LORD SKERRINGTON—I agree with your Lordships.

The LORD PRESIDENT and LORD JOHNSTON were absent.

The Court recalled the two interlocutors of the Lord Ordinary, both dated 27th November 1912, except in so far as dealing with the amendment of the record, disallowed the proposed issue, allowed a proof, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers (Respondents)—Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—D. M. Wilson. Agents—Fraser & Davidson, W.S.

Tuesday, December 17.

SECOND DIVISION.

[Lord Hunter, Ordinary.

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

Succession—Legacy—Extrinsic Evidence—Admissibility — Designation of Beneficiary.

A Scotsman resident in Scotland left along with legacies to Scottish charities a legacy to "The National Society for the Prevention of Cruelty to Children." The legacy having been claimed by "The National Society for the Prevention of Cruelty to Children," London, and by "The Scottish National Society for the Prevention of Cruelty to Children," Edinburgh, *held* (*rev.* judgment of Lord Hunter, Ordinary) that the designation of the society was ambiguous, and proof allowed of extrinsic facts averred by the claimants to show testator's intention.

Thomas Goodall Mason, M.D., Edinburgh and others, the trustees acting under the trust-disposition and settlement of Alexander Hogg Nasmyth of Middlebank, Fife, *pursuers and real raisers*, brought an action of multiplepoinding against the National Society for the Prevention of Cruelty to Children, London, and the Scottish National Society for the Prevention of Cruelty to Children, Edinburgh, and Ninian Hill, the general secretary thereof, *defenders*, to determine the rights of the defenders in a sum of £500, the amount of a legacy bequeathed by Mr Nasmyth under his trust-disposition and settlement to "The National Society for the Prevention of Cruelty to Children."

Mr Nasmyth by his trust-disposition and settlement bequeathed, *inter alia*, the following legacies:—"To the Dunfermline and West of Fife Hospital, One thousand pounds free of legacy or other Government duty and other charges, To the Royal Blind Asylum, Edinburgh, Five hundred pounds, free of legacy or other Government duty and other charges, To the Edinburgh Deaf and Dumb Benevolent Society, Five hundred pounds free of legacy or other Government duty and other charges, To the National Society for the Prevention of Cruelty to Children, Five hundred pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Incurables (Longmore Hospital) Five hundred pounds free of legacy or other Government duty and other charges, To the Scottish Society for the Prevention of Cruelty to Animals Two hundred and fifty pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Sick Children, Five hundred pounds free of legacy or other Government duty and other charges, and to the Edinburgh Royal Infirmary, One thousand pounds free of legacy or other Government duty and other charges."

The National Society averred, *inter alia*—"(Cond. 2) The claimants originated in 1884 as the London Society for the Prevention of Cruelty to Children. In 1889, under a new constitution, they adopted the title of the National Society for the Prevention of Cruelty to Children. In 1895 they were incorporated by royal charter as a body corporate under that name. Since 1889 they have continuously borne the name of 'The National Society for the Prevention of Cruelty to Children.' No other society or body is or ever has been known by that name. By the constitution as contained in the charter the sphere of operations of the Society embraces the whole of the United Kingdom. It is widely known throughout the Kingdom, including Scotland, as the National Society for the Prevention of Cruelty to Children. Its sole right to that name has recently been prominently before the public in Scotland, particularly in 1905 and again in 1907. This right was admitted by the competing Society in 1907, and since that year that Society has disclaimed that name and prominently published its disclaimer. The present claimants receive financial assistance from supporters in Scotland. (Cond. 3) The claimants are the only society for the prevention of cruelty to or otherwise for the furtherance of the interests of children whose constitution and operations are national in their scope by embracing the whole of the United Kingdom. The other defenders are in all respects limited to Scotland, and are not entitled to use and do not use the name 'The National Society for the Prevention of Cruelty to Children.' All the charitable societies named as legatees in the will are carefully and accurately designed. Another of those societies is the Scottish Society for the Prevention of Cruelty to Animals, which is so named in the will with the intention and result of distinguishing it from the Royal Society for the Prevention of Cruelty to Animals, whose head office is in London. (Cond. 4) With

reference to the competing claim, denied that the interests of the testator were exclusively Scottish; that the competing claimants are the intended legatees of the fund *in medio;* that they are in Scotland or elsewhere the National Society for the Prevention of Cruelty to Children; that they are usually referred to in Scotland under that name; and that they are the only Society in Scotland devoted to the prevention of cruelty to children. On the contrary, there are in Edinburgh district alone over 250 societies and agencies engaged in such work. Further, denied that the present claimants' charter was applied for with a view to the inclusion of the competing society. As to the terms of affiliation referred to in the competing claim, it is explained that at no time were they more than a domestic document regulating how the present claimants should dispose of certain legacies after they had uplifted the same; that the terms were in law *ab initio* null and void; and that they were publicly denounced as such as early as 1905. With reference to the case of cruelty in 1909, founded on by the competing claimants, the present claimants have no knowledge and give no admission. It is denied that that case had anything to do with the origin of the legacy now in dispute. So far as regards that legacy, the testator's will of 1911 is a verbatim copy of an earlier will made by him in 1906. This fact was known to the competing claimants when they lodged their claim in this process. Believed and averred that the precise wording of the bequest was prescribed in writing by the testator himself. (Cond. 5) All the facts regarding the existence of the two societies, the differences in their names, and the scope of their operations, were well known to the testator."

The Scottish Society averred, *inter alia*—"(Cond. 2) The claimant Society is the charity intended by the testator to be benefited by his bequest of £500 to the National Society for the Prevention of Cruelty to Children, and is the Society indicated by him under that designation. The claimant Society is in Scotland the National Society for the Prevention of Cruelty to Children, and is commonly referred to in Scotland under that name. It is the only Society in Scotland devoted to the prevention of cruelty to children, and its operations in that behalf are widely known and favourably recognised in Scotland by charitable persons, by the authorities, and by the general public. The work of the claimant Society so far as Scotland is concerned is national in its character and scope. Its operations are constantly referred to in the public press and its reports are widely circulated. Subscriptions, donations, and legacies to a large amount are received by the Society from all parts of Scotland. (Cond. 3) The claimant Society was formed under its present name in the year 1889 as the result of a series of successive amalgamations of a number of smaller bodies devoted to the same charitable work in Scotland. It continued to be known by its present name from 1889 to 1895, when negotiations were entered into with a view to affiliation or incorporation with a similar society which had been founded in London in 1884, and had adopted in 1888 the title of the National Society for the Prevention of Cruelty to Children. The latter Society applied in 1895 for a royal charter, and with a view to the inclusion of the Scottish Society within the scope of the charter terms of affiliation, dated 19th January to 5th March 1895, were entered into. Under article 2 (5) of this agreement it was provided that "all legacies left by Scottish testators, domiciled in Scotland, to the National Society for the Prevention of Cruelty to Children (unless directly specified to the contrary), shall belong to the Scottish branch." A charter was thereafter duly granted to the English Society, and in terms of the said agreement the claimant Society in 1895 adopted the designation of the National Society for the Prevention of Cruelty to Children (Scottish Branch). After the said agreement had been acted on for ten years, it was found that the terms used in the said charter were insufficient to include the claimant Society, and in 1907 the latter reverted to the designation of the Scottish National Society for the Prevention of Cruelty to Children. The claimant Society has always maintained a separate and distinct organisation of its own. . . . (Cond. 4) The testator was a domiciled Scotsman, and his interests and associations were exclusively Scottish. The trust administered by the pursuers is a Scottish trust and all the trustees are Scottish. Under his trust-disposition and settlement the testator also made a series of bequests in favour of other charities. All these other charities are Scottish, and there are no bequests in favour of any English charities. The bequest in question is preceded by three bequests and succeeded by four bequests, all in favour of Scottish charities. In the year 1909 the attention of the testator was particularly drawn to the operations of the claimant Society by a case of cruelty to children which occurred on his own estate of Middlebank and in which he was interested. The case was taken up by the claimant Society, and had the accused not pleaded guilty the testator's gamekeeper and gardener were to have been witnesses for the prosecution. It is believed and averred that the testator then formed a favourable opinion of the charitable work carried on by the claimants, and that the legacy now in dispute was designed by him to assist in the furtherance of their work."

On 17th January 1912 the Lord Ordinary (HUNTER), after hearing counsel in the Procedure Roll, repelled the claim of the National Society, and ranked and preferred the claimants the Scottish Society to the fund *in medio*.

Opinion—"The late Mr Alexander Hogg Nasmyth of Middlebank died on 3rd June 1911 leaving a trust-disposition and settlement, in which, *inter alia*, he directed

payment by his trustees of a legacy in these terms—'To the National Society for the Prevention of Cruelty to Children Five hundred pounds, free of legacy or other Government duty and other charges.'

"In the present action of multiplepoinding that legacy is claimed by two societies, The National Society for the Prevention of Cruelty to Children, incorporated by Royal Charter, and having its central office in London, and The Scottish National Society for the Prevention of Cruelty to Children, 137 Princes Street, Edinburgh.

"The claimants each asked for a finding in their favour without inquiry, but the Scottish Society maintained that if against them I ought to allow them a proof of certain averments. It appears to me, however, that all the material facts averred are either made matter of admission as after stated, or that they are not of such a character that I could competently allow them to be proved. Neither claimant says that the testator subscribed to their funds, and even if it be legitimate to inquire into the testator's intention, I think specific facts must be averred from which an inference of intention may be drawn. What the Court has a right to ascertain are as the Lord Chancellor (Lord Cairns) said in the case of *Charter* v. *Charter*, L.R., 7 H.L. 364, at 377—'All the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses.'

"The National Society were, it seems, incorporated under their name in 1895. They had been known by the same name since 1889. They therefore say that as they are the only one of the two societies claiming which the designation employed by the testator exactly fits, they are entitled to succeed. The strength of their position appears to me to be weakened by the circumstance, which was made matter of admission by their counsel, that their charitable operations do not extend to Scotland, but are entirely confined to England, Ireland, and Wales. They do not aver that the testator knew of their work or took any interest in their existence. The other claimants say they are in a similar position to a society in Australia or America making a claim to a legacy left by a Scotsman in a Scots will.

"The Scottish National Society maintain that the description used fits and designates them. To a Scotsman the Society which is national is, they say, the one which benefits his own nation, and the addition of the word 'Scottish' neither adds to nor detracts from the designation. Certain illustrations of this, to which I need not refer, were given in the course of the argument which I heard. These claimants also point out that the will is in Scots form, and that the other charities benefited are all Scots. These circumstances might of themselves have been insufficient to justify my finding in favour of the Scottish Society. They have, however, to be taken in conjunction with the fact that the other Society does no charitable work in Scotland, and that the Scottish Society were for a period of nine years prior to 1907 known as The National Society for the Prevention of Cruelty to Children (Scottish Branch). The importance of the latter circumstance is, if anything, increased on the assumption that the National Society are right in stating that the testator's will of 1911 is a verbatim copy of an earlier will made by him in 1906. On the whole I think that there is sufficient to justify me in preferring the claim of the Scottish National Society for the Prevention of Cruelty to Children to the fund, and I shall accordingly do so."

The claimants, the National Society, reclaimed, and argued—These claimants were entitled to be ranked and preferred to the legacy *de plano*. Their correct name and designation was given in the will, and there was no authority for passing over a legatee who had been correctly described. The Lord Ordinary had gone beyond the terms of the will, but in any event he should have allowed extrinsic evidence and it was incompetent for him to sustain the claim of a legatee who was not accurately described against the claim of a legatee who was accurately described, without a proof. Extrinsic evidence was only admissible when there was ambiguity, and here there was none — *Charter* v. *Charter*, 1874, L.R., 7 H.L. 364, *per* Lord Hatherley at p. 376. The suggested ambiguity in the present case arose from an attempt to construe the word national as if it were used in a descriptive sense and not as part of the name. But this was not so, because the word was spelt with a capital.

Argued for the claimants, the Scottish Society—The Lord Ordinary was right in view of the admitted facts. In a Scots will the word "national" meant "Scottish." In any event, and looking to the surrounding circumstances, the word "national" was ambiguous and a proof should be allowed—*Charter* v. *Charter*, *cit. sup.*; *Wedderspoon* v. *Thomson's Trustees*, December 15, 1824, 3 S. 287 (396); *Scottish Missionary Society* v. *Home Mission Committee*, February 19, 1858, 20 D. 634; Jarman on Wills, 6th ed., i, pp. 513, 578.

LORD JUSTICE-CLERK—The Court is of opinion that it would hardly be safe to affirm the Lord Ordinary's interlocutor without inquiry. The case is not sufficiently clear, although, so far as I can see at present, it is extremely probable that the testator was referring to the Scottish National Society for the Prevention of Cruelty to Children. There must be some inquiry, because we are here dealing with a word which is unquestionably ambiguous—the word "national"—and evidence is necessary to show in what sense it was used by this testator.

LORD SALVESEN and LORD GUTHRIE concurred.

LORD DUNDAS was absent.

The Court recalled the interlocutor of the Lord Ordinary and allowed the parties a proof of their respective averments on record.

Counsel for the Claimants, The National Society for the Prevention of Cruelty to Children — Constable, K.C. — Hon. W. Watson. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Claimants, The Scottish National Society for the Prevention of Cruelty to Children — Chisholm, K.C. — Mitchell. Agent—R. C. Gray, S.S.C.

Agent for Pursuers and Real Raisers — A. C. D. Vert, S.S.C.

Wednesday, December 18.

SECOND DIVISION.

(SINGLE BILLS.)

ROBERT A. MUNRO & COMPANY, LIMITED, PETITIONERS.

Company — Petition — Reorganisation of Share Capital — Advertisement — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 45.

In a petition for the confirmation of a special resolution authorising the reorganisation of the share capital of a limited company, presented under section 45 of the Companies (Consolidation) Act 1908, the petitioners having moved for intimation of the petition without advertisement, the Court *ordered* intimation as craved.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts — Section 45 — "(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes. . . . (2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed."

Robert A. Munro, Limited, Glasgow, *petitioners*, presented a petition under section 45 of the Companies (Consolidation) Act 1908 for confirmation of a special resolution authorising the reorganisation of their share capital. In moving for intimation of the petition on the walls and in the minute book, counsel for the petitioners submitted that advertisement of a petition for reorganisation of the share capital of a company was unnecessary, in respect that it was a purely domestic matter, and cited *in re Ashanti Development, Limited*, 1911, W. N. 144, 27 T.L.R. 498, as to the English practice.

The Court pronounced this interlocutor—

"Appoint the petition to be intimated as craved, and answers, if any, to be lodged within eight days thereafter."

Counsel for the Petitioners—Hon. W. Watson. Agents—Webster, Will, & Co., W.S.

HIGH COURT OF JUSTICIARY.

Saturday, December 21.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

SUMMERLEE IRON COMPANY, LIMITED *v.* THOMSON.

JOHN WATSON, LIMITED *v.* THOMSON.

Justiciary Cases — Statutory Offences — Truck Act 1831 (1 *and* 2 *Will. IV, c.* 37)—*Miner—Contract that Employer may Retain Wages for "Rent" after Employment has Ceased.*

The Truck Act 1831, section 2, makes illegal all contracts between an employer and employee containing provisions regarding "the place where or manner in which . . . the wages due or to become due to such employee shall be laid out or expended." Section 3 provides that the employee's entire wages shall be paid in current coin of the realm.

A company contracted with its employees that it should be entitled, in the event of the workmen leaving its employment, to retain whatever moneys were in its hands until the workmen removed from the houses belonging to it, and that for rent of and obligations connected with their occupation of the houses subsequent to leaving the company's service. Under this contract the company stopped and deducted from the workmen's wages certain sums for rent and other obligations connected with their occupation of the houses after their employment had ceased.

Held (1) that this contract was contrary to section 2 of the Truck Act, and that such retention of wages did not fall within the exceptions allowed by section 23, in respect that the money was to be retained as damages for illegal occupation and not for rent; (2) that the retention and appropriation of a part of the wages by the employers, after the employment had ceased, was contrary to section 3, in respect that a portion of the wages being retained for a specific purpose, payment was being made otherwise than in coin of the realm.

The Truck Act 1831 (1 and 2 Will. IV, cap. 37) enacts—Section 2—"If in any contract hereafter to be made between any artificer . . . and his employer, any provision shall