be affirmed, and the appeal dismissed with costs.

Counsel for the Appellant—Balfour, Q.C. — Haldane, Q.C. Agents — Grahames, Currey, & Spens, for Menzies, Black, & Menzies, W.S.

Counsel for the Respondents—The Lord Advocate — Shaw, Q.C. — Deas. Agents—William Robertson & Company, for W. & J. Burness, W.S.

COURT OF SESSION.

Friday, January 28.

SECOND DIVISION.

MACKENZIE FRASER *v.* CROFT.

Succession—Bequest of Furniture in House—Ademption—Silver Plate Deposited in Bank.

By his last will dated 8th July 1895 a testator left to his widow for her use during her life, and to his heir after her death, "the whole furniture, plenishing, furnishings, and articles which may be in the mansion-houses" on his estate. He also appointed his widow his sole residuary legatee. At the date of the testator's death there was in a bank at Aberdeen a chest of silver plate valued at £159, 10s. belonging to the testator. This chest had been deposited there by him for safe custody prior to 8th July 1895, and was there at that date. Towards the end of August or beginning of September 1895 the chest was taken from the bank to one of the mansion-houses, and various articles were removed from it. The chest with the remaining articles was redeposited in the bank for safe custody in November 1895, and remained there till the testator's death on 19th May 1897.

Held that the chest and its contents were not included in "the whole furniture, &c., in the mansion-houses," and were the property of the widow as residuary legatee.

Fee and Liferent—Rights of Liferenter—Power to Grant Lease to Endure Longer than Lifetime.

A testator made his wife the liferentrix of his heritable estates and provided that she was to have "the absolute control and management of the estates so long as she shall survive me, and without any interference from the heir who is appointed to succeed after her death."

Held that the widow had no power to grant leases to endure longer than her lifetime.

Heir and Executor—Relief—Payment of Moveable Debts and Duties out of Heritage.

A testator appointed his wife liferentrix of his heritable estate and his residuary legatee, and further gave and left to her "full power to raise such sums as may be required to pay all death and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses."

Held that the widow was not entitled to charge the heritable estate with the personal debts and funeral expenses of the testator, or with the estate-duty beyond the rateable part effeiring to the heritage.

Lieutenant-Colonel Frederick Mackenzie Fraser died on 19th May 1897, leaving a holograph last will and testament dated 8th July 1895, in the following terms:—"I hereby leave to my wife Mrs Theodora Lovett Darby or Mackenzie Fraser, for her sole use and enjoyment during the term of her natural life, so long as she shall survive me, my whole lands and estates of Castle Fraser and Inverallochy, and the whole plenishing, furnishings, and articles in the mansion-house thereon; and after the death of my said wife I hereby dispone, convey, and make over my said lands and estates of Castle Fraser and Inverallochy, and the whole furniture, plenishing, furnishings, and articles which may be in the mansion-houses thereon, to Thomas Fraser Croft, son of Thomas Denman Croft and his wife Eleanor Fraser Tomlinson or Croft, and the heirs whatsoever of his body; . . . And I hereby specially ordain that my wife the said Mrs Theodora Lovett Darby or Mackenzie Fraser is to have the absolute control and management of the estates of Castle Fraser and Inverallochy so long as she shall survive me, and without any interference from the heir who is appointed to succeed after her death; and I further give and leave to my said wife full power to raise such sums as may be required to pay all death and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses: And I hereby constitute and appoint the said Mrs Theodora Lovett Darby or Mackenzie Fraser to be my sole executrix and sole residuary legatee."

At the death of Colonel Fraser his estate consisted of heritage valued at £27,289, 4s. 6d., and of moveables valued at £7418, 9s. 4d. The personal debts and funeral expenses amounted to £1194, 0s. 10d. On the basis of the above figures the amount of estate-duty due in terms of the Finance Act 1894, in respect of the free heritable and moveable estate (£33,513, 13s.) was £1507, 10s. At the date of Colonel Fraser's death there was a plate chest containing silver plate in the office of the Union Bank of Scotland, Limited, at Aberdeen, which chest had been deposited there by him for safe custody prior to 8th July 1895 (the date of his will), and was there at that date. Towards the end of August or beginning of September 1895 the chest was uplifted from the bank and taken to the mansion-house at Castle Fraser. Various articles were then taken from the chest. Some of the articles uplifted were used by Colonel Fraser in a house at North Berwick, and thereafter in a house at Ascot. The remain-

ing articles uplifted were used by him at his mansion-house on his estate of Castle Fraser. The chest was taken from the said mansion-house of Castle Fraser and redeposited with the bank for safe custody in the month of November 1895. The chest and contents were not removed from the bank between the last-mentioned date and the date of Colonel Fraser's death. The articles taken out of the chest and used in the mansion-house at Castle Fraser were never returned to the bank, and were in the mansion-house at the date of Colonel Fraser's death. The articles taken out of the chest and used at North Berwick and Ascot were sent down to Castle Fraser mansion-house, and were there at the date of the Colonel's death. The remaining articles in the chest were never in use at the mansion-house of Castle Fraser or any other house between the date of the last will and testament and the date of the said Frederick Mackenzie Fraser's death. They consisted of silver and plated articles for household use valued at £159, 10s.

In these circumstances various questions arose as to the construction of clauses in Colonel Fraser's will, and for the decision of these questions a special case was presented to the Court by (1) Colonel Fraser's widow, and (2) the heir, Thomas Fraser Croft, a pupil, and Thomas Denman Croft, his father, as his tutor and administrator-in-law.

The questions at law were, *inter alia*—"(2) Is the first party entitled in fee to the said plate chest and its contents at the date of the said Frederick Mackenzie Fraser's death? (3) Has the first party power to grant ordinary agricultural leases of the heritable estate for periods not exceeding nineteen years? (5) Is the first party entitled to charge the said heritable estate with the debts and funeral expenses of the said Frederick Mackenzie Fraser? (6) Is the first party entitled to charge the heritable estate of the deceased Frederick Mackenzie Fraser (*a*) with the whole estate duty, or (*b*) only with the proper rateable part thereof effeiring to the heritable estate?" The other questions are not referred to, being considered by the Court unworthy of argument.

Argued for first party—*On Question* 2—As residuary legatee under Colonel Fraser's will she was entitled to the fee of the plate chest and its contents. The chest could not be said to be constructively in any mansion-house at the date of Colonel Fraser's death. *On Question* 3—In terms of the special clause in the will she had power to grant ordinary agricultural leases for a term not exceeding nineteen years. *On Questions* 5 *and* 6—In terms of the special clause in the deed she was entitled to burden the heritable estate of the deceased, with all death and succession duties which might fall upon her in any way and in any capacity in respect of the heritable or moveable estate, and with all the deceased's debts and his funeral expenses, and was entitled to the moveable estate falling to her as residuary legatee without any deduction of death or succession duties payable in respect thereof, or of the debts or funeral expenses of the deceased. The testator had given her power to raise money, and that meant power to raise money on some other estate than her own.

Argued for second parties—*On Question* 2—The first party was only entitled to the liferent use of the chest and its contents. Although actually out of the mansion-house the chest was constructively in it. Colonel Fraser was very often away from home, and the box must be held to have been removed to the bank for safe custody, for its preservation from accidental fire or the like. The proper domicile of the chest and plate was the mansion-house and not the bank, and it therefore was included in the furniture "in the mansion-house"—*Land* v. *Devaynes* (1794), 4 Brown Ch. Cases, 536; *Rawlinson* v. *Rawlinson* (1876), L.R., 3 Ch. D. 302; *Cockerell* v. *Earl of Essex* (1884), L.R., 26 Ch. D. 538; Williams on Executors, 9th ed., ii. 1190. *On Question* 3—The first party's rights were merely those of a liferentrix at common law, and she had no power to grant leases to endure longer than her lifetime. *On Questions* 4 *and* 5—The first party was not entitled to charge the heritable estate with the testator's debts and funeral expenses, and was only entitled to charge the heritable estate with the proper rateable part of the estate-duty effeiring thereto. The general rule which rendered heritable debts a burden on the heir and moveable debts a burden on the executor would not be defeated by an attempt to construe loose and general expressions of the testator as imparting an intention contrary to that rule—*Forbes* v. *Forbes*, November 14, 1766, Hailes 138; *Douglas's Trustees* v. *Douglas*, January 17, 1868, 6 Macph. 223; opinion of L.P. Inglis in *Macleod's Trustees*, June 28, 1871, 9 Macph. 906.

Lord Young—In regard to the second question, my opinion is that the plate in question is not plate in the house within the meaning of the expression in the deed. I think that plate "in the mansion-house" only includes plate which is either within it or which is customarily in use in the house, although it may have been sent out of the house temporarily for safe custody, with the intention to have it brought back. I do not think that the plate in question was in this position, and am therefore of opinion that the widow is entitled to it under the residuary clause of the will.

Turning to the third question, I am of opinion that Mrs Fraser has not power to grant agricultural leases of the heritable estate for periods not exceeding nineteen years. She has no power with respect to the granting of leases other than that which she has as a liferentrix, for I do not read the words Mrs Fraser "is to have the absolute control and management of the estates of Castle Fraser and Inverallochy as long as she shall survive me, and without any interference from the heir who is appointed to succeed after her death," as giving her power to grant leases for a period longer than that for which an ordinary liferenter

has power to grant them. These words relate to the ordinary management of the estate—control, management, and enjoyment of the estate during her life—but she has no power to leave a lease or any other deed which shall fetter or interfere with the enjoyment of the fiar when upon her death he succeeds to the estate.

The fifth and sixth questions may be taken together. They both depend upon the meaning which the Court gives to the following words in the deed—"I further give and leave to my wife full power to raise such sums as may be required to pay all death and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses." Now, with respect to the debts on the heritable estate, I am of opinion that these do not fall upon her. They fall upon the estate, which will be diminished by the payments which are made out of it in terms of the Duty Acts, and the widow's enjoyment of it will be diminished accordingly. With respect to the duties, if any, which are chargeable on her succession, I do not think there are any duties chargeable as succession duties upon the widow at all, for the general rule is that a spouse is not liable in any succession duties, but if there are any death duties falling upon her in respect of the personal estate which she takes under the deed, I am of opinion that the clause which I have read does not put it in her power to make them cease to fall upon her, and to make them fall upon the heir. What was in the testator's mind when he wrote these words I cannot undertake to say, but the words which he has used do not enable me judicially to pronounce that the import and legal effect of them is to entitle the widow succeeding to the personal estate to impose any liability of her own upon the heir, or to diminish his estate by paying out of it the death duty, or by whatever name you call it, which falls upon her as succeeding to the personal estate.

LORD TRAYNER, LORD MONCREIFF, and the LORD JUSTICE-CLERK concurred.

The Court answered the second question and the second alternative of the sixth question in the affirmative, and answered the third, fifth, and the first alternative of the sixth question in the negative.

Counsel for the First Party—The Dean of Faculty—Craigie. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Second Party—Dundas, Q.C.—Kincaid Mackenzie. Agents—Waddell & M'Intosh, W.S.

Saturday, January 29.

SECOND DIVISION.

FLEMING *v.* ALEXANDER EADIE & SON.

Reparation — Safety of Premises — Contributory Negligence—Want of Light.

A sanitary inspector was asked by the contractors to inspect some of the drains in a house under reconstruction. On arriving at the house he went through an open door down a stair leading to the basement in search of the foreman. He proceeded down six or seven of the steps, which were in total darkness, and fell into the basement, the lower part of the stairs having been cut away during the reconstruction.

In an action for damages against the contractor, a jury returned a verdict for the pursuer. Verdict *set aside* as contrary to evidence, in respect that the pursuer had been guilty of contributory negligence.

Walter Fleming, a sanitary inspector in the employment of the police department of the Corporation of the City of Glasgow, raised an action in the Glasgow Sheriff Court against Alexander Eadie & Son, contractors, Glasgow, for £1000 damages. The pursuer averred—"(Cond. 2) The defenders are the contractors for the reconstruction of certain buildings in Ingram Street, Glasgow, between Hutchison Street and Brunswick Street, formerly used as the City Chambers. Their work consists of a general reconstruction of the premises, and includes the relaying of the drains and their connections. (Cond. 3) On or about the morning of the 28th April last the defenders applied to the City Sanitary Office in Montrose Street, Glasgow, and requested that a sanitary inspector should be sent over to the said buildings to apply the smoke test to a section of the drains which had been recently laid in the basement of the buildings. The pursuer was sent with an assistant to apply the smoke test accordingly. (Cond. 4) The pursuer proceeded to the buildings and entered by a door in Hutchison Street, and began to descend the stair leading to the basement of the buildings. This was the same entrance and the same staircase by which the pursuer had obtained access to the same buildings on an occasion in December preceding, when he had gone on the invitation of the defenders to test certain drains, and he believed it to be the proper access for him to take. . . . When he had gone down a number of steps he suddenly fell a distance of nearly seven feet, owing to the lower part of the stair having been taken away." The pursuer, after describing the injuries received by him, further averred—"(Cond. 8) The said accident was due entirely to the fault of the defenders or those for whom they are responsible, in failing to have the premises in a safe and proper condition . . . The door leading to the stair was open, and there was nothing to warn people passing