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—

LORD DUNEDIN—In this case the pursuers and appellants are a firm of auctioneers, who carry on business also as valuers, and they made an agreement with the defender (the respondent) to act for them as manager. The agreement dealt with the terms of his employment, and included a fifth clause, upon which the question arises. The fifth clause provides that "the second party"—that is, the defender—"shall be entitled, but shall not be bound, to undertake any factorship or trusteeship on, or other office involving the management of, any estate, provided always that before undertaking any such factorship, trusteeship, or office he shall first obtain the consent of the first parties, unless in the case of a testamentary or other gratuitous trusteeship, executorship, or factorship, any of which he shall be entitled to accept without the consent of the first parties," that is, the pursuers, and then it provides that any fees that the second party derives from such employment shall "be pooled with all fees and commissions, including fees for measurements derived by the first parties from any sales or valuations in connection with any such estate . . . and the proceeds thereof shall be divided in the proportion of one-half to the first parties and the other half to the second party, provided always that, before any such division shall take place, there shall out of said proceeds be paid to the first parties 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, and that whether from the principal or any subsidiary or collateral obligant therefor, or from the respective estate of any such obligants."

The effect of that agreement is not doubtful. If the defender acted as a trustee in a sequestration, under this agreement he would, in terms thereof, be bound to put the fees that he got as remuneration as trustee into a pool with any fees which they, the pursuers, got for employment which he gave them as trustee, and then in the division there would not be absolutely equal division of those pooled fees, but before anything else the pursuers, if they were creditors under the estate on which he was a trustee, were to receive such an allowance over and above the dividends which they would get in common with ordinary creditors as would give them 20s. in the £1. The action is raised in form for a count and reckoning by the pursuers against the defender, in which he is asked for a count and reckoning of the particulars set forth of three particular occasions on which he acted as trustee, and in respect of which transactions they say there is money due to them upon an accounting, if the accounting is worked out in terms of that clause which I have just read. To that action the defender pled by his third plea that "The agreement founded on by the pursuers being void, in respect that it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed;" and that is the plea to which the learned Judges of the Second Division have given effect.

As to the general proposition that you cannot sue upon an illegal contract, there is of course no doubt; the question is whether a contract of this sort is an illegal contract. Now, taking it upon Scotch authority first, before coming to English authority, I find that the matter is very clearly dealt with, as it always is, by Mr Bell in his Principles. After setting forth that there are such things as illegal and immoral contracts, he deals in section 37 with contracts void at common law. He first sets forth contracts properly immoral —*contra bonos mores*—then certain rules as to *pactum illicitum*, and so on; and then he says this—"Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements, are invalid." One best sees what is the true meaning of the words he there uses by going to the illustrations that he gives in the note, in which he sets forth the cases on which his proposition is founded, and in the clause which I have read—"prejudicial or offensive to the public or to third parties"—he adds this—"Such are, *e.g.*, agreements in which a creditor in fraud of an agreement to accept a compensation stipulates for a preference to himself;" and he gives a reference to his well-known work, the large work, Commentaries on the Law of Scotland—2 Bell's Com. (M'L.'s ed.), 370, 396, 399. Now the Commentaries give more than one illustration of this matter. They give the one I have just read, and they give also a case where a creditor has got a sum in order to accede to a trustee; that is a case, not of regular sequestration, but of private arrangement with the creditor where his concurrence has been bought. And another very good instance of the same thing is given by a case which is referred to in Lord Hunter's judgment, and has been cited to your Lordships—the case of *Macgown* in Faculty Collection, December 13, 1808.

Now the truth is that a case of this sort really comes in either division. It is not only prejudicial to third parties, but it is inconsistent with public law and arrangements, and it is equally inconsistent with public law and arrangements whether it actually contravenes a section of the Bankruptcy Act, of which *Thomas* v. *Waddell* (February 23, 1869, 7 Macph. 558) may be taken as an example, or whether it goes against those general principles which are just as much applied to private arrangements in Scotland, such as trust deeds, as they are to the general arrangements which are laid down in a sequestration.

I have so far kept only to Scotch authority. In English authority the matter is dealt with in precisely the same way. I note in the admirable work on Contracts by Sir Frederick Pollock that he expresses the matter in almost the same terms as Mr Bell, where he says (8th ed., p. 292)—"An agreement will generally be illegal though the matter of it may not be an indictable

offence, and though the formation of it may not amount to the offence of conspiracy if it contemplates any civil injury to third persons." And then he goes on and points out that when you come to this question of agreement in fraud of creditors you may really look at it from either point of view—either bearing directly on the sentence I have just read, or bearing on the general idea of being an interference with general arrangement of justice. So that if you look at the agreement and take it as it stands, with this provision, that in certain circumstances—that is to say, whenever these people are creditors—they are to eke out their dividends by getting from the trustee part of his remuneration, I think it is clearly an illegal bargain.

But that does not quite end the matter, because it might be said that the persons who really are prejudiced in this way are the other creditors, and this is not a matter with which the other creditors here are having anything to do. There again I think the matter has been settled by a long course of decisions. The test was laid down so long ago as 1816 in the case of *Simpson* v. *Bloss* (7 Taunton 246), and the head-note there expresses it perfectly correctly—"The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case." The same thing was again said in the very celebrated case of *Fivaz* v. *Nicholls*, reported in 2 Common Bench 501, in which at page 512 Chief-Justice Tindal says—"I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated in the record without relying upon this illegal agreement originally entered into between himself and the defendant." It was repeated again in 1869 in the case of *Taylor* v. *Chester*, which is reported in 4 Queen's Bench 309, where Mr Justice Mellor says (at p. 314)—"The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*" (he is there referring to the words of Lord Mansfield in the leading case of *Holman* v. *Jackson*, which was quoted to your Lordships) "is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." And it was again applied in the case of *Scott* v. *Brown, Doering, M'Nab, & Company*, in 1892, reported in 2 Queen's Bench at p. 724.

Now taking that test here, it seems to me to solve the whole matter perfectly easily. The pursuers have solved it for themselves, because they cannot get the accounting they seek without getting it through the aid of that very clause which I have already said was illegal. They want that very clause to help them; and it is this test that really turns the flank of all those cases which have been quoted by Mr Holman Gregory. There are certain cases where an agreement is so divisible that it may be that the pursuer or plaintiff can enforce his demand without having recourse to the illegal part of the agreement; but here they cannot do so, because the only reason why they want this accounting is in order that when the money has been pooled they may be allowed to get 20s. in the £1, and that is in these three transactions set forth.

On the whole matter I am of opinion that the judgment appealed from is perfectly right, and I move your Lordships that the appeal be dismissed with costs.

LORD ATKINSON—I entirely concur. I think this is a case of the greatest possible simplicity. The plaintiffs sue for an account of certain moneys received by the defendant, and they base their right to get an account on a certain clause in this agreement. The moneys in respect of which they ask for an agreement are moneys received in three bankruptcy matters in which the defendant was trustee. It is alleged that there were other bankruptcy matters in which he was trustee, but they are not specifically mentioned, but they are for an account in reference to the moneys he received as trustee.

Now what is the particular clause of this agreement on which they base their right to that relief? There may be a dozen other clauses on which they would have other relief, but the particular clause that they wish to enforce here, and upon which they base their right to the relief that they claim, is the 5th clause, which to my mind is simply a device between the plaintiffs and the defendant, in fraud of the bankruptcy laws, to secure to the plaintiffs a larger dividend than the other creditors in that estate are receiving. It is that and nothing less. The provision is that this gentleman cannot act as trustee without their consent, and the clause of the agreement on which they rest their case might, I think, be conveniently stated thus—that in consideration that they would consent to the defendant acting as trustee in certain bankruptcy matters in which they were creditors, he would allow part of his remuneration to go to secure to the plaintiffs a larger dividend than the other creditors in those bankruptcy matters were receiving.

I have not the slightest hesitation in holding that such an agreement is a fraud upon the bankruptcy laws, the great object of which, as distinguished from the Statute of Elizabeth, is not merely to secure that the assets of a bankrupt shall be distributed amongst his creditors, but that they shall be distributed equally. Equality is the great object and virtue of the Bankruptcy Acts, and it is to defeat that equality that this agreement was entered into.

For that, and for other reasons which have been given by the noble and learned Lord on the Woolsack at greater length, I have no hesitation whatever in saying that this is an agreement which cannot be enforced, and that this action is brought to enforce it, and the appeal must be dismissed and the judgment below affirmed.

LORD SHAW—This is an appeal from a decision of the Second Division of the Court of Session. Having looked carefully through the judgment of the learned Lords I agree with the conclusion reached therein. But

I do not find myself in agreement with the opinions and grounds of judgment stated by their Lordships; and it is only in view of this that I venture to add any observation of my own.

I agree with my noble and learned friends who have preceded me. I think this action is pivoted upon one fact and essentially in so far as it is relevant upon one fact alone. It is an action directed by the former employers of the respondent Mr Milne, in order to obtain from him an accounting with regard to certain receipts that he obtained in respect of transactions carried out under the terms of a certain agreement. That agreement under head 5 provides that Mr Milne, being the acting manager and valuator and auctioneer for this farmers' mart, should be entitled to accept trusteeships under arrangement with creditors, or under bankruptcy, and that his fees as trustee should be dealt with in the manner to which I will presently allude. In clause 5 it is provided that being trustee of those estates he shall, although there is no clause compelling him to do so, be entitled to employ his own firm for all purposes of valuations and the like.

The judgments in the Court below, in my opinion most unfortunately, give prominence, and in the case of the Inner House, give entire prominence, to the relations thus existing between Mr Milne and his firm; and the ground upon which this agreement is said by the Second Division to be an improper arrangement which cannot be maintained is a ground of what their Lordships call double interest.

There are many cases in Scotland in which one member of a legal firm or a member of a firm of accountants becomes a trustee in bankruptcy also, and I have listened with some surprise to the argument that because the firm of which that individual is a partner is employed without any suggestion of overcharges or the like in the business of the trust or the bankrupt's estate, therefore a double interest has been created which entitles the parties to void the entire bargain.

All I will say upon that head at present is this—that in affirming the conclusion reached by the Second Division I must not (and I assume your Lordships are in the same position) be held to commit myself to any one of the propositions under which the Second Division reached that conclusion. It would require a very great deal of argument, as I am at present advised, to enable me to assent to the general and somewhat astonishing proposition of the Lord Justice-Clerk that "A contract of this kind may be possible to carry it out without committing any illegality;" and his Lordship proceeds to say that if an innocent contract which might be carried out without any illegality might also be carried out by way of illegality, therefore the contract itself is a void contract. In building transactions there are what are known as time and lime contracts. In many transactions in which tradesmen are employed the customer is at the mercy of a tradesman, who, if he be dishonest, can act illegally and make overcharges and the like. There is hardly any innocent contract for the doing of an act or rendering of a service which may not by reason of dishonesty be converted into something improper. But I have never yet heard it suggested that that is a reason for voiding such a contract. And I withhold my assent entirely from the argument contained in the judgments both of the Lord Justice-Clerk and of Lord Guthrie under the head of there being that double interest which made this contract a voidable bargain.

But there is a much simpler approach to real justice in this case, and it is that which I am glad to think your Lordships have taken. Under head 5 of this agreement it is provided that when the fees of the trustee in bankruptcy come to be pooled along with the auctioneering and other charges of the firm by which he was employed, then out of these proceeds there shall be paid to the first parties—that is to say, to the appellants—the balance of any debt remaining due to them from such estate. I agree with my noble and learned friend Lord Atkinson in the language he has just employed. That is a distinct bargain of an illicit character.

This does not depend in Scotland on any Act of Parliament, although if the Statute of 1856 and other Bankruptcy Acts were applied to it it would be found that there is confirmation in every line of the provisions against illegal preferences, of the proposition that when once an estate is thrown into bankruptcy every creditor upon that estate is entitled in the distribution of its assets to equal terms and nothing but equal terms. Special preferences created under special contracts or by special circumstances there may be, but that is the general rule. But equality of treatment is destroyed if in respect of any services rendered by the trustee he has a private bargain with certain creditors that out of his fees they shall be preferred as to the balance unpaid to them out of the estate in general. It is manifest that the trustee in such circumstances is in the position of having to distribute a part of his fees to one set of creditors in preference to others. If that part of his fees was distributable among creditors at all it was distributable among the whole body. Accordingly on that ground I should be prepared to affirm the conclusion reached by the learned Lords of the Second Division, although by no means for any of the reasons assigned in their judgments.

I have dwelt upon this because it occurred to me when I read the judgment of the Second Division that this case could surely not have been argued as it was presented at your Lordships' Bar, in the Court below. But Mr Wilton has assured me that it was so argued, and I call your Lordships' attention to a passage in the judgment of Lord Hunter upon this subject. Anything under the hand of Lord Hunter is entitled to great weight, and his Lordship puts the matter in this way:—"The stipulation as to the pursuers receiving payment in full of any debt due to them by the bankrupt

out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties." In the view that I take it is much more than an unfortunate condition; it is a condition expressly contrary to that equality of honest distribution of the estate which ought to prevail in all bargains with respect to trusteeships of sequestrated estates in Scotland.

But Mr Holman Gregory said, and said with much force, that this occurs only in one clause of the contract, and the action is a general one for count and reckoning and may apply to a series of circumstances in which it did not operate. Most unhappily for such an argument the language of the condescendence of the pursuers makes this unavailing. I find on a perusal of this record that the broad proposition radically affecting the finance of the matter and the claims of the appellants occurs in condescendence 5, where there is a reference to an unpaid balance of £168 due from the estate of a Mr John Fairweather. With regard to that unpaid balance the scheme of the present count and reckoning is this, that that unpaid balance, in the language of condescendence 5, "falls to be first paid to the pursuers out of the sums pooled in terms of said article fifth," that is to say, it falls to be paid out of the trustee's own remuneration.

I do not think Mr Wilton in drawing these pleadings was erroneous when he stated that "such a transaction if carried out would be a fraud upon the other creditors who accepted their dividends in the belief that all the creditors, including the pursuers, were receiving equality of treatment from the defender as trustee." I think that is a sound proposition; it is in accordance with the equitable distribution of assets under the law of Scotland. (I may say in passing that I have not heard anything in the argument to suggest to me that any different rule from that prevailing north of the Tweed prevails to the south of it.)

But if that be so it is conclusive of the case, and therefore I repeat my surprise that when this proposition so broadly stated upon this record reached the Second Division of the Court of Session it should not have been dealt with at all by any of the judgments, but that, on the contrary, these judgments proceeded upon grounds to which I feel myself constrained to say that I must decline assent. I agree with the conclusion at which your Lordships have arrived.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuers (Appellants)—Sandeman, K.C.—Holman Gregory, K.C.—William Mitchel. Agents—Tait & Crichton, W.S., Edinburgh—Helder, Roberts, Walton, & Giles, London.

Counsel for the Defender (Respondent)—Younger, K.C.—Wilton. Agents—John C. Brodie & Sons, W.S., Edinburgh—Grahames, Currey, & Spens, London.

Friday, July 17.

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

AYR STEAM SHIPPING COMPANY, LIMITED *v.* LENDRUM.

(In the Court of Session, December 5, 1912, 50 S.L.R. 173, and 1913 S.C. 331.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising Out of and in the Course of the Employment*"—*Onus of Proof*—*Unexplained Drowning of Ship's Steward.*

Circumstances in which *held* (*diss.* Lords Dunedin and Atkinson, and *rev.* judgment of the Second Division) that an award of compensation by an arbiter in a workmen's compensation case, where the workman, a ship's steward, was last seen alive in his bunk, and was found drowned next day near where his ship had been lying, should be sustained, inasmuch as a reasonable man might have drawn the inference that his death resulted from an accident arising out of and in the course of his employment.

Master and Servant—Workmen's Compensation Acts—Process—Stated Case—Remit.

Per Earl Loreburn, in a case under the Workmen's Compensation Act 1906—"Where a case is stated incompletely or ambiguously a court may remit for further information. . . . A remit is not intended to assist the court in substituting itself for the arbiter."

This case is reported *ante ut supra.*

The applicants Mrs Lendrum and her son appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—In this case the arbiter found that the applicants came within the statute and awarded compensation accordingly. The Court of Session set aside the award, and the question before your Lordships is simply this, Was the conclusion of the arbiter such as a reasonable man could reach? In the case of *Mackinnon* v. *Miller* (46 S.L.R. 299) Lord Dunedin laid down that principle, and it is now quite ascertained. Any of us may think that we can see the truth better than the arbiter. Perhaps we may be right, perhaps we may be wrong. It is, however, no business of ours. We have no jurisdiction to decide the question of fact as we think right. Our jurisdiction is confined to the more modest duty already described.

The deceased was steward on a ship lying in harbour. He was lying in his bunk. The captain told him to get tea ready for the men. The next thing known is that he disappeared, and was found some time later drowned in the sea. He was sober. He was subject to nausea. The bulwarks were 3 feet 5 inches above the deck. These are to my mind the material facts found by the arbiter in the case stated.

This class of case has led to much refine-