taking all manner of fish as well within as upon or about the said island, and in the places surrounding the same, with hooks or nets, or in any other manner of way, and of salting or packing with salt (commonly called packing and peeling) the fish so caught or taken in casks, hogsheads, or barrels, or otherwise at their pleasure, and according to the custom of any other persons, with the teinds, parsonage and viccarage, of the said island and pertinents, as formerly comprehended under the Barony of Westbarns, and lying as foresaid, in so far as we have right to the said teinds, together with all right, title, and interest which we or our predecessors and authors had, have, or can anyway claim or pretend thereto in all time coming."

Following upon the said disposition in their favour, the Commissioners of Northern Lighthouses obtained a Crown charter of resignation, dated 20th December 1814, and written to the seal, registered, and sealed 16th February 1815, containing, *inter alia*, the following clause:—"Et cum proficuis privilegiis et pertinentiis earundem quibuscunque jacen in ostio maris et fluminis vel freti de Forth, intra dominium de Pittenweem et vicecomitatum de Fife cum libertate prehendi et captandi omnia genera piscium tam intra vel super quam circa dict. Insulam et in locis eandem circumambientibus cum hamis retibusve seu ullo alio modo ac saliendi vel condiendi (vulgo vocat. packing and peeling) pisces prehensos et captos in cadis doliis seu barellis vel aliter uti placeant ac secundum consuetudinem ullarum aliarum personarum cum decimis rectoriis et vicariis dictæ Insulae et pertinentium uti antea intra baroniam de Westbarns comprehensis et jacen ut prædicitur."

In virtue of a precept contained in the foresaid charter, the Commissioners of Northern Lighthouses were infeft in the subjects above mentioned, conform to instrument of sasine in their favour, dated 12th, and recorded 19th, September 1815.

The Commissioners of Northern Lights contended that in virtue of the titles above mentioned they had exclusive right to the salmon fishings in the sea surrounding the Isle of May, in so far as the right admits of being exercised from the island.

On the other hand, the Commissioners of Her Majesty's Woods and Forests maintained that the Crown is vested with the rights to these fishings notwithstanding the terms of the titles above mentioned, inasmuch as the Commissioners of Northern Lighthouses have not exercised the right by net and coble, or otherwise, for the prescriptive period. The Commissioners of Northern Lighthouses admitted that they have not so exercised the right.

The questions put to the Court were:

1. Whether, in the circumstances above explained, the salmon fishings around the Island of May belong to the Commissioners of Northern Lights? or
2. Whether the said salmon fishings are vested in and belong to Her Majesty?

Authorities cited—Ersk. Inst., ii. 2, 615; Ersk. Prin., ii. 2. 11; *Menzies*, 19 F.C. 531; *Forbes*, M. 14,250, 7812; *Campbell*, M. 14,250; *Gemmell*, 13 D. 854; 8 Macph. 419.

At advising—

Lord Justice-Clerk—This is a question of novelty but of no great difficulty. The title of the Commissioners was acquired from a crown vassal in 1814. The Duchess held the barony of Westbarnes of which the island is a part, with the clause we have here, and the question is, although it is not alleged the Commissioners have ever captured a single salmon, whether these words confer a right of salmon fishing on them? It is plain the right conveyed by the disposition of 1814 cannot be wider than the right held by the Duchess, and so the question is what her right was? Is it different from the right conferred by an ordinary clause *cum piscationibus* without possession following. The same question was raised in the two cases of *Forbes* and *Campbell*. In the case of *Forbes* there was strong proof of possession; both parties alleged possession, and the judgment did proceed on possession, and found possession by wand and spear insufficient. Probably also in 1701 the general rule was not so firmly fixed that a clause *cum piscationibus* was good to constitute prescriptive possession but not a grant of salmon fishings. The case of *Campbell* is so imperfectly reported that the grounds of judgment cannot be ascertained. I think the clause here really relates to those kinds of fishings which can be conveyed as a pertinent of lands, and not as a separate tenement, so that salmon fishings are not included.

Lord Benholme—I concur. This is a question of title requisite to constitute the regalia of salmon fishing. I think the title insufficient, and the want of any enjoyment to give colour to doubtful expression makes the case clear.

Lord Neaves—I concur. I think the general clause without possession insufficient to convey the right of salmon fishing.

Lord Ormidale concurred.

The Court answered the first question in the negative, but declined to answer the second question.

Counsel for Lord Advocate—Solicitor-General (Millar) and Ivory. Agent—Donald Beith, W.S.

Counsel for the Commissioners—Rutherfurd and Dean of Faculty. Agent—A. Cunningham, W.S.

Wednesday, May 27.

SECOND DIVISION.

SPECIAL CASE—MATTHEW DYER AND OTHERS.

Succession—Settlement—Substitution.

By antenuptial contract A conveyed to B, her intended husband, *de presenti* her whole property, and renounced her legal rights, while B assigned to A if she survived him all he might leave at his death, and failing her by decease before or after him, in favour of the lawful children alive on the death of the longest liver. A survived B and died leaving a conveyance of her whole means and estate in favour of C.

In a question with the disponee under the conveyance of A and the issue of the marriage—*Held* (1) that the right of the children was that of substitutes.

(2) That the institute was entitled to evacuate the substitution gratuitously.

(3) That the substitution was competently evacuated, and included a sum of £300 not specially mentioned.

Mathew Dyer, farmer, Lanarkshire, died on 18th March 1872, having been thrice married.

The parties of the first part to this Special Case are the whole surviving children and grandchildren of his first and second marriages, with the exception of two daughters. He had no marriage-contract with either his first or second wife. On 1st June 1863 the said deceased Matthew Dyer entered into an antenuptial contract with Janet Weir, who afterwards became his third wife, and who brought him a sum of £300 or thereby. There was no issue of the marriage. Janet Weir or Dyer survived her husband and died on 13th July 1873, leaving a disposition and settlement dated 28th January 1873. The disponee under that settlement is the party of the second part in the case. The antenuptial contract contained the following mutual provisions:—"In contemplation of which marriage, and in consideration of the provisions underwritten, the said Matthew Dyer, with consent and concurrence of the said Janet Weir, hereby assigns, dispones, conveys and makes over to and in favour of the said Janet Weir and her assignees and disponees, in case she shall survive him, the said Matthew Dyer, and failing her by decease either before or after him, to and in favour of his, the said Matthew Dyer's, lawful children who shall be surviving at the decease of the longest liver of himself and the said Janet Weir, including the issue of any such children who may then be deceased, as representing the parent or respective parents *per stirpes*, and that in such shares and proportions as he, the said Matthew Dyer, may fix by any writing under his hand, which failing, equally amongst them share and share alike, All and Sundry lands and heritages, goods, gear, debts, and sums of money, and in general the whole means and estate, heritable and moveable, of every description now belonging, or that shall happen to belong or be due to him at his decease, with the whole writs, vouchers, and instructions of the same, and all that has followed or may follow thereupon, but always with and under burden of his just and lawful debts and sick bed and funeral expenses, and declaring that none of the substitutes under the above destination shall be any way entitled to interfere with the said Janet Weir during her survivance in regard to the management or disposal of the said means and estate, and the said Matthew Dyer hereby appoints the said Janet Weir, in case she shall survive him, to be his sole executrix, excluding all others from that office. For which causes, and on the other part, the said Janet Weir hereby assigns, dispones, conveys, and makes over to and in favour of the said Matthew Dyer, All and Sundry lands and heritages, goods, gear, debts, and sums of money, and in general the whole means and estate, heritable and moveable, of every description, now belonging to her or which she may succeed to or acquire during the subsistence of the said intended marriage, with the whole writs, vouchers, and instructions of the same, and all that has followed or may follow thereon, but declaring always that the said Matthew Dyer shall be bound and obliged, as he hereby binds and obliges himself, his heirs and representatives, at the decease of the longest liver of himself and the said Janet Weir, to make payment of the sum of £100 sterling to the children then surviving of Isabella Weir or Carruthers, sister of the said Janet Weir, and that equally amongst them, and including in the division the issue of any children of the said Isabella Weir or Carruthers who may then be deceased, as representing the parent or respective parents *per stirpes;* which provisions above contained in favour of the said Janet Weir she hereby accepts in full of all terce, *jus relictæ*, and other legal claims competent to her against the estate of the said Matthew Dyer in case of his decease." The disposition by Mrs Dyer conveyed to Isabella Weir "All and Sundry the whole means and estate, heritable and moveable" belonging to the disponer at her decease.

The party of the second part claimed the whole estate of the said Matthew Dyer as having been conveyed to Janet Weir, and carried by her settlement, subject to an accounting with the children of Matthew Dyer for legitim. At all events she claimed the £300 which belonged to Janet Weir.

The parties of the first part maintained that the destination in their favour in the marriage-contract was pactional in its nature and could not be defeated by any deed of Janet Weir to take effect at her death.

The questions submitted to the Court were:—"(1) Whether, in the circumstances, the first parties are entitled to a proportional part, being seven-ninth parts or shares, of the whole estate of the deceased Matthew Dyer, of which the said Janet Weir or Dyer died possessed, under deduction of his just and lawful debts, and of the sum of £100 contained in the said marriage-contract? (2) In the event of the first question being answered in the affirmative, Whether the foresaid sum of £300, which belonged to the said Janet Weir or Dyer, is included in the said estate, or falls to the said second party?"

Authorities quoted—Stair, iii, 5, 1; Ersk. iii., 8, 44; *M'Dowall* v. *M'Gill*, 9 D. 1284; *Barrie* v. *Craig*, 7 D. 845; *Leith*, 3 W. & S. 366.

At advising—

LORD JUSTICE-CLERK—Three questions arise under this contract,—first, whether the right of the first parties, the children of the first marriage, under this contract be that of proper substitutes or that of conditional institutes; secondly, whether, if there be here a proper substitution, the institute was entitled to alter and evacuate it gratitously; and thirdly, whether Mrs Dyer's general settlement did evacuate the substitution.

As to the first there is no doubt, and indeed no dispute. The terms of the contract show quite clearly that a proper substitution was intended. The nature of the deed was that Janet Weir conveyed to her intended husband *de præsenti* her whole property, and renounced her legal rights; while, on the other hand, Matthew Dyer, the intended husband, conveyed to her, if she survived him, all that he might leave at his death; "and failing her by decease, either before or after him," in favour of his lawful children who should be in life at the death of the longest liver. It is plain, therefore, that this right did not depend on the predecease of Mrs Dyer, and therefore was not a conditional institution, but a proper substitution.

On the second question, it is well settled that a substitution unaccompanied by a prohibition to alter is not a condition of the institute's right; but, on the contrary, that the substitute's right is

conditional on the institute not having altered; and Stair lays this down very clearly—"The ordinary intent of such clauses is to appoint portions for the bairns named therein, who therefore are substitute heirs of provision to their father, so that if he do not expressly alter or prejudge the substitution his intent is that they succeed him whensoever." And again—"The nature and intent of such clauses is not to constitute the first person as a naked liferenter, but that they are understood as if they were thus expressed—'With power to the first person to alter and dispose at his pleasure during his life.'" The only exception which subsequent practice has admitted to this rule is when the substitution is in favour of the granter himself under a clause of return; in which case it has been held that the granter is only divested conditionally and *sub modo*, and that the property must revert when the condition is fulfilled, preferably to gratuitous disponee of the institute or his heirs. But even in this case the institute may alter gratuitously if his original right was onerous or in fulfilment of a prior obligation. The general effect, however, of a bare substitution or destination, even when the right of the institute is gratuitous, has never been doubted, and no authority to the contrary was quoted to us. The cases in regard to clauses of return, collected in Morrison's Dictionary under the head of Fiar, Absolute and Limited, and especially the case of the *Duke of Hamilton* v. *Douglas*, there reported, illustrate this branch of the law very fully.

But, no doubt, a destination may be accompanied by a prohibition to alter, gratuitously imposed on the institute; and this may be either express or derived from clear implication. It was maintained that such a prohibition was implied here—first, from the general tenor of the contract, and, secondly, from its special clauses.

As to the first, I am of opinion that the general tenor of the contract leads to the very opposite presumption. This conveyance proceeded on the most onerous considerations as regarded the institute. It was contained in her antenuptial marriage-contract. She renounced her legal rights, and she brought her husband £300—about half of what he ultimately left. On the other hand, the right of the children of the first marriage was not onerous in any sense. They gave no consideration for it. There was no obligation of any kind on either party to the contract to confer it, and their legal rights in their father's succession were not only not impaired, but were necessarily augmented by the wife's fortune. They were, as regarded this provision, simply third parties.

As regards the clause in the contract declaring "that none of the substitutes shall be entitled to interfere with Janet Weir during her survivance in regard to the management or disposal of the said means and estate," and which is supposed to limit the right of the institute, I should hesitate merely from words of limitation on the substitutes to spell out a restriction on the right of the institute. The inference, at the best, is uncertain and ambiguous, But I read this clause differently. I think it merely expresses what Lord Stair says such clauses imply, an absolute right in the widow during her survivance to manage and dispose of the property, and the absence of all right or interest on the part of the substitutes to prevent her. There is not a word said as to the clause being limited to deeds to take effect during the institute's survivance; and I see no reason to infer that such was its intention.

On the third question, how far Mrs Dyer's general settlement did evacuate the substitution, the point was decided *in terminis* in the case of *Leitch*, in the House of Lords, 3 W. and S. 366, and was treated in the case of *Baine* v. *Craig*, 7 D. 845, as not being open to argument.

The other Judges concurred.

Counsel for Parties of the First Part—Darling. Agents—Gillespie & Paterson, W.S.

Counsel for Parties of the Second Part—Kinnear and H. Moncrieff. Agents—Maconochie & Hare W.S.

Wednesday, May 27.

SECOND DIVISION.

SPECIAL CASE FOR JAMES CRAIG, INSPECTOR OF THE POOR OF THE PARISH OF ST CUTHBERTS, AND THE EDINBURGH STREET TRAMWAYS COMPANY.

Poor—Stat. 8 *and* 9 *Vict. c.* 83.

Held that a Tramway Company were liable to be assessed for support of the poor, as owners and occupiers of lands and heritages.

The party of the first part to this Special Case was the Inspector of the Poor of St Cuthbert's Parish, Edinburgh. The second party was the Edinburgh Tramway Company. The questions submitted for the opinion of the Court were:—

"(1) Are the Tramways belonging to the second party liable to assessment for poor rates as lands and heritages?

"(2) Is the second party liable to be assessed for poor rates as occupier and owner of such lands and heritages, or as owner, or as occupier, of such lands and heritages?"

The Tramway Company are incorporated by the Act 34 and 35 Vict., in which are incorporated, *inter alia*, parts II and III of the Act 33 and 34 Vict. c. 78. By sec. 57 of the last mentioned Act it is enacted that, "notwithstanding anything in this Act contained, the promoters of any tramway shall not acquire or be deemed to acquire any right other than that of user of any road along or across which they lay any tramway, nor shall anything contained in this Act exempt the promoters of any tramway laid along any turnpike road, or any other person using such tramway, from the payment of such tolls as may be levied in respect of the use of such road by the trustees thereof." The second party stated that the assessor of railways and canals has valued the line of tramways belonging to the said second party, and has included the said line in the valuation roll prepared by him for the year from Whitsunday 1872 to Whitsunday 1873 as lands and heritages belonging to or leased by and forming part of the undertaking of the second party—and the yearly value of the said 2 miles 41 chains of the second parties' line situated within the parish of St Cuthberts and burgh of Edinburgh is stated by him to be £904. The first party, in terms of their powers of assessment, imposed upon the second party as owner and occupier of the said line of tramways an assessment for the relief of the poor of the said parish, for the year ending Whit-