means of transit at all. I grant that a boat is a quite proper means of getting back to a ship where the ship is not moored to a quay. But a boat in that sense is such a boat as is referred to by the Lord Chancellor in the case of *Fletcher* v. *Owners of the "Duchess,"* namely, an ordinary boat. It is certainly not making use of an ordinary boat to go into one which is ordinarily meant to be propelled by oars but which has no oars, is meant to be manned by seven or eight men but has only one man in it, whose course can only be influenced by paddling with the rudder, the propulsion being effected by the wind and tide. This seems to me a case where the boat used was really no boat at all, and that the poor man by going back to his ship in that way subjected himself to a risk which was no part of his employment, and a risk which his employers never could have thought that he should be subjected to in the ordinary course of his employment. I therefore have no hesitation in saying that the first question must be answered in the negative.

LORD KINNEAR—I am of the same opinion. I think it clear that this man exposed himself to a risk which was not one of the risks of his employment at all. It was not one of the risks which his contract of employment as seaman required him to take. That he was entitled to return to his ship by means of a boat nobody disputes, but what is said is that, as the boat which was meant for the purpose was not at hand, he took a lifeboat which had no oars, and which in ordinary circumstances required to be manned by six men, each with an oar, and getting on board of her he trusted that he would be carried more or less in the direction of the ship by the force of the wind and tide, his only means of directing the boat being that he took out the rudder and used it as a paddle for steering. I cannot see that this is a risk to which he was required by his employment to expose himself

LORD JOHNSTON—I agree that this accident did not arise out of the employment of the deceased.

LORD MACKENZIE was absent.

The Court answered the first question of law in the negative, found it unnecessary to answer the second question of law, recalled the determination of the Sheriff Substitute as arbitrator appealed against, and decerned.

Counsel for Appellants—Murray, K.C.—Jameson. Agents — Boyd, Jameson, & Young, W.S.

Counsel for Respondent — Maclennan, K.C.—Mitchell. Agent—R. H. Miller & Company, S.S.C.

Tuesday, November 7.

FIRST DIVISION.

EARL OF CAITHNESS *v.* SINCLAIR.

Succession — Fee - Simple Destination — Clause of Devolution—Validity of Clause —Public Policy.

By *mortis causa* settlement the proprietor of certain estates disponed them to his daughter and the heirs whomsoever of her body, whom failing to a series of heirs therein mentioned. The destination was a fee-simple one, but the disposition contained a clause of devolution in the following terms—"And under this condition always, that the husband of my said daughter and each of the heirs, and the husband of each of the female heirs who shall succeed to the lands before disponed under the destination herein contained, shall be obliged in all time, after they or their wives succeed to the said lands, to use and retain the surname of Buchan and the arms and designation of Buchan of Auchmacoy, and no other surname, arms, or designation; and that in case any of the said heirs shall succeed to a peerage, then when the person so succeeding or having right to succeed to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves of all right, title, and interest which may be competent to them in or to my said lands, and the same shall thenceforth *ipso facto* accrue and devolve upon the next heir for the time being who shall be entitled to succeed under the destination herein contained, as if the person so succeeding to a peerage were naturally dead."

On the succession opening to A, one of the heirs of provision who had already succeeded to a peerage, B, the next heir, challenged his right to take up the succession to the said estates.

Held that the clause of devolution was neither inapplicable nor invalid, and that accordingly A was excluded from the succession to the said estates.

On 15th October 1910 the Right Hon. John Sutherland, Earl of Caithness, *first party*, and the Hon. Norman Macleod Sinclair, *second party*, presented a Special Case to determine whether, on the sound construction of a clause of devolution contained in the *mortis causa* settlement granted by the late James Buchan of Auchmacoy, Aberdeenshire, the first party by his succession to the peerage was excluded from succeeding to Auchmacoy.

The *facts* were as follows — "James Buchan, Esquire, of Auchmacoy, in the county of Aberdeen, died on 28th November 1874, survived by his daughter Miss Louisa Buchan, and leaving no other issue. On 26th December 1873 Mr Buchan executed a disposition of the estate of Auchmacoy in favour of the said Miss Louisa Buchan, and the heirs whomsoever of her body,

whom failing his nephew James Augustus Sinclair and the heirs-male of his body, whom failing to other heirs and substitutes therein mentioned. The disposition contained no clauses of prohibition against alienation, contracting debt, or altering the order of succession, fenced with irritant and resolutive clauses, nor did it contain an express clause authorising registration of the deed in the Register of Tailzies. The disposition, however, contained a name and arms clause and a clause of devolution in the following terms— . . . [*The clause is quoted supra in rubric.*] . . . Miss Buchan died unmarried on 18th April 1910 without evacuating the destination in the disposition executed by her father. The person next called in the destination after Miss Louisa Buchan and the heirs of her body was James Augustus Sinclair. He succeeded to the peerage as sixteenth Earl of Caithness on 25th May 1889, but he predeceased Miss Louisa Buchan on 20th January 1891, leaving a family of sons and daughters, of whom the present Earl of Caithness, who was born on 17th September 1857, the first party hereto, is the eldest son, and the Honourable Norman Macleod Sinclair, the second party hereto, is the second son."

The first party *contended* that the disposition of 1873 did not contain any clauses upon the true construction of which his right to succeed to the estate of Auchmacoy on the death of Miss Louisa Buchan was defeated; that the clause quoted above did not apply to the circumstances which had occurred; and that in any event the absence of irritant and resolutive clauses or their equivalent precluded any question being successfully raised as to the right of the first party to enter into possession of and complete his title to the said estate.

The second party contended that the said clause of devolution formed an integral and operative part of the destination of the said estate, and that on a sound construction thereof the first party by his succession to the peerage was excluded from the succession to the said estate, which had accordingly devolved upon the second party. He further contended that it was a condition of the succession to the said estate that the party succeeding thereto should use and retain the name and arms of Buchan, and that the first party not being in a position to implement that condition, was consequently not entitled to take up the succession to the said estate, and the second party, who was prepared to implement the said condition, was thus now in right thereof.

The *questions of law* were—"1. Is the first party, on a sound construction of the terms of the said disposition, excluded, in the circumstances which have occurred, from the succession to the estate of Auchmacoy? 2. In the event of the first question being answered in the affirmative, is the second party now in right of the said estate?"

Argued for the first party—(1) *Esto* that the absence of an irritancy clause did not invalidate the condition, such conditions were not binding in fee-simple destinations—*Munro* v. *Butler Johnstone*, December 18, 1868, 7 Macph. 250, *per* Lord Cowan at p. 255, 6 S.L.R. 208. They were only binding in entails, or where the devolution depended on succeeding to an estate as distinguished from a dignity, or to a specific peerage as distinguished from the peerage in general—*Simpson and Home* v. *Earl of Home* (1697), M. 15,353; *Lockhart* v. *Gilmour* (1755), M. 15,404; *Hay* v. *Marquis of Tweeddale* (1771), M. 15,425, *aff.* 2 Pat. 322. The case of *Fleming* v. *Lord Elphinstone*, (1804) M. 15,559, relied on by the second party, was distinguishable, for the question of the disqualification of a peer *qua* peer was not there raised—[*vide* Sir Ilay Campbell's notes on that case in Session Papers]. Reference was also made to *Stirling* v. *Stirling*, January 16, 1834, 12 S. 296, and to *Marquis of Hastings, &c.*, November 12, 1844, 7 D. 1, *aff.* 9th March 1847, 6 Bell's App. 30. (2) The clause was inapplicable where, as here, the first party had already succeeded to a peerage. It only applied where the peerage had been acquired subsequent to the acquisition of the lands. The contention of the second party on the point was unreasonable, for it meant that an heir who succeeded to a peerage before succeeding to the lands would have no way of escape, whereas an heir succeeding first to the estate might easily get rid of the devolution clause, *e.g.*, by conveying the estate to another who could reconvey to him. Further, the clause must be strictly construed where, as here, the intention of the author of the clause was not indicated. A construction which did not fit the words would only be allowed where the testator's intention was clearly manifest—*Earl of Eglinton* v. *Hamilton*, June 3, 1847, 9 D. 1167, at 1189; *Howden* v. *Fleeming*, February 14, 1867, 5 Macph. 658, 3 S.L.R. 193, *rev.* July 16, 1868, 6 Macph. (H.L.) 113, 5 S.L.R. 698; *Munro* v. *Butler Johnstone* (*cit. sup.*). (3) The condition was invalid in respect that it was (*a*) capricious and irrational, and (*b*) contrary to public policy, and ought therefore to be held *pro non scripto*—Bell's Prin., 1785. It was irrational, in respect, *inter alia*, that while a Buchan of Auchmacoy who was created a peer with that title would be able to retain the estates, his son would be bound to forfeit them on his succeeding to the peerage. It was contrary to public policy, in respect that it penalised the succession to a peerage—*Egerton* v. *Earl of Brownlow and Others*, (1853) 4 Clark's H.L. Cas. 1; *in re Beard*, [1908] 1 Ch. 383. As to the functions of a peer, reference was made to Erskine May's Parliamentary Practice (10th ed.), pp. 49 and 61, and to the opinion of Lord Shaw in *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. p. 87.

Argued for the second party—(1) *Esto* that this was a fee-simple destination, the devolution clause was none the less binding, for such clauses were as effective in fee-simple destinations as in entails—*Viscountess Hawarden* v. *Elphinstone's Trustee and Dunlop*, February 2, 1866, 4 Macph. 353, 1 S.L.R. 132. *Esto* that in the

case of *Munro* (*cit.*) the devolution clause was held to be invalid, the ratio of that decision was that the clause in question was a mere pendant of the entail, and stood or fell with it. Further, the Court there reserved the question whether by itself the clause would not have been valid—*vide* Lord Neaves' opinion. Such clauses were to be read fairly, and where, as here, they occurred in a gratuitous disposition, and affected the "quality" of the right, they must receive effect. The clause provided that "no other designation" was to be used, consequently the holder of any peerage than one of "Buchan of Auchmacoy" was bound to denude—*Hunter* v. *Weston*, January 31, 1882, 9 R. 492, 19 S.L.R. 416. *Esto* that the assumption of an official title, *e.g.*, Lord Clerk Register, would not involve denuding, that was different from a peerage, for a peerage took the place of the family name. The cases showed that such clauses were not limited to entails or to the case of specific peerages; they were equally effective in fee-simple destinations and where the succession in question was not to any specific peerage but to the peerage *qua* peerage—*e.g.*, *Fleming* (*cit. supra*); *Bruce-Henderson* v. *Henderson*, (1790) M. 4215; *Lockhart* (*cit. sup.*); *Hay* (*cit. sup.*); *Stirling* (*cit. sup.*). (2) The clause was applicable to the present circumstances, for where, as here, the intention was obvious, viz., to prevent convergence of the estate and the peerage, it ought to receive a benignant construction—*Fleming* (*cit. sup.*); *Hay* (*cit. sup.*). It was similar to the clause in *Fleming's* case, which was on all fours with the present. (3) The clause was not invalid on the ground of public policy, for that doctrine was inapplicable, and in any event was not a safe guide for construction—*Richardson* v. *Mellish*, (1824) 2 Bing. 229, *per* Burrough, J., at p. 252. It was only in certain well-defined categories, *e.g.*, restraint of marriage, &c., that it would receive effect—*Janson* v. *Driefontein Consolidated Mines Limited*, [1902] A.C. 404, at pp. 491, 495, and 507. It had no application to the clause in question, for such clauses had received effect from time immemorial. The case of *Egerton* was distinguishable, for the ratio of that decision was that any attempt to fetter the Crown in the use of the royal prerogative as to the creation of peers was illegal—*vide* pp. 162, 172, 177, 198, and 203, and Pollock on Contracts (7th ed.), 315; Anson on Contracts (12th ed.), 221.

At advising—

LORD PRESIDENT—[*After narrating the facts*]—The argument of the first party resolved itself into three points. In the state of the authorities it would be idle to contend that a clause of this sort was feudally inefficacious. But the first party contended (1) that the clause in question was inefficacious because it was not protected by the fetters of a valid entail; (2) that it did not apply because the Earl did not succeed to the earldom after the succession opened; and (3) that the clause was against public policy and should therefore be held *pro non scripto*.

I am of opinion that the first question is really settled by authority, viz., by the judgment of the House of Lords in the case of *Fleeming* v. *Howden*, 6 Macph. (H.L.) 113. The facts of that case were these.

John Fleeming was served heir of tailzie and provision, and was duly infeft in certain estates known as the Wigtown estates in 1841. The entail was a good and valid entail, but it contained a clause which provided that in case any of the heirs (with certain exceptions which were not brought into question) should succeed to a peerage, then the person so succeeding, and also succeeding or having right to succeed to the Wigtown estates, should be bound to denude in favour of the next heir, and the estates should *ipso facto* accrue and devolve on the next heir of tailzie.

In 1860 John Fleeming became by succession Lord Elphinstone. At that date a Mr Dunlop was in possession of the lands under a trust deed granted by John Fleeming. In October 1860 Lady Hawarden, sister of John Fleeming, raised an action to have the lands transferred to her as next heir of entail. In 1861 John Fleeming, Lord Elphinstone, died, and his estates were sequestrated after his death. The action of Lady Hawarden was then defended by Dunlop and by James Howden, the trustee in the sequestration. The case went to the whole Court, who decided that the clause of devolution took effect immediately on John Fleeming's succession to the peerage, and that in equity her right was superior to that of Dunlop and to that of Howden. This case is reported under the name of *Viscountess Hawarden* v. *Elphinstone's Trustees*, 4 Macph. 353.

There were also some other lands called Duntiblae, which had been held by John Fleeming under another entail. This entail had the same clause of devolution as that quoted, but the entail had never been recorded in the register of tailzies and was therefore a bad entail—that is to say, none of the prohibitions or irritancies were enforceable against a singular successor or against creditors of any heir who executed diligence against the lands.

The trustee in the sequestrated estate accordingly raised an action against the trustee under the private deed and against the heir of entail of the said Lady Hawarden, she having meantime died. The Court of Session, by a majority, distinguishing this case from the former on the ground that it was an unrecorded entail, gave decree in his favour. But the judgment was reversed by the House of Lords.

Now the value of this judgment was that a clause of this kind was in no sense an irritancy or forfeiture which could only be effectual if the entail were unimpeachable, but was a condition of the right which operated *ipso facto* the moment that the event occurred. The validity or invalidity of the prohibitive and irritant clauses was therefore an irrelevant consideration to the question of the efficacy

of the clause which, *inter hæredes*, was always binding.

The next question is, I think, equally settled by authority, viz., by the old case of *Fleeming* v. *Elphinstone*, M. 15,559.

The remaining question is whether the condition is against public policy and should therefore be disregarded. But it never seems to have occurred to the Bar or Bench in the long series of cases with clauses of this sort to take such a plea; and I agree with the opinion which has been more than once expressed, that the argument of public policy should be most cautiously applied by Judges. Indeed I would say should hardly be applied when there is not exact precedent to bind them. But further, in the cases which were cited, of which *Egerton* v. *Earl Brownlow* and *in re Beard* may be taken as examples, the illegality always lay in this, that the condition if held to be valid would prompt the legatee to a certain course of action, whether that action was positive as in *Egerton's* case or negative as in *Beard's*, which action was against public policy. But here the condition affects no course of action. The succession to a peerage is a thing which the succeeding person cannot help. On the other hand, the legality of the wish on the part of a testator that his estate should remain the appendage of a distinct family, bound to bear a certain name and arms and not to be merged in the family of a peer, has been recognised by the numberless instances mentioned in the books.

I am therefore of opinion that this question must be answered in the affirmative.

Had the father of the first party succeeded to the estate before he succeeded to the peerage he might have altered the destination. But so might Miss Louisa Buchan. She did not do so, and therefore the destination must rule, as it stands, in accordance with the rules which I have sought to explain above.

LORD KINNEAR—I agree with your Lordship upon all the points which you have stated. The first question seems to me to be whether the clause of devolution is applicable to the position of the first party as having succeeded to the peerage before the succession to the estate of Auchmacoy had opened to him. That appears to me to be a mere question of construction to be determined according to the intention of the *mortis causa* settlement. So considering it, I should without authority have come to the conclusion that the clause was directly applicable to the case of the first party. But then, I agree with your Lordship that it is unnecessary to go further than to say that the question is really settled by the case of *Fleming* v. *Lord Elphinstone* (M. 15,559).

Upon the second question, which is the more important question in the case, as to the legal efficacy of the clause of devolution, I also agree with your Lordship that that is settled by the judgment of the House of Lords in *Fleming* v. *Howden* (6 Macph. (H.L.) 113. We were referred to the observations of the Judges in *Munro* v. *Butler Johnstone* (7 Macph. 256), where it was doubted whether a clause of devolution could be sustained where the conveyance contained only a simple destination and not a strict entail. I apprehend there can be no doubt that the deed in question contains only a simple destination. There are no prohibitions fettered by the irritant and resolutive clauses of a strict entail, nor are there any prohibitions directed against the heirs of entail which would be good *inter hæredes*, though they might be ineffectual against onerous creditors. It is a simple destination which might undoubtedly be evacuated by the first taker or any subsequent holder making up a title as heir of provision. But then I think it is settled by the case of *Fleming* v. *Howden* that in order to sustain a clause of devolution of this kind it is not necessary that it should be connected with a strict entail. What was held in that case was that the clause must be sustained although there were no fetters effectually imposed upon the heirs of entail, because, the deed not having been registered, the heir in possession, before the contingency which brought into force the clause of devolution, might have dealt with the estate so as to disappoint the next substitute after him. It was pointed out by Lord Colonsay that the clause of devolution has no necessary connection with the entail clauses at all, that it is a condition of the right conferred by the deed, and, accordingly, that it may be sustained notwithstanding that there is no valid entail. I think it follows that it may be sustained even although the deed in which it occurs was never intended to be an entail at all, because the whole point of the decision is, that so long as the heir in possession possesses by virtue of the gift which contains the clause of devolution, and has in fact done nothing effectually to discharge that condition, he holds the estate under the obligation which the granter lays upon him. I take it that the real principle is that a gratuitous donee must accept the gift subject to the conditions which are imposed upon it by the granter. He binds himself by his acceptance of the gift to give effect to the condition attached to it. And, accordingly, I think it is clear upon the decision that a simple destination is quite as effectual to support a clause of devolution as a strict entail would be.

In the present case the question does not arise exactly in the same way as if the present Lord Caithness had possessed the estate for a certain period and then been called upon to convey it to the next heir-substitute, but it depends upon exactly the same rule. He has not, so far as the case before us shows, made up a title to the estate. The real question is whether it is he or whether it is the next heir who is now entitled to take up the succession as heir of provision, and the view I take of the case is this, that he is not so entitled because the destination under which he would otherwise have

been heir of provision expressly excludes him by reason of his having succeeded to the peerage.

Upon the third question I agree also with your Lordship, and I should be very unwilling to proceed upon any personal notion of public policy with reference to a question which has been so often before the Court without any difficulty of that kind having ever been suggested. I think the rule to be extracted from the case of *Egerton* v. *Earl Brownlow* (4 Clark's H.L. Cases 1) is that the force of any objection on the ground of policy depends upon the tending of the testamentary disposition in question to affect conduct. But as your Lordship has pointed out, the succession to an existing peerage does not depend upon the conduct of anyone. It is not a thing which the heir to the peerage directs his conduct to obtain. It happens to him whether he will or not. And, accordingly, I think the principle of *Egerton* v. *Lord Brownlow* is quite inapplicable.

LORD JOHNSTON—I come to the same conclusion as your Lordship. But I prefer to reach it in a somewhat different way.

Miss Buchan died in 1910. On her death the succession to Auchmacoy opened to the heir of provision under her father's settlement of the estate, which contained a tailzied destination, though it was not a strict entail. The heir to Miss Buchan has to be sought in that destination. The present Earl of Caithness cannot serve heir of provision to Miss Buchan, because by the fact of his being already a peer at the date of her death, he is, on the authority of *Fleming's* case (M. 15,559), not the heir of investiture. In the circumstances the case is one of exclusion, not devolution. And as a case of exclusion it is, I think, simple.

Had the present Earl succeeded to the estate on Miss Buchan's death prior to his succession to the peerage, a case of devolution would have arisen, which I am glad I am not called on to consider. The authority of *Fleming's* case, 6 Macph. (H.L.) 113, is, I must assume, conclusive. Yet I have, unfortunately for myself, entirely failed to grasp how, consistently with the principle of Scots law, that without a trust or the fetters of an entail you cannot give an absolute right and yet control or forfeit that right, a fee-simple proprietor who is so absolutely master of his estate that he can burden and dispose of it at will, without any breach of trust, can suddenly find himself deprived of property so absolutely vested in him, and reduced by implication to a mere trustee for some-one else.

LORD MACKENZIE—I am of opinion that both questions should be answered in the affirmative. Although in the event which has happened, of the Earl succeeding to the peerage before the succession to Auchmacoy opened to him, the language of the conveyance does not directly apply, the proper construction to be put upon it has been concluded by authority adversely to the contention of the first party. This was decided in the case of *Fleming* v. *Lord Elphinstone* (M. 15,559). It makes no difference whether an heir of entail in possession succeeds to a peerage or a peer succeeds to the estate. The clause of devolution is meant to apply upon the co-existence of the two events, without regard to which happens first.

Nor is it necessary, in order that the clause of devolution shall operate, that it should be in a recorded deed of entail (*Fleming* v. *Howden*, 6 Macph. (H.L.) 113). It takes effect as a condition of the gift, which must qualify its terms.

It was contended that it was contrary to public policy for a person to adject as a condition to a bequest of his estate that it shall not be held by one who succeeds to a peerage, and shall not be taken by one who is already a peer. It has, however, been held that a similar condition is effectual if directed against particular peerages. I am unable to say there is a valid distinction between the one case and the other. The case of *Egerton* v. *Earl Brownlow* (4 H.L. C. 1) was different. Here what is provided against is not acquisition but succession, and there is no interference with the prerogative of the Crown. In the case of *in re Beard* (1908, 1 Ch. 383) a direct inducement was held out to a legatee not to enter the naval or military service of the country. This was held void, as striking against the security of the state. There is no such inducement here.

There is thus sufficient to conclude the case against the first party.

The Court answered both questions of law in the affirmative.

Counsel for First Party—Macphail, K.C. — Hon. W. Watson. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for Second Party—D.-F. Scott Dickson, K.C.—Macmillan. Agent—F. J. Martin, W.S.

Tuesday, November 7.

EXTRA DIVISION.

M'PHEE'S TRUSTEES *v.* M'PHEE AND OTHERS.

Succession—Trust—Uncertainty—Religious and Charitable Institutions.

A direction to testamentary trustees to "pay and divide the sum of £250 sterling, free of legacy duty, among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper," is not void from uncertainty.

On 20th January 1911 a Special Case was presented to the Court by Andrew Bolton and another, testamentary trustees of the late Hugh M'Phee, wine and spirit merchant, Eglinton Street, Glasgow (*first parties*), and James M'Phee, Thistle Street, Glasgow, the testator's brother, for his own