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

behoof and as tutor and administrator-in-law for his pupil children, and Isabella M'Phee or Kirkwood, the testator's sister, wife of and residing with Thomas Kirkwood, engineer, Glasgow, with the consent and concurrence of her husband (*second parties*), to decide as to the validity of one of the directions in the trust-disposition and settlement of the said Hugh M'Phee.

The direction in question was—"I direct and instruct my 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."

The Case stated—"7. The first parties *maintain* that they are entitled to select any institution or institutions in Glasgow and neighbourhood, each of which has for its object works of a combined religious and charitable character, and to pay over to such institution or institutions the said legacy of £250 in such proportions as they may think fit. 8. The second parties contend that the directions as to paying and dividing the said sum of £250 are too vague and indefinite to receive effect, and that the legacy is void in respect that the beneficiaries sought to be benefited cannot with reasonable certainty be ascertained. They accordingly maintain that the said sum becomes part of the residue of the testator's estate, and falls to be divided among them as residuary legatees."

The *questions of law* were—"1. Are the testator's directions as to paying and dividing the foresaid sum of £250 sterling sufficiently definite to receive effect, and are the first parties entitled to pay and divide the same in terms of said directions? 2. Does the said sum of £250 sterling become part of the residue of the testator's estate, and fall to be divided among the second parties as residuary legatees?"

Argued for the first parties — If the bequest had been to charitable institutions only it would have been valid — *Dick's Trustees* v. *Dick*, 1908 S.C. (H.L.) 27, 45 S.L.R. 683. It was true that "charitable or religious" had been held invalid — *M'Grouther's Trustees* v. *Lord Advocate*, 1907, (O.H.) 15 S.L.T. 652; *M'Intyre* v. *Grimond's Trustees*, March 5, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466—but in the present case "and" was used instead of "or," and therefore the bequest was valid—*Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212, *per* Lord Davey. In other words, the proper reading of the legacy was "charitable institutions of a religious nature"—*M'Intyre* v. *Grimond's Trustees*, January 15, 1904, 6 F. 285, 41 S.L.R. 225, *per* Lord Trayner *obiter*; *Smellie's Trustees* v. *Glasgow Royal Infirmary*, 1905, (O.H.) 13 S.L.T. 450. In *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046, 46 S.L.R. 707, a bequest to "educational, charitable, and religious purposes" had been held void from uncertainty, but in the present case the word used was "institutions," which was much more definite in meaning. [Lord Dundas referred to *Weir* v. *Crum Brown* (*Murdoch's Trustees* v. *Weir*), 1908 S.C. (H.L.) 3, 45 S.L.R. 335, and *Hay's Trustee* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908].

Argued for the second parties — The testator's directions were too vague to receive effect. The full wording of the clause was important. The word "divide" meant that the sum was to be paid to two classes, and therefore "and" was to be read as "or"—*Williams* v. *Kershaw*, 1835, 5 Cl. and Fin. 111; *M'Conochie's Trustees* v. *M'Conochie* (*cit. sup.*), *per* Lord Ardwall; *Hay's Trustees* v. *Baillie* (*cit. sup.*), *per* Lord M'Laren; *M'Intyre* v. *Grimond's Trustees* (*cit. sup.*), *per* Lord Moncreiff. In introducing the word "religious" there was introduced something which it was impossible to define. To sustain the bequest therefore was really to make a will for the testator.

LORD DUNDAS—The question raised in this Special Case is a short one, and, speaking for myself, I do not find it to be attended with serious difficulty. We are asked to construe a clause in a settlement whereby the testator directs his 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." The question we have to decide is whether that bequest is void from uncertainty or whether it is sufficiently definite to receive legal effect.

If one approached the question simply as a matter of ordinary construction, and in total ignorance of the decided cases, I should say that the bequest is sufficiently specific, and one which the trustees would have no practical difficulty in carrying into effect, and I should regard it as meaning that they were to divide this not very large sum of money among such institutions of a religious and charitable character in Glasgow and the neighbourhood as they might select. But we have been referred, and quite properly, to a number of cases more or less similar to the present, and we must of course pronounce our judgment having regard to what has been already decided by the Court. It seems clear enough that a bequest to such "charitable" institutions as the trustees might select would be good. There is no dispute about that. The word "charitable" has an ascertained meaning in law, and such a bequest would be beyond question. On the other hand, if it had been to such "religious or charitable" institutions as the trustees might select, without any limitation as regards locality or otherwise, the bequest, I take it, must have been held bad on the authority of the case of *M'Intyre* v. *Grimond's Trustees*, 1904, 6 F. 285, *revd.* 1905, 7 F. (H.L.) 90. In that case the House of Lords decided that owing to the very vague character of the word "religious" as used in the settlement, without any qualification as to locality or other aid to its understanding, it could not be given effect to; and as it was disjunctively used in connection with "charitable," the whole bequest was bad. Here we have not "religious or

charitable" but "religious and charitable" institutions, and we have the further feature that the field is not the whole world but is confined to Glasgow and the neighbourhood. As I have said, *prima facie* I should hold that the words mean institutions of a religious and charitable character, and that there is no division into two classes, as distinct from one another, of religious institutions and charitable institutions. We were referred to dicta in decided cases which seem to show that the phrase "religious and charitable" stands, as one would have thought, in a better position than "religious or charitable." Lord Davey in the case of *Blair* v. *Duncan* (1901, 4 F. (H.L.) 1) thought that a bequest to "charitable and public purposes" might have been quite good, whereas one to "charitable or public purposes" was, in his Lordship's opinion and in that of the House, invalid. In the same way Lord Trayner expressed an opinion in the case of *Grimond* (and the weight of his dictum is not affected by the fact that the judgment of the Court of Session was reversed on appeal) that "if the trust-deed had said 'charitable and religious societies' there would have been no question that the bequest was valid." We must also keep in view that in the present case the "religious and charitable institutions" are expressly confined to a very definite neighbourhood, and I think that is a circumstance of considerable weight in the matter. We were referred to a decision of my own in the Outer House in *Smellie's Trustees* v. *Glasgow Royal Infirmary* (1905, 13 S.L.T. 450), where I sustained a bequest to "other benevolent and religious societies in Glasgow and the West of Scotland." I see no reason to differ from what I then said as to the effect and weight of such limiting words. The case most pressed upon us by counsel for the second parties was that of *M'Conochie's Trustees* v. *M'Conochie* (1909 S.C. 1046), in the Second Division, where the words used were "educational, charitable, and religious purposes within the city of Aberdeen." Every case must be decided on its own language, and I am far from saying that I would have differed from the decision in *M'Conochie's Trustees*. But what I think turned the scale, certainly in the opinion of Lord Low, was that the word used was "purposes" and not "institutions." That is the ground of Lord Low's opinion, and I think the circumstance must necessarily have affected the minds of the other learned Judges who decided that case. There are many other cases bearing more or less on the matter. The First Division alone have quite recently decided three, viz., *Hay's Trustees* v. *Baillie* (1908 S.C. 1224), *Mackinnon's Trustees* v. *Mackinnon* (1909 S.C. 1041), and *Paterson's Trustees* v. *Paterson* (1909 S.C. 485), but I do not think any good purpose would be served in discussing them in detail; the cases are merely illustrations of the way in which the Court will approach a question like the present. In *Murdoch's Trustees* v. *Weir and Others* (1908 S.C. (H.L.) 3) the present Lord Chancellor put the rule in this way—"All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable a man of common sense to carry out the expressed wishes of the testator." And in the subsequent case of *Allan's Executor* v. *Allan* (1908, S.C. 807), at p. 814, Lord Kinnear, having quoted these words of Lord Loreburn, says—"That is, therefore, the rule which is held to be established by *Crichton* v. *Grierson* (3 W. & S. 329) and the subsequent cases, and the question to be put in each particular case is whether the description of the class to be benefited is sufficiently exact to enable an executor of common sense to carry out the expressed wishes of the testator." Applying this criterion I think only one answer can be given to the question before us, because I cannot suppose that trustees of common sense would have any difficulty in carrying out the directions which this testator has expressed. The Court, I take it, is always more inclined to sustain than to destroy a testament. I think there is ample ground, without in any way trenching upon decided cases, for upholding this bequest. I accordingly propose to your Lordships that the first question should be answered in the affirmative, and the second in the negative.

LORD MACKENZIE—I concur. I should only add, with reference to the argument which was first stated by Mr Lippe, that I am unable to give the effect which he desired to the word "divide." According to that argument the word "divide" was said to compel us to read the word "and" coming between "religious" and "charitable" as disjunctive and not conjunctive. I am unable to assent to that view. It appears to me the intention of the testator was that the object of his benefit was to be institutions in Glasgow and neighbourhood of which it could be predicated that they were both religious and charitable, and that the selection of the particular institutions and the proportion that each institution was to get was left to his trustees. So construing the expression "religious and charitable institutions," I entirely agree with the opinion of Lord Dundas.

LORD KINNEAR concurred.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First Parties—J. A. M'Laren. Agent—John M. Rae, S.S.C.

Counsel for the Second Parties—Lippe. Agents—Erskine Dods & Rhind, S.S.C.