run over in the streets or roads which he had to traverse; but he certainly would not say that one of the ordinary risks was to be knocked down by the engine of a railway train, while the man was in the act of walking along a narrow path where the public have no right to be, but which the man had taken because it saved him a certain number of yards in getting to his office.

It is almost the same class of test as that which was put by Lord Justice Kennedy, and which I quoted with approbation in the case of *Revie* v. *Cumming*, 1911, 48 S.L.R. 831, which we decided only about a week ago, namely this—Has the servant by this action increased the risks of his employment? Well, I think a man who instead of walking along the public road, which is the natural way to go, chooses to take a short-cut for himself along a railway line where the path is so near to the rails that he is liable to be knocked down by a passing engine does increase the risks, and that if something happens to him in that position the accident is not one which arises out of his employment.

Therefore I am of opinion that the learned Sheriff-Substitute here is in the right, and that we ought to dismiss the appeal.

LORD JOHNSTON—The evidence justifies, I think, the conclusion which the learned Sheriff-Substitute drew from it, and the questions fall to be answered accordingly.

The deceased went to Grahamston station on his employers' business, and he was still on his employers' business when returning. He did not turn aside to do business of his own. He must therefore be held, when he met the accident which resulted in his death, to have been in the course of his employment. But he did turn aside from his ordinary and proper road of return. Instead of keeping the high road, he climbed on to the railway line and walked along it. He was on a definite errand in his employers' service. Had he met with an accident incident to passage along any proper and ordinary route between Grahamston Station and his office—had he been run over, for instance, by a carriage or even by a motor bus or a traction engine—the accident would have been incident to his employment, and would therefore have arisen out of his employment. But when he went on to the railway line, he went to a place where he could not reasonably be while in the employment. An incident of his going there was the risk of being run over by a train. But that risk resulting in accident, that accident did not thereby become an accident incident to his employment. The accident which befel him was not therefore an accident which arose out of his employment, though it may have happened in the course of his employment.

LORD MACKENZIE—I agree with the view taken in this case by the Sheriff-Substitute. I think that the accident did happen in the course of the employment of the deceased, because he was making his way from Grahamston Station back to his office in connection with his employers' business. I think it did not arise out of his employment. Instead of doing what the Sheriff-Substitute has found he could perfectly easily have done—gone along by the public road — he walked along the narrow path by the side of the railway line. It is found, as a matter of fact, that that part of the line is very dangerous. He had no right to be on the line. He had been warned by his superior not to go on the line. The path was, however, a little shorter than the public road.

The workman was on the line for a purpose of his own, and is not entitled to compensation.

LORD KINNEAR, who was present at the advising, was absent at the hearing.

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

Counsel for the Appellant—D. Anderson—Aitchison. Agent—James A. B. Horn, S.S.C.

Counsel for the Respondents—Blackburn, K.C. — Wark. Agents — Hope, Todd, & Kirk, W.S.

Saturday, July 1.

SECOND DIVISION.

WATSON AND OTHERS (MACGILLIVRAY'S TRUSTEES) *v.* MAXWELL (MACGILLIVRAY'S CURATOR) AND OTHERS.

Succession—Faculties and Powers—Power of Appointment — Exercise of Power—Appointment of Strangers—Consent of Objects—Validity.

A testatrix, who had under her father's settlement a power of appointment among her children of a share of his estate, directed her trustees to hold one-half for one of her sons in liferent, and on his death to divide it among his children.

Held that the exercise of the power, being invalid in respect of the introduction of strangers thereto, could not be rendered valid by the son's consenting to the exercise subsequent to the death of the testatrix.

Mackie v. *Mackie's Trustees, &c.*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814, *considered* and *distinguished.*

Succession—Will—Husband and Wife—Mutual Settlement—Revocability—Exercise in Settlement of Power of Appointment by Wife—Invalid Exercise—Right of Wife to Exercise Power by Codicil subsequent to Husband's Death.

A wife, who had under her father's settlement a power of appointment of a share of his estate, executed along with her husband a mutual settlement

containing an exercise of the power, which was subsequently held to be invalid.

Held that, though the mutual settlement was contractual, the wife was nevertheless entitled to make a new exercise of the power by codicil executed subsequently to the death of the husband.

A Special Case was presented for the opinion and judgment of the Court by (1) Charles Heron Watson and others, trustees acting under a mutual trust-disposition and settlement by the Reverend Alexander Gordon MacGillivray and his wife, dated 2nd April 1883, and three relative codicils, *first parties;* (2) Charles Brodie Boog Watson and others, trustees acting under trust-disposition and settlement of the late Reverend Charles Watson, D.D., father of Mrs MacGillivray, *second parties;* (3) Hamilton Maxwell, W.S., *curator bonis* to Duncan MacGillivray, who was one of the two sons of Mr and Mrs MacGillivray, and was unmarried, *third party;* (4) Charles Watson MacGillivray, Mr and Mrs MacGillivray's other son, *fourth party;* and (5) the three children of the said Charles Watson MacGillivray, *fifth parties.*

The following *narrative* is taken from the opinion of Lord Dundas—"By his said settlement the late Rev. Dr Watson, Mrs MacGillivray's father, after sundry prior purposes, directed the remainder of his estate to be realised and divided equally among his children alive at his death, with the exception that the shares falling to his two daughters were to be held for them in liferent, the capital to devolve at their deaths 'to all or any of their respective children as my daughters or either of them may direct, and failing such direction, equally among their issue respectively;' and he empowered his daughters to bequeath a liferent of their respective portions to their husbands so long as the latter did not marry again.

"Mr and Mrs MacGillivray by their said mutual settlement granted and disponed to the survivor of them in liferent, for his or her liferent use only, and on the death of the survivor to trustees, the whole means and estate which might belong and be addebted to them or either of them or over which they might have power of disposal at the time of their respective deaths; and Mrs MacGillivray, in addition to giving her husband, if he should survive her, the liferent of the other estate belonging to her, bequeathed to him the annual income or liferent of the share or portion of the funds to which she and her heirs had right under her father's settlement. The spouses appointed the survivor of them to be the sole executor of the predeceaser, and the trustees to be the executors of the survivor. The trust purposes, so far as here material, were (second) for payment to their son Charles, after the death of the survivor, of one-half of the free residue of their joint-estate, with certain destinations over in the event—which did not happen—of his predeceasing the survivor of his parents; (third) to hold and retain the other half of the said residue and pay their son Duncan the free annual income and proceeds thereof, as the trustees should think advisable, for his alimentary use only; and (fourth) on his death, to pay to his child or children, equally among them if more than one, the capital of the said share of residue, the issue of any who might predecease taking their parent's share; and if Duncan should die without issue, survived by Charles, the said share of residue was, in that event, to be paid over to Charles or his children as by the said mutual settlement provided. The spouses expressly reserved not only their own liferent use of the premises but full power and liberty at any time of their joint lives to alter, innovate, or revoke the mutual settlement as they should think fit. It was not, and scarcely could have been, disputed that Mrs MacGillivray intended by the said settlement to exercise the power of appointment contained in her father's trust deed, and that it was competent for her to do so by such an instrument; but the primary question in the case is whether she did or did not succeed in validly exercising her power.

"On 3rd March 1884 Mr and Mrs MacGillivray made a codicil to their mutual settlement, and altered it, *inter alia*, by declaring that Mrs MacGillvray should have power to bequeath out of the means and estate then belonging to her, or which might thereafter belong to her, other than the funds falling to her under her father's trust settlement, any legacies or bequests to any persons she might think right by any writing under her hand alone either during her husband's life or after his death. Mr MacGillivray died on 11th May 1889. His wife was duly confirmed as his executrix; and his estate, which amounted to £1013 or thereby, became immixed with her estate, and so remained down to the time of her death. On 29th November 1889 Mrs MacGillivray made a codicil declaring the mutual settlement to be a direction to her father's trustees as to the disposal of her share of her father's estate; but nothing turns upon this codicil, the execution of which seems to me to have been more or less a work of supererogation. On 18th Janury 1902, however, she made another codicil, which is an important factor in the case. By it, in the first place, Mrs MacGillivray—in virtue of the powers reserved to her by the joint codicil of 1884—revoked the bequest of half of the free residue of her estate to her son Charles contained in the (second) purpose of the mutual settlement, and directed the trustees to deal with it, both capital and income, in the same manner as was prescribed in the purpose (third) and (fourth) of the said settlement with regard to the other half of the said free residue. In the second place, Mrs MacGillivray directed her father's trustees to hand over her share of her father's estate to the trustees appointed under the mutual settlement for payment over of the same by them to her son Charles, or, if he had predeceased her—which did not happen—then as in that event by the said codicil provided. The import of the codicil therefore was (1) to give half the free residue of

her own estate—which was by the mutual settlement destined to Charles—to be held for Duncan's alimentary use, and to be paid on his death to his children, whom failing in the manner mentioned in the (fourth) purpose of the settlement; and (2) to give the whole of the fund over which she had power of appointment under her father's will to Charles, whereas by the mutual settlement it was destined one-half to Charles, and one-half for Duncan's alimentary use and to his children in fee. It appears that Mrs MacGillivray's estate at her death in 1909—including her husband's said estate, amounting to about £1013—consisted almost entirely of house property in Edinburgh, yielding when fully let about £185 a-year, and the share of her father's estate which she had power to dispose of was about £8500."

The third party, with consent of all parties, added at the Bar the following statement to the Special Case—"The third party, on behalf of Duncan MacGillivray, has consented to the appointment of the one-half of the share of the Rev. Dr Watson's estate liferented by Mrs MacGillivray, as contained in the third and fourth purposes of the mutual trust-disposition and settlement."

The *contentions* of the parties were, *inter alia*, as follows:—

The fourth party contended that the late Mrs MacGillivray by the codicil of 18th January 1902 validly exercised the power of appointment conferred upon her by her father's trust-disposition and settlement, the said power not having been validly exercised by the mutual trust-disposition and settlement dated 2nd April 1883; and accordingly that the whole of the share of her father's estate liferented by her fell to be paid over to him as his own absolute property.

The third party contended that the exercise of the power of appointment contained in the mutual settlement, or alternatively the exercise in so far as it conferred a liferent on Duncan MacGillivray, was valid and effectual; that the settlement being contractual the exercise of the power, or alternatively the exercise so far as it conferred the said liferent, was irrevocable by Mrs MacGillivray without her husband's consent, and that accordingly the codicil of 1902, in so far as it altered the exercise of the power contained in the settlement, or alternatively in so far as it revoked the said liferent, was *ultra vires* and ineffectual. Alternatively the third party maintained that there had been no valid exercise of the power of appointment, and that accordingly the said share of the Rev. Dr Watson's estate fell to be divided equally between the fourth party and Duncan MacGillivray.

The fifth parties concurred in the first contention of the third party, viz., that the power of appointment was validly exercised by the mutual settlement.

The *questions of law* were, *inter alia*, as follows—"1. Is the appointment of the estate which was liferented by the late Mrs MacGillivray under the trust-disposition and settlement of the late Dr Watson, her father, contained in the said mutual trust-disposition and settlement, (*a*) wholly valid, or (*b*) only partly valid, and if so, to what extent, or (*c*) wholly invalid? 2. In the event of branch (*a*) or branch (*b*) of the foregoing questions being answered in the affirmative, has the appointment, so far as valid, been effectually revoked by the codicil of 18th January 1902? 3. Is the appointment of the said estate contained in the codicil, dated 18th January 1902, (*a*) wholly valid, or (*b*) only partly valid, and if so to what extent, or (*c*) wholly invalid?"

Argued for the third and fifth parties—A power of appointment could be exercised by a general settlement conveying the testator's estate to trustees, and the mutual settlement here contained a valid exercise of the power—*Tarratt's Trustees* v. *Hastings*, July 7, 1904, 6 F. 968, 41 S.L.R. 738; *Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, 42 S.L.R. 404; *Bray* v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746. The clause conferring the power contained the word "issue." That would not be held as equivalent to "children" unless the context imperatively demanded it. Even if it were so read, it did not follow that the exercise of the power was bad simply because a liferent instead of a fee was given to one of the objects—*Darling's Trustees* v. *Darling's Trustees*, 1909 S.C. 445, 46 S.L.R. 394, *per* L. P. Dunedin, at p. 449, p. 397. Further, it was *jus tertii* of anyone but Duncan to challenge the validity of the exercise, and he so far from challenging it consented to it. That being so the exercise was good—*Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814. Moreover, the exercise of the power contained in the settlement need not involve the introduction of a stranger, for if Duncan died childless and survived by his mother the share liferented by Duncan would fall to his brother, who was an object of the power. The third party further argued—The mutual settlement was contractual, and therefore could not be revoked by the survivor—*Kerr* v. *Ure*, June 28, 1873, 11 Macph. 780; *Robertson's Trustees* v. *Bond's Trustees*, June 28, 1900, 2 F. 1097, 37 S.L.R. 833; *Johnstone's Trustees* v. *Johnstone's Trustees*, October 15, 1907, 45 S.L.R. 1. Therefore even if the exercise of the power attempted in the mutual settlement were invalid, the exercise contained in the codicil of 1902, after the death of Mr MacGillivray, was *ultra vires*, and the direction as to equal division failing appointment contained in the Rev. Dr Watson's will must receive effect.

Argued for the fourth party—The objects of the power were the daughter's children—"issue" clearly meaning "children." The exercise of the power attempted in the mutual settlement was bad because it introduced strangers to the power—*Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Lord Inverclyde's Trustees* v. *Lord Inverclyde*, 1910 S.C. 420. There could be no question of partial validity here, because the settlement did not contain a good exercise of the

power merely coupled with objectionable conditions—*Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, 43 S.L.R. 718. The consent of the curator could not avail to make the invalid exercise of the power good, because even assuming a curator could consent on behalf of his ward, the consent must be given at the time the exercise is made, or at least before the death of the party in whom the power is vested. That distinguished the present case from *Mackie* v. *Mackie's Trustees* (*cit.*). Even if subsequent consent could validate an invalid exercise of a power of appointment it could not do so to the effect of excluding a subsequent good exercise such as contained in the codicil of 1902. (2) Though the mutual settlement was contractual, the contract could not bind the wife to an exercise of the power of appointment that was invalid. The contract only involved that the wife could not revoke a valid exercise of the power. If the exercise contained in the settlement turned out to be invalid, then she was not precluded by the contractual nature of the deed from making a subsequent good exercise. The exercise of the power contained in the codicil was not a revocation of the settlement. It had been revoked as far as the power was concerned by the fact that the exercise therein was invalid. The exercise of the power contained in the codicil of 1902 should therefore receive effect.

At advising—

LORD DUNDAS—[*After the narrative above quoted*]—The first question in the case has regard to the validity or invalidity of the appointment made by Mrs MacGillivray in the mutual settlement. Notwithstanding the form in which it is stated, no argument was advanced on either side to the effect of partial validity; but the contentions were (I think quite properly) maintained as for and against the out-and-out validity of the appointment. It was urged for the fourth party that the appointment was totally invalid because as regards one-half of the fund the fee was given to Duncan's children, who (if they ever existed) must be strangers to the power. I do not think it was seriously disputed that when a power is given to appoint among children, issue of such children are strangers to the power, or that, in the general case, the appointment of such strangers to the whole or part of the fee of the fund would render the appointment totally invalid. It was, however, maintained for the *curator bonis* of Duncan that the blot was in this case curable, and had been cured. He added at the bar (of consent of all parties) a statement at the end of article 3 of the case to the effect that on behalf of his ward he consented to the appointment in the third and fourth purposes of the mutual settlement. We were told that this consent proceeded upon a careful consideration of what it was best to do in the interests of the ward. I assume for the purposes of this case that it is within the curator's power to give such consent. But I am unable to see that it betters materially the defect in the appointment. It may well be that where, as here, a mother is given power to appoint a fund among her children, she might, with the express concurrence of one of them—either on the occasion of the child's marriage or otherwise—so arrange as to validly appoint the share of the fund which she intended for that child to its issue, the transaction being truly of a double character, though contained (it may be) in one deed, viz., an appointment by the mother to her child, and an assignation by the appointee to his or her own children. But the present case is of quite a different nature; there is nothing to indicate that Mrs MacGillivray intended to appoint to Duncan the fee which she in fact appointed to his issue; or that she acted as she did in pursuance of any arrangement with or concurrence on the part of Duncan. If Mrs MacGillivray's appointment was bad, as I think it was, I do not see that the mere fact that the *curator bonis* is willing to consent to it makes it any better. He is not, in my judgment, nor would his ward have been, *in titulo* to do so But the curator founded on the case of *Mackie* v. *Mackie's Trustees* (1885, 12 R. 1230) as supporting his position. In that case a mother, who had by her marriage contract reserved power to herself to appoint certain estate among the children of her body, exercised the power by testamentary deed, giving an annuity and a legacy to one of her children, a son, and the remainder in liferent to her other child, Mrs M'Cutcheon, and to her children in fee. These children were admittedly strangers to the power, but the Lord Ordinary (Fraser) and this Division of the Court held that the appointment, so far as in favour of Mrs M'Cutcheon and her children, was valid, because Mrs M'Cutcheon consented to it. I have not been able to ascertain satisfactorily the circumstances of the matter or the grounds of the judgment in *Mackie's* case. Mrs M'Cutcheon was not a party to the action, which was raised by the son for the reduction of his mother's trust settlement, the defenders being the trustees under it and under her marriage contract respectively. I have carefully examined the session papers, and am able to say that there is no averment or plea on the record in regard to any consent by Mrs M'Cutcheon, nor any minute of compearance on her behalf to that effect. The Lord Ordinary in his opinion quoted certain passages from Sugden on Powers (8th ed., pp. 670, 671), and referred to some observations by Lord Chelmsford in the Scots case of *Smith Cuninghame* (1872, 10 Macph. (H.L.) 39); but these, as I read them, clearly refer to the class of circumstances I figured a short time ago, where issue (strangers to the power) may be validly brought within the scope of an appointment by an instrument or instruments when (as Lord St Leonards puts it) "the act operates first as an appointment, and secondly as a settlement by the appointee." Lord Fraser concluded

by simply saying that "so far as regards the appointment of the fee to the children of Mrs M'Cutcheon there can be no objection, seeing that she consents to it." The pursuer reclaimed, but his argument on this point (which was only one of many) seems to have been confined to the view that there was no written evidence of Mrs M'Cutcheon's consent. The defenders appear to have stated in reply that "Mrs M'Cutcheon was willing to give a deed of consent now if necessary." In the Inner House the point was only dealt with by an observation of the Lord Justice-Clerk (Moncreiff) that "but for the consent of the daughter" (Mrs M'Cutcheon) "this would not have been a valid exercise of the power. But it seems to have been decided in England that such a provision, made with the consent of the beneficiary or appointee, will be supported, and I quite agree with the Lord Ordinary in his view of the authorities on this head." I repeat that I am somewhat baffled in my endeavour to apprehend either the circumstances in fact or the precise grounds of decision upon this point in *Mackie's* case. It appears from Lord Fraser's judgment that he considered it to be a fact "of great moment" that the power of appointment was a reserved one over funds belonging originally to the appointer, and was therefore to be construed "in the most favourable and ample way" in reference to its execution by the owner of the funds. It may be assumed that this fact, and other elements which I am unable to gather from the report, afforded sufficient grounds for the decision arrived at. But I am not prepared, in the obscurity of the circumstances, so far as I can apprehend them, attending *Mackie's* case, to accept it as an authority for the proposition advanced in the present case to the effect that the curator's consent, now tendered, to an appointment made by his ward's mother, invalid in law because admitting strangers, can cure the invalidity of the appointment when it is challenged in the circumstances above narrated. For the reasons now stated I am for answering head (*c*) of the first question put to us in the case in the affirmative, and heads (*a*) and (*b*) in the negative. If this view is correct, the second question is superseded and requires no answer.

The third question, like the first, relates to the fund which Mrs MacGillivray had power to appoint under her father's will, and proceeds on the assumption that the first question is answered, as I propose to answer it, by saying that no valid appointment was made by the mutual settlement. We were asked, on that assumption, to decide whether Mrs MacGillivray's appointment by the codicil of 1902 was or was not a valid exercise of her power. I am of opinion that it was. As against this view it was argued that the provisions made by the spouses in the mutual settlement, being of a contractual character, were not revocable by the surviving spouse, and that Mrs MacGillivray's appointment by the codicil of 1902 was *ultra vires* and ineffectual. It may, I think, be admitted that the element of contract was involved; but one has to consider, upon a construction of the settlement, what this mutual contract amounted to. I think what the wife contracted to do was, not to make a valid exercise of her power of appointment, but to destine the estate forming the subject of appointment in the manner described in the settlement. If that provision turned out to be disconform to her power and therefore illegal (as I hold to be the case), then I see no reason why, the contract being (so to speak) spent, Mrs MacGillivray might not proceed to make a new and effectual exercise of her power. I do not know whether in fact she was advised that she had not validly exercised it by the settlement; and the consideration would, in any event, be immaterial; but she was, in my judgment, free to make a fresh appointment, and did so validly by the codicil of 1902. I consider, therefore, that we should answer head (*a*) of the third question in the affirmative, and heads (*b*) and (*c*) in the negative.

[*His Lordship dealt with questions upon which the case is not reported*].

LORD SALVESEN—I have had an opportunity of reading the opinion just delivered, and I concur in it generally. The only matter on which I have some doubt is as to whether the appointment made by Mrs MacGillivray in the codicil can receive effect. The reason of my doubt is that it seems to me if you assume there was an element of contract in the mutual settlement executed by Mrs MacGillivray and her husband, then it might quite well be inferred that her power of appointment had been thereby exhausted, and that whether that exercise was good or bad she had no right to make a subsequent appointment to which her husband was not a party. The result of that view, if sound, would be that her appointment in the codicil would simply not receive any effect at all, and that the property over which Mrs MacGillivray had the right of appointment would fall to be divided in terms of the original disposition by Mrs MacGillivray's father in the case of there being no appointment. But while I entertain doubts about this matter, they are not so strong as to induce me to dissent from the opinion just delivered.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL was absent.

The Court answered head (*c*) of the first question in the affirmative, heads (*a*) and (*b*) in the negative, found it unnecessary to answer the second question, and answered head (*a*) of third question in the affirmative and heads (*b*) and (*c*) in the negative.

Counsel for First and Fourth Parties—Sol.-Gen. Hunter, K.C.—Moncrieff. Agents—Mackintosh & Boyd, W.S.

Counsel for Second Parties—Hon. R. B. Watson. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Third Party—Wilson, K.C.—Chree. Agents — Melville & Lindesay, W.S.

Counsel for Fifth Parties — Pringle. Agents—Stuart & Stuart, W.S.