclusion that the judgment the Lord Ordinary pronounced has not been impinged upon by the proof which has been led, but rather supported, and that we ought to adhere to his interlocutor.

LORD SALVESEN—I also agree that the judgment of the Lord Ordinary ought to be affirmed. I think, however, that we have got the grounds of judgment more clearly now that the facts have been inquired into. To use the language which is quoted by the Lord Ordinary from the opinion of Lord Chancellor Cairns in the case of *Charter*, the facts which were known to the testator at the time that he made his will ought to be known to the Court, so that the Court may place itself in the testator's position in order to ascertain the bearing and application of the language which he uses.

Now the facts as so ascertained are that this gentleman was a Scotsman whose whole interests were in Scotland, who very rarely visited England at all, who knew of the existence of the Scottish Society for the Prevention of Cruelty to Children in Scotland, and who was not known to have had any knowledge whatever of the English Society. The objects of his beneficence otherwise are purely Scottish. These being the ascertained facts of the case I think there can be no moral doubt that when the testator used the designation the National Society for the Prevention of Cruelty to Children he intended to benefit the Scottish Society. I agree with what your Lordship in the chair has said, that the word "national" may be used in two senses. A Scotsman generally speaks of institutions the full name of which may be "Scottish National" or the "National of Scotland" by using the description "national." He feels no occasion when he is speaking in Scotland to differentiate the institutions of this country from institutions similarly named in England. He speaks of a Scottish thing in Scotland, and he speaks of it as a Scotsman generally does.

This is not a case of a designation which does not fit a Scottish society such as the testator intended to benefit. No doubt it is true that the designation is the complete designation of the London Society, and is not the complete designation of the Scottish Society, because the London Society having come into existence first it was necessary to differentiate between the two by indicating that the sphere of operations of the Scottish Society was confined to Scotland. At the same time one cannot resist the view that the testator's intention was to benefit the Scottish Society, of which he knew, and not to benefit a society with which he had never come in contact, and of which, so far as the evidence goes, he had no knowledge whatever.

It is an additional speciality of this case, to which your Lordship has referred, that at the time the will was drawn the funds bequeathed by Scottish testators to the National Society for the Prevention of Cruelty to Children would under a domestic arrangement between the Scottish branch and the general Society have gone to Scotland. But apart from that altogether, I think here there is sufficient ambiguity in

the designation which the testator used to admit of proof of his intention as that intention can be gathered from the language he used in relation to the surrounding circumstances and the state of the testator's knowledge.

On these grounds, which are substantially those on which the Lord Ordinary has proceeded, I am of opinion that his interlocutor should be affirmed.

LORD GUTHRIE—I am of the same opinion. The Lord Ordinary had assumed certain facts which it was thought desirable should be investigated. I think the result of the proof is to show that the Lord Ordinary was right in the view he took of the facts, as well as in the result which he reached in reference to the will itself. With reference to the will, which was the second will, the testator was Scottish with none but Scottish interests, the trustees were Scottish, and with the possible exception of the legacy in question all the other legacies are to Scottish beneficiaries, the one in question being embedded between a legacy to the Edinburgh Deaf and Dumb Benevolent Society and a legacy to the Edinburgh Hospital for Incurables, the Longmore Hospital.

It is certainly not impossible, even in such circumstances, that the testator might have desired to benefit the English Society, which no doubt is in itself an excellent Society, and is dealing incidentally with Scottish children in England. But certainly, although not impossible, it would not be probable that being interested as he evidently was in children, his own bequest would have been to a society which is purely an English Society, having only incidental and remote interest, the one I have mentioned, in Scottish children.

Mr Constable argued that there was no room here for evidence at all, because the description of the Society which he represents is exactly given by the testator, and that is a description which does not fit any other society; and he maintained that if his clients were in that position the Court was bound to give effect to his claim without any other consideration. It is not necessary to consider what the result might be in a case where you had a description which did not contain any word that was possibly ambiguous, such as some of the illustrations which were given to us in the course of the argument. Here you certainly have the adjective "national," a word which seems to me to introduce such ambiguity as makes it possible for evidence to be competently submitted to the Court.

If evidence is to be considered, then it appears that the parties are agreed as to the origin of this bequest. It goes back to the year 1904, at which time a legacy, in the terms here contained, would have gone to the Scottish Society, and would have been spent for the benefit of children in Scotland. Moreover, these notes, which are under that date, were the foundation of the will of 1906, the first will he made. At that time the same result would have followed, because it was not until 1907 that the alteration was made under which we are now considering the present question.

The will of 1911, that we are now considering, is, however, admitted to be, in the words of Mr Constable's clients, "a verbatim copy of an earlier will made by him in 1906." That seems to me, as your Lordship in the chair has said, to be a special element, which would be sufficient for the decision of this case; but if one looks at evidence contained in the proof and other matters, it appears that he, so far as we know, never heard of the English Society. He was not a member of the Scottish Society and did not contribute to it, but he certainly knew about it and had an interest in it, that interest being in regard to a particular case connected with his own estate, which got the benefit of the Society's operations.

On the whole matter I think there can be no moral doubt whatever of the man's intention; and I think there are ample legal grounds for supporting the judgment of the Lord Ordinary.

The claimants, the National Society for the Prevention of Cruelty to Children (the London Society), appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—I greatly regret, and I am sure everyone will greatly regret, that there should have been this unfortunate litigation between two most excellent societies, both of whom must command our entire sympathy; but if there is any recompense to those who have heard the argument we must find it in the excellence of the arguments which have been addressed to us on both sides.

In this case a Scotchman living in Scotland left by a Scotch will £500 to the "National Society for the Prevention of Cruelty to Children," using that name to describe the legatees. That is a Society with its headquarters in London, which does not appear actively to operate in Scotland. Now there is a Scottish National Society for the Prevention of Cruelty to Children also in existence, and it claims that under the circumstances it is entitled to this bequest. The Courts in Scotland have said, we will examine—and they did examine—the circumstances of the testator, and the evidence in regard to his presumed intention; and they came to the conclusion that the testator did really intend to benefit, not the Society which he had by name designated but the Scottish National Society for the Prevention of Cruelty to Children.

I regret, as I always must do in differing from the Court of Session, that I am unable to come to that conclusion. When Mr Younger opened his argument he laid down as a general proposition that when once a legatee is accurately named in a will then the rigid rule descends which forbids under any circumstances any further inquiry or consideration in regard to the person who is to take the benefit.

I am not prepared to affirm so wide a statement. I do not enter upon it now; if I did so the discussion would be academic,

and it is not necessary for the decision of this case. I will only take leave to observe that an extreme danger is apt to lurk in general rules like that. Some unforeseen circumstances may arise. No one—not even a judge—can prophesy all the events of the future, and the Court may find itself confronted by a rule which, applied in unexpected conditions, might lead to something quite shocking to its sense of justice. After that had happened a series of refinements upon that rule might find their way into the Law Reports until in the end the courts would rebel against the further period of subtlety. Quite recently a venerable rule of equity — or supposed rule of equity — which had been long undermined was finally and of necessity exploded by a decision of this House.

I think that the true ground upon which to base a decision in this case is this, that the accurate use of a name in a will creates a strong presumption against anyone claiming who is not the possessor of the name mentioned in the will. It is a very strong presumption, and one which cannot be overcome except in quite exceptional circumstances. I use as a convenient method of expressing one's thought the term "presumption." What I mean is that what a man has said ought to be acted upon unless it is clearly proved that he meant something different from what he said. Mr Shaw—in an argument from which I derived profit as well as pleasure—said that you have first to establish an ambiguity and that then the scales would be even; the statement in itself, if you do establish an ambiguity, is a very accurate statement. In that way he proposed to displace presumption.

I do not think that in this case any ambiguity has been established. The position is that a name apt to describe a certain society has been used, and it is necessary for those who question the right of that society to displace the inference which arises from that designation. Counsel for the respondents sought to do so by saying that the name of the society is not necessarily to be treated in the same way as that of an individual, and the presumption is not so strong that the society was intended, as in the case of an individual. It is a circumstance perhaps to be considered, but I confess I do not see that there is much difference between the two.

It was then urged that in the mouth of a Scotsman the use of the term "National Society" would of itself mean the Scottish Society; but it must be remembered that the testator here used this term not as expressive of his own thoughts but as part of a title or name which had been adopted by people living outside Scotland. It was then urged that the other charitable bequests in the will were given to Scottish charities. I do not see what conclusion is to be derived from that; perhaps that was a reason for thinking that in this part of the will England also should participate. It was said that being a Scotsman he probably meant to benefit Scotsmen. I should think that very likely; but I do not know why he would not also wish to benefit others of his countrymen living in the southern part of the Island. We were told that all his interests and his residence were to be found in Scotland, and that he actually knew of a case and had had brought to his notice a case in which the Scottish National Society had intervened.

I think that concludes the evidence by which it is sought to strike out from a will the name of the society designated in that will to receive the bounty of the testator and to substitute the name of another society, of which there is actually no proof that the testator ever heard. With the utmost respect to their Lordships of the Court of Session I am quite unable to accept that view and I think this appeal ought to be allowed.

LORD DUNEDIN—I candidly regret that I do not see my way to differ from the opinion that has just been expressed, because I cannot help having the moral feeling that this money is probably going to the society to which, if we could have asked him, the testator would not have sent it. But that is not the question for a court of law; the question for a court of law is, taking his will, who is the beneficiary—whom did he mean by the words he used? On the one hand we have a perfectly full and perfectly accurate description of an existing society, the existence of which the testator may quite well have known, although upon that matter our minds must necessarily be a blank. On the other hand we have a description which if taken as the description of another society is not fully accurate.

Now I think that the argument, as is really almost now conceded, of the appellants' learned counsel in this matter went too far. He would have it that so long as you had an accurate description of one person, and that accurate description did not exactly fit in its terms another person, no ambiguity could arise. I do not think that is the law. I think that the test whether an ambiguity does arise would be quite fairly put in what I ventured to put at a very early stage of the argument, namely, would the description, standing as it does, supposing there had been no competitor who had the exact name, have fitted the second competitor? If that is so, I think the question of ambiguity arises, but then that question of ambiguity has to be solved. The meaning of a question of ambiguity arising is this—that it allows of an inquiry, not into intention, but into any such facts and circumstances as may help to give you a key to the meaning of the words which the testator used.

Now we have gone into that inquiry. I do not myself put it so much as my noble and learned friend who has just spoken has done, as a presumption, but I put it thus—that here you have an accurate description of the one person and a description which is admittedly not quite accurate of the other. You must, I think, have positive evidence of some cogent sort to make you prefer the latter to the former. Such evidence unfortunately in this case I do

not find. I do not think there is anything here in the very meagre facts which are before us which can make me prefer a description which is admittedly short of perfect accuracy to one which suffers under no such defect, and I therefore concur in the motion which my noble and learned friend proposes to make.

LORD ATKINSON — I concur with my noble and learned friend on the Woolsack. I think that in this case the testator has used the well-known name of a certain society. In the name itself there is nothing ambiguous or difficult to construe, and *prima facie* of course those words in which he describes it should receive their ordinary meaning.

Now it is sought to show that he meant some other society not the society which he so describes, but it appears to me that this one circumstance disposes of the case—that there is no sufficient evidence to show that he intended to benefit any society different from that which he has accurately described. His language is in no way ambiguous; he selects the name and description of the society which it bears, and which no other society bears. I think therefore that there is no reason to apply any principles applicable to a case where an ambiguity is raised, in the face of the man's will and of its terminology.

LORD SHAW—I agree with the judgment pronounced by the noble and learned Earl on the Woolsack.

LORD PARMOOR—I agree with the judgment pronounced by the noble and learned Earl on the Woolsack. I think the leading principle in all cases of this character is that the Court has not to make a will but to interpret the words which the testator has used. On this occasion I can find no ambiguity. The words he used are "The National Society for the Prevention of Cruelty to Children," which are the actual words to be found in the charter which was granted to this Society a few years ago. I also agree—as was said by the noble and learned Earl on the Woolsack—that it is important to remember that the descriptive words in this case were not selected by the testator, and therefore it occurs to me that the arguments which we have had addressed to us as to the use of the word "National" as applied to an institution of this kind are not relevant to the present case, because the words here to which attention has been called are not the words of the testator at all, but they are descriptive words taken from an outside document.

So far as the extrinsic facts are concerned I think that most of the evidence here is quite irrelevant and inadmissible, but so far as it is relevant and admissible it appears to me to be of little or no assistance. I agree with the view put forward by the noble and learned Earl on the Woolsack that the accurate use of the name "The National Society for the Prevention of Cruelty to Children" creates a very strong presumption in favour of the institution so named. What a man says ought to be acted upon unless it is really shown to be wrong, and so far from its having been shown to be wrong in the present instance I think that no evidence has been brought before your Lordships' House which in any way interferes with the presumption as to the accurate use of the language in itself.

I agree with the motion of the noble and learned Earl on the Woolsack.

Their Lordships reversed, with expenses, the interlocutor appealed from.

Counsel for the Claimants and Appellants (the National Society for the Prevention of Cruelty to Children) — Younger, K.C. — Church. Agents — John Burns, W.S., Edinburgh — Church, Rackham, & Company, London.

Counsel for the Claimants and Respondents (the Scottish National Society for the Prevention of Cruelty to Children)—Clyde, K.C.—The Hon. A. Shaw. Agents—R. C. Gray & Paton, S.S.C., Edinburgh—Lithgow & Peffer, London.

Thursday, July 16.

(Before Lord Dunedin, Lord Atkinson, and Lord Shaw.)

THE FARMERS' MART LIMITED *v.* MILNE.

(In the Court of Session, December 2, 1913, 51 S.L.R. 137, and 1914 S.C. 129.)

Contract—Pactum illicitum—Bankruptcy—Agreement to Share Fees.

A firm of live-stock salesmen, agents, auctioneers, appraisers, and land-surveyors, agreed with their manager that he should be entitled, with their consent, to accept any appointment as factor, or trustee on, or other office involving the management of any estate, the fees so earned by him to be pooled with any fees or commissions earned by them for any sales or valuations in connection with such estates and the proceeds divided, one-half to him and one-half to them, "provided always that before any such division shall take place there shall, out of said proceeds, be paid to" the firm "the balance of any debt remaining due to them from such estate, after giving credit for all sums received or falling to be received on account of such debt. . . ."

In an action by the firm against the manager, who had left their service, calling for an accounting of the fees earned by him as factor or trustee, in particular as trustee under a certain trust-deed for behoof of creditors, *held* that the agreement was a *pactum illicitum*, as impinging on the equal distribution of assets amongst creditors in bankruptcy, and action *dismissed*.

This case is reported *ante ut supra*.

The Farmers' Mart, Limited, *pursuers*, appealed to the House of Lords.

At delivering judgment—