respect to the position of the lights, second, in respect to the kind of burners that are to be provided, and third, in respect of the way in which these are to to be maintained.

The pursuer might have countered that case and averred herself out of the Act by alleging that the provisions of the Act had not been followed. But all that she says is, "The section of the Act mentioned in answer is referred to," thereby I think justifying the assumption that the Act was complied with. The pursuer's case is quite consistent with the inspector having been there that morning, or the night before when the burners were lighted, and having passed everything as in his opinion sufficient in the particular circumstances.

I therefore think the Sheriff-Substitute has taken the right course in dismissing the action.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Reclaimer (Pursuer)—Johnston, K.C.—M. P. Fraser. Agents—Oliphant & Murray, W.S.

Counsel for the Respondent—Munro, K.C.—Lippe. Agents—Macpherson & Mackay, S.S.C.

Saturday, October 18.

FIRST DIVISION.

MACLEOD'S TRUSTEES *v.* MACLEOD'S TRUSTEES AND OTHERS.

Succession—Faculties and Powers—Apportionment—Liferent Given to Objects of the Power and Fee to Strangers—Consent of Liferenters.

By antenuptial marriage contract a person reserved to himself a power to apportion among his children the sum of £1000, contained in a policy of assurance on his life assigned to the trustees, who were to divide the proceeds after fulfilling certain purposes among the children, and a sum of £2000, which he thereby became bound to pay to his children at the date of his death. By his trust-disposition and settlement, under declaration that the provisions were made by him in exercise of his power of apportionment, he left legacies of £25 to each of his sons, and thereafter directed his trustees to hold a sum of £7000, which more than exhausted his estate, for his two daughters in liferent and their children in fee.

Held that although the fee of part of the fund to be apportioned had been given to strangers to the power, yet the liferenters being objects of the power and consenting, the power of apportionment had been validly exercised.

Mackie v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814, *commented on per curiam*, and *dub. per* Lord Johnston.

Charles Campbell M'Leod and others, marriage-contract trustees of the Rev. John Macleod, D.D. (*first parties*); the said Charles Campbell M'Leod and others, testamentary trustees of the said Dr Macleod (*second parties*); John Norman Macleod, the Rev. William Arthur Macleod, Charles Roderick Macleod, and Norman Augustus Macleod, sons of the said Dr Macleod (*third parties*); the said Norman Augustus Macleod, executor of the deceased Duncan Archibald Macleod, another son of the said Dr Macleod (*fourth party*); the Rev. Robert Baldock Scott and others, the marriage-contract trustees of Mrs Alexa Evelyn Macleod or Scott, a daughter of the said Dr Macleod, with the consent and concurrence of the said Mrs Scott and her husband (*fifth parties*); and Leonard Walter Dickson and others, the marriage-contract trustees of Mrs Margaret Eleanor Macleod or Macdonald, a daughter of the said Dr Macleod, with the consent and concurrence of the said Mrs Macdonald and her husband (*sixth parties*), brought a Special Case to determine whether the said Dr Macleod, by his trust-disposition and settlement, had validly exercised a power of apportionment reserved by him in his antenuptial marriage contract.

The Case stated—"1. By the *contract of marriage* of Dr and Mrs Macleod (hereinafter referred to as the marriage contract) Dr Macleod assigned to the trustees therein named a policy of assurance with the Life Association of Scotland for £1000, on his own life, upon the trusts and for the uses, ends, and purposes specified in the marriage contract, and he provided in the fifth place that after the death of the spouses the proceeds of the life policy should be held for the children of the marriage as therein set forth, and in particular he provided 'that if there shall be more than one child of said intended marriage it shall be lawful to and in the power of the said John Macleod, at any time of his life and while unmarried, after the death of the said Alexandrina Macpherson, and even on deathbed, to divide and proportion, as he shall think fit and proper, among said children, the foresaid principal sum of £1000 or the balance thereof, and any additions thereto and interest thereof hereinbefore provided to them, and failing of any such division, then the said sum of £1000 or the balance thereof, and any additions thereto and interest thereof, shall belong to and be divided among said children equally and share and share alike.' 2. The marriage contract also contains the following obligation by Dr Macleod, viz.—'And for provisions to the children, if any, of the said intended marriage, the said John Macleod binds and obliges himself and his foresaids to pay to such child or children the sum of £2000 sterling as at the date of his death, with interest at the rate foresaid from that date till payment, and that in such shares and proportions, if more than one child, as he shall fix and appoint by any writing under his hand, and failing such writing, then equally and share and share alike.' 3. It was also declared by the marriage contract

that the provisions conceived in favour of the children of the marriage were in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else they could claim or demand by or through the decease of Dr Macleod, excepting what he might think fit to bestow of his own good will only. . . . 4. Dr Macleod died on the 4th day of August 1898, leaving the *trust-disposition and settlement* before mentioned (hereinafter referred to as the trust-disposition and settlement) by which he conveyed to the trustees therein named his whole estate and effects, heritable and moveable, belonging to him at his decease, 'including therein any sum or sums of money to which I have right or over which I have power of disposal under and in virtue of the contract of marriage entered into between me and my said wife, dated 24th August, and recorded in the Books of Council and Session 31st October, both in the year 1863.' 5. After providing for payment of his debts and deathbed and funeral expenses, and directing his trustees to fulfil all obligations incumbent upon or prestable against him in favour of his wife under the contract of marriage, Dr Macleod, by the fourth purpose of the trust-disposition and settlement, directed his trustees, at the first term of Whitsunday or Martinmas occurring not less than three months after his decease, to pay to each of his sons, on their respectively attaining majority, the sum of £25 sterling, and by the fifth purpose he directed his trustees to hold the residue of his estate for behoof of his wife in liferent. 6. The sixth purpose of the trust-disposition and settlement is as follows:—'I direct and appoint my trustees, upon the death or second marriage of my said wife, or upon the youngest of my surviving sons attaining majority, should such event not take place before the death or second marriage of my said wife, and in the event of there being two or more of my daughters surviving, to hold, retain, and invest, in their own names as trustees foresaid, a sum of £7000 sterling out of the remainder of my means and estate, and to pay or apply the free annual income arising therefrom to or for behoof of my said daughters in equal proportions for their liferent alimentary use allenarly, and on the death of any or all of my said daughters leaving lawful issue, my trustees shall pay to or for behoof of such issue, in equal proportions, the share of free annual income which would have effeired to their mother had she survived, and on the youngest of said issue attaining majority (until which event vesting shall not take place), my trustees shall pay to the issue then surviving, and equally among them, the share of the capital of the fund hereinbefore directed to be liferented by their mother and them respectively.' The residue clause is as follows, viz.—'I direct and appoint my trustees in the event of there being any residue of my means and estate remaining after setting aside the sum of £7000 sterling . . . to pay and divide said residue equally to and among my sons on their respectively attaining majority, the lawful issue of any of my sons who may have predeceased taking their parent's share equally among them *per stirpes*.' 7. By the trust-disposition and settlement Dr Macleod declared as follows:—'I hereby declare that the provisions hereinbefore conceived in favour of my sons and daughters are made by me in exercise of the powers of apportionment and division conferred upon me by the foresaid contract of marriage in regard to a sum or provision of £2000 sterling, and the contents or proceeds of a policy of assurance for £1000 sterling effected on my life, both particularly mentioned in said contract of marriage, and shall be accepted of by my said sons and daughters in full satisfaction of all claims competent to them or any of them on my decease under said contract of marriage in regard to said sum or provision of £2000 sterling, and the contents or proceeds of said policy of assurance for £1000 sterling: And I hereby specially provide and declare that the share or proportion in said sum or provision of £2000 sterling, and the contents or proceeds of said policy of assurance for £1000 sterling, of any of my sons or daughters who may repudiate the provisions hereinbefore conceived in their favour and betake themselves to their rights under the said contract of marriage shall be limited and restricted to the sum of £25 sterling each, and the sons or daughters so repudiating shall forfeit, not only for themselves but also for their issue, all further interest, not only in said sum or provision of £2000 sterling and the contents or proceeds of said policy of assurance for £1000 sterling, but also in the remainder and residue of my means and estate, in the same way and manner as if such sons or daughters had predeceased me without issue.' 8. Dr Macleod was survived by Mrs Macleod and the following children, who had all attained majority at the date of his death:—(1) John Norman Macleod; (2) William Arthur Macleod; (3) Charles Roderick Macleod; and (4) Norman Augustus Macleod, who are the third parties hereto; (5) the since deceased Duncan Archibald Macleod, whose executor is the fourth party; (6) Alexa Evelyn Macleod, now Mrs Scott, whose marriage trustees are the fifth parties hereto; and (7) Margaret Eleanor Macleod, now Mrs Macdonald, whose marriage trustees are the sixth parties hereto. 9. Mrs Macleod died on the 20th day of May 1910, survived by the children above named, other than Duncan Archibald Macleod, who predeceased Mrs Macleod, and died on 9th December 1907, survived by his children Duncan Crawford Macleod and Deirdre Macleod, who are in pupillarity. Mr Norman Augustus Macleod, Mr Duncan Archibald Macleod's executor, is the fourth party hereto. . . 12. At the date of Mrs Macleod's death the investments and cash representing the proceeds of the life policy amounted to £1170, 12s. 6d., and the investments and cash representing the estate

belonging to Dr Macleod personally to £2813, 11s. 4d., amounting together to £3984, 3s. 10d."

The following *question of law* was, *inter alia*, submitted:—"Is the exercise of the power of appointment contained in Dr Macleod's trust-disposition and settlement (*a*) wholly valid, (*b*) only partially valid, or (*c*) wholly invalid as an exercise of the power reserved in the marriage contract with reference to the policy of assurance and the sum of £2000?"

Argued for the third and fourth parties—The power of apportionment had not been validly exercised, in respect that part of the fund was given to persons who were not objects of the power. But for the consent of the liferenters the apportionment was clearly bad, and their consent alone was not enough to cure the defect. There would require to be consent on the part of all the objects of the power, each of whom had a *spes* which extended over the whole fund—*Crum Ewing's Trustees* v. *Bayly's Trustees*, 1910 S.C. 484, *per* Lord Kinnear at p. 497, 47 S.L.R. 423, at p. 430. *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814, relied on by the fifth and sixth parties, stood alone, and was inconsistent with the principle that a power of apportionment authorised apportionment among the objects of the power only. So far as *Mackie* (*cit. sup.*) decided that the consent of an object of the power whose right was restricted to a liferent would validate a gift of the fee to a stranger to the power, it was the considered judgment of the Lord Ordinary only, and the authorities relied on by him did not bear out the proposition—*MacGillivray's Trustees* v. *Watson's Trustees*, 1911 S.C. 1103, *per* Lord Dundas at p. 1109, 48 S.L.R. 887, at p. 891. Moreover, *Mackie* (*cit. sup.*) did not apply, as the present case contained no statement that the liferenters consented. The conditions were here so immixed with the benefits conferred by the exercise of the power that it was impossible to separate what was good from what was bad, and the exercise was consequently wholly invalid—*Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, *per* Lord President at p. 553, 42 S.L.R. 404, at p. 408; *Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, 43 S.L.R. 718. The apportionment made by the testator in the event of his sons or daughters repudiating the provisions contained in the trust-disposition and settlement was not a valid exercise of the power, as it was not a *bona fide* exercise thereof, but an attempt to concuss the beneficiaries into acquiescence in an invalid exercise of the power—*Dick's Trustees* v. *Cameron*, 1907 S.C. 1018, *per* Lord Low at p. 1026, 44 S.L.R. 753, at p. 757.

Argued for the fifth and sixth parties—No doubt an apportionment to children in liferent and their issue in fee would be bad if the liferenters did not consent, but in the face of that consent such an exercise of a power of apportionment was not open to challenge. Here the consent of the liferenters must be assumed from the fact that they were in Court supporting the exercise of the power as valid. It would be perfectly lawful for the donee of a power of apportionment to give a share to one of the objects of the power, and for the beneficiary thereafter to divest himself of the fee of the share in favour of his issue. In this case the exercise of the power consented to by the liferenters was just doing in one act what could thus have been done in two. It would be a very narrow distinction to hold that the liferenters' consent could not be given after the death of the donee of the power. The present case was indistinguishable from *Mackie* (*cit. sup.*). The apportionment in the event of repudiation was not an attempt to concuss the sons, whatever it might be *quoad* the daughters, as the sons got the same under the alternative apportionment as under the first. The facts in the present case were quite different from those in *Dick's Trustees* (*cit. sup.*), where there was clearly an attempt to concuss children into accepting an apportionment which the father had no power to make.

At advising—

LORD KINNEAR—[*After a narrative of the facts*]—Now it is perfectly clear—and it is not disputed—that it is no objection to the exercise of the power that he has thrown the moneys to which it applies into the general estate and disposed of them in terms as if they were part of the general estate. Nor is it any objection that if the will takes effect, the sons will have little more than what has been called an elusory gift—£25—the greater part of the small estate remaining to be divided going to the daughters in liferent and to their children in fee. So far the execution of the power is admitted to be perfectly regular and valid, but then the question which has occasioned the present dispute arises.

The dispute arises from his settlement of the shares which he gives to his daughters, upon them in liferent and their children in fee, because it is obvious that that brings into the distribution persons who are not objects of the power, to wit, the grandchildren. He is bound by his marriage contract to divide these moneys among his children, and the grandchildren being outside the limits of the power to which he is by contract restricted, it is said that the execution of the power has failed, and that the estate must be divided among the children equally.

Now I think that might have raised a question of considerable difficulty if it had not been already settled by authority which is binding upon this Court. But it is exactly the question which arose for decision in the case of *Mackie* v. *Mackie's Trustees*, where it was held that under a power to appoint among children, interests might be given to grandchildren, either by way of settlement or otherwise, with the concurrence of their mother, provided that the mother herself was an object of the power. I take that to be quite clearly and distinctly laid down as law in that case. The circumstances were exactly the same as those with which we are concerned, because the testa-

trix in that case had settled by marriage contract certain heritable and moveable estate for herself in liferent and for her children in fee in such proportions as she might appoint by writing under her hand. She died leaving a trust-disposition and settlement in which she stated her intention to exercise this power of appointment, and directed her trustees to pay a certain legacy to her son and the rest of her estate to her daughter in liferent and the daughter's children in fee. Now that is exactly the same position as we have to consider. It was objected on behalf of the son that the exercise of the power was invalid, because it brought in persons who were not objects of the power. The Court held, on the ground I have mentioned, that the power was well exercised in so far as it settled a liferent upon the daughter and the fee upon her children, inasmuch as she consented to that disposition of the fund.

I think that case is binding upon us, and that we are bound to follow it. If it were open to consideration we should have no power to review or to overrule it, as the Court is at present constituted; and the only way in which, if it were erroneous, it could be corrected would be by an appeal to the House of Lords or by decision of a Court of Seven Judges. I should not have been averse to take the second of these two courses if the estate with which we are concerned had been a large one, but I should have assented to that proposal only out of deference to certain views which have been expressed in the other Division in a later case, and also in deference to what I believe to be the view of my learned brother Lord Johnston. As far as I am concerned I see no reason to doubt that the decision in *Mackie* v. *Mackie's Trustees* is based upon a body of authority which justifies it. I think the law has been laid down by the highest authorities, and especially by the authority upon whom we always have looked as the weightiest of all authorities upon the doctrine of powers, Lord St Leonards. And in the series of cases to which I have already referred, it is no objection to the exercise of a power that it gives the fee to the grandchildren, who are not objects of the power, provided that that is done with the consent of a parent who is an object of the power and to whom the liferent is given.

In the present case there can, of course, be no question at all that we have the consent of the daughters so far as their interest is concerned, and that we must proceed upon that consent, because they have expressed it in the simplest and most effective of all possible ways by appearing in this case and supporting the execution of the power by their father's will as valid. We must take it, therefore, that the thing is done with their approval and consent.

In those circumstances I should not myself have thought it necessary that the case of *Mackie* v. *Mackie's Trustees* should be reconsidered, but if there had been sufficient estate in dispute to justify such a course I should not have been averse to the proposal to send this case to Seven Judges. But then the estate is an extremely small one—there is not much over £3000 to be divided, I think, among six children—and I think it would be really oppressive to expose these people to the expense of further litigation and a new hearing because of any difficulty which this Court might have in accepting the case of *Mackie*. My own view is that whatever our own opinion may be we are bound by it, but so far as I am concerned I see no reason to doubt its soundness.

I should therefore propose to your Lordships to answer the first question in the affirmative in so far as it regards the first alternative of that question: Is the exercise of the power of appointment contained in Dr Macleod's trust-disposition and settlement wholly valid? I think we should say that it is.

LORD JOHNSTON — The late Rev. John Macleod unquestionably intended by his will to exercise a power of appointment among his children of the provision made by him for them in his antenuptial marriage contract. It is not immaterial to note that these provisions were onerous, the children's legal right being by a term of the contract satisfied thereby. Dr Macleod exercised his power by a practically elusory appointment to his sons and the appointment substantially of the whole fund to his daughters equally in liferent and their issue in fee. *Prima facie*, therefore, this is *quoad* the fee, an appointment in favour of strangers to the power. But it is said that such an appointment, the daughters raising no objection to the settlement upon their children, is valid on the authority of *Mackie's* case (12 R. 1230). I have carefully examined that case and the authorities on which it proceeded, and I am satisfied that it is so closely identical with the present that we could not do otherwise than sustain the appointment here without repudiating its authority. I agree with your Lordship that we are bound to follow it, or submit the question to a combined Court of both Divisions. It is not without hesitation that I concur in abstaining from the latter course in the present case. But the reasons which your Lordship has stated, and in which I understand that Lord Mackenzie concurs, prevail. At the same time I desire respectfully to associate myself with the doubt of the authority of the decision in *Mackie's* case, expressed by Lord Dundas in the case of *MacGillivray's Trustees* (1911 S.C. 1103). I am not satisfied that the English authorities on which the judgment in *Mackie's* case proceeded have been examined with sufficient discrimination, and I think that the question is deserving of reconsideration in a more appropriate case than the present.

I therefore concur in disposing of this Special Case as your Lordship proposes.

LORD MACKENZIE—I agree with Lord Kinnear. I am prepared in this case to follow the decision in the case of *Mackie*, an authority which is directly in point.

The Court answered the first alternative of the first question of law in the affirmative.

Counsel for the First, Third, and Fourth Parties—Moncrieff, K.C.—Black. Agents—Bell, Bannerman, & Finlay, W.S.

Counsel for the Second Parties—Howden. Agents—Bell, Bannerman, & Finlay, W.S.

Counsel for the Fifth and Sixth Parties—Blackburn, K.C. — Hon. W. Watson. Agents—Horne & Lyell, W.S.

Friday, October 24.

FIRST DIVISION.

[Sheriff Court at Hamilton.

SCULLION *v.* CADZOW COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8, *sub-sec.* (2), *and Third Schedule—Industrial Disease—Process of Mining—Surface Worker at Pit-head.*

A workman was engaged as a surface labourer at a colliery pit-head on 8th and 9th January 1913, and on the latter day was attacked by pain in the head and dizziness. He subsequently obtained from the certifying surgeon a certificate that he was suffering from nystagmus, that in consequence he was disabled from earning full wages, and that the date of his disablement was 9th January 1913.

Held that he was not employed in any process of mining within the meaning of section 8, sub-section (2), and the Third Schedule of the Workmen's Compensation Act 1906, and consequently was not entitled to the statutory presumption thereof, viz., that the disease was due to the nature of the employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8—"(1) Where (i) the certifying surgeon appointed under the Factory and Workshop Act 1901, for the district in which a workman is employed, certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act, and is thereby disabled from earning full wages at the work at which he was employed, . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, he or his dependants shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications: — . . . (2) If the workman at or immediately before the date of the disablement . . . was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment unless the employer proves the contrary."

By Order in Council, dated 22nd May 1907, the lists of processes and diseases contained in the Third Schedule to the Act was extended to include, *inter alia*:—

Description of Disease or Injury.	Description of Process.
Nystagmus.	Mining.

Denis Scullion, miner, 4 M'Creath Street, Cadzow, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 from his employers, the Udston Coal Company, Limited, Hamilton, *respondents*, on the ground that he was suffering from nystagmus, being one of the scheduled diseases to which the Act applied.

Being dissatisfied with the determination of the Sheriff-Substitute (HAY SHENNAN), acting as arbiter under the Act, Scullion appealed by Stated Case.

The Case stated, *inter alia*—"The appellant founds his claim on the certificate of disablement after mentioned, and claims compensation on the ground that at or immediately before the date of his disablement he was in the respondents' employment in their Cadzow Colliery, Hamilton.

"Proof was led before me on 17th March and 21st April 1913, when the following *facts* were admitted or proved:—1. The appellant worked as a miner in the respondents' employment at Cadzow Colliery, Hamilton, from October 1911 to 1st May 1912, when his right eye was injured by a spark from a pick and he became totally incapacitated for work. The respondents paid the appellant compensation down to 4th January 1913, when payment was stopped on the ground that the appellant was then fit to resume work. No claim is made in the present arbitration in respect of this accident. 2. On payment of compensation being stopped the appellant obtained work as a surface labourer at the respondents' pit-head and wrought there on 7th and 8th January 1913, but he had to give up work on account of pain in his forehead and dizziness. 3. On 23rd January 1913 the appellant obtained a certificate from the certifying surgeon that he was suffering from nystagmus and was thereby disabled from earning full wages, and that the disablement commenced on 9th January 1913. The respondents appealed to one of the medical referees under the Act, but their appeal was dismissed on 8th February 1913. 4. During the twelve months previous to the date of the appellant's disablement (9th January 1913) he worked with the respondents as a miner below ground from 9th January 1912 to 1st May 1912, and as a surface labourer on 8th and 9th January 1913. During the period intervening between those periods of employment he was off work owing to the accident of 1st May 1912. 5. It is not proved that the appellant suffered from nystagmus either between 9th January 1912 and 1st May 1912 or at any previous period. 6. The Cadzow pit in which the appellant was employed is a safety-lamp pit. 7. The