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

through it of danger. The stair was dark and neglected, and the pursuer was unable to see that there was danger ahead, and there was no barricade or protection of any kind to prevent pursuer from falling over where the lower part of the stair had been taken away."

The defenders pleaded, *inter alia*—"(2) Contributory negligence."

On 7th July 1897 the Sheriff-Substitute (SPENS) allowed a proof, and the case was appealed by the pursuer for jury trial.

On 27th November the case was tried on the record before the Lord Justice-Clerk and a jury.

The following are extracts from the the Judge's notes of evidence—The pursuer deponed—"Went in by open door. Low stair going to basement. The door at top of stair was open—almost quite open. Saw no one about. I intended to get the foreman to show me what he wanted. I saw nothing to show it was not safe. Went down very slowly. Very dark. I only saw the first and second steps. I put my hands against the two walls. After 6 or 7 steps my feet went from me. I saw no iron beam or wall in front. I became unconscious. . . . *Cross.*—I knew court was being gutted out and reconstructed. Did not know stairs had to be removed. 11th July 1896 I went there. When I went I did not inquire for the foreman. I knew foreman had asked for me. The whole building was barricaded. I used the door the clerk of works used to go through the barricade. In entering the close you go along a landing. There is a stair going up. I did not see any gangway going down from upper stair. You turn to your right and come to door leading to stair going down. In 1896 I went down the same stair as I did in 1897. I don't remember that part of stair removed and gangway put in its place. Roy was with me. Don't remember if he went down by stair. I think it was about a water machine I went down. I saw then they were reconstructing the building. Was back in December. Tested the main drains. Did not inquire for foreman. May have seen him. He did not show me a roadway by Brunswick Street for going down that I remember neither in July nor December. . . . I did not get a light. Did not think of it. Quite dark after second step. In saying my feet went from me, I mean that I cannot say whether there was an iron beam with a wall built on it across the stair 3 feet above the last step. Did not see or feel it. We usually go down such places without lights—going carefully." William Roy junior, aged 19, assistant to the pursuer, and called on his behalf, deponed—. . . "Saw stair going up and stair to right leading to basement. Door open. Pursuer went down carefully. Saw him fall. Called and got no answer. Struck match and saw him." Alexander Finlay, a sanitary inspector, and one of the pursuer's witnesses, deponed—"Saw place. Door was secured. Looked at place from above. Beam 3 feet 2 inches above step, 11 or 12 inches in front of step. Quite dark. When I go to test drains I would use a light. *Cross.*—If I came to dark stair I would use a light if I knew the stair. If building in course of reconstruction I would go very carefully, or use a light." William Kerr, architect, also one of the pursuer's witnesses, deponed—"No one not familiar with a place in a building under reconstruction would go down a dark place without a light unless he was familiar with it." James M'Beth, the defenders' foreman, and one of their witnesses, deponed—. . . "Steps removed in June 1896. We put gangway from last step that was left for carrying down stuff. No one used that stair but workmen. . . . I never thought anybody would go down that stair. No one had business to do so. It is very dark, and anyone going down required a light."

The jury found for the pursuer and awarded damages.

The defenders obtained a rule to show cause why the verdict should not be set aside and a new trial granted.

Argued for pursuer—He had come to this house on the invitation of the defenders. The open door constituted an invitation to the pursuer to go down this stair to seek the foreman. It was a plain duty on the part of the defenders to lock this door, but they had not done so. They had thus left, as it were, a trap for persons entering the house—*Cairns* v. *Boyd*, June 5, 1879, 6 R. 1004; *Jamieson* v. *Russell & Co.*, June 8, 1892, 19 R. 898.

Argued for the defender—The pursuer had been guilty of contributory negligence. He should have asked to be directed to the drains that he was to test. But in any event he had no right to go down this stair in the dark. If he had struck a light the dangerous character of the stair would have been at once revealed to him—*Walker* v. *Midland Railway Company*, 1886, 2 Times L.R. 450; *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21.

LORD JUSTICE-CLERK—The facts on which the question between the parties depends are contained in the notes of evidence before us. I tried the case, and had I been a juryman, I think that I should have held upon the first question which arises, viz., Whether there was fault on the defender's part—that that issue must be negatived—that fault was not established. This was the case of a building undergoing reconstruction. In such circumstances there must be many places in which a man—unless he uses the greatest care—may meet with accident owing to the state of the premises, and the fact of an accident in such a state of the premises is certainly no evidence of fault. But that first question is truly a question for a jury, and the jury having found in the pursuer's favour, I do not see my way to differ, and to propose to allow a new trial on that ground.

But there is a second question on which I am of opinion that the jury have erred, and have given a verdict which is against evidence. They have negatived contributory negligence, and in my opinion con-

tributory negligence was established.

The pursuer had been at this place before. He had either gone down by that stair or not. If the former, he must have known that the lower steps had been removed, for he was there on that previous visit in July 1896, and the steps had been removed in June 1896. If he went down the stair then and used the temporary gangway which was then at the bottom of it, he must have gone down in the light, for it is not suggested that he went down in the dark then. There was nothing to exclude light at that time. He must therefore on this occasion on which the accident befel him have known that a change had taken place, for he now found himself in the dark. And if a man comes to a building that is being reconstructed, and to a stair in that building which is in a different state from that in which he knew it to have been before, and cannot see his way, he should exercise reasonable care before proceeding to descend in the dark. I cannot hold him justified in proceeding to descend it in pitch darkness. Even to descend in the dark slowly, taking care before putting his weight upon a place where a step may or may not be, to feel his way and see if the step is there—even such an action is risky. But at least that may be expected of him, and the pursuer did not do it. But what would have been a reasonable precaution in the circumstances? Was it not to strike a light? There was no difficulty in getting one. The man who was with him had lights, for whenever the pursuer fell, he struck a light and saw the pursuer lying in a hole at the foot of the stair. Or the pursuer, finding this stair in a new state and pitch dark might have turned back and gone to seek some one who could inform him of the state of the stair. He did neither, but descended the stair in the dark. He certainly could not have felt for each step before allowing his weight to go down. His own witnesses, Kerr and Finlay, men accustomed to such circumstances, say that it would be prudent to use a light even if one knew the stair. Kerr, who is an architect, says, "No one not familiar with a place in a building under reconstruction would go down a dark place without a light unless he was familiar with it."

The other alternative position of the pursuer must be that on the previous visit he had not seen this stair. If so, it was very rash to go down it in the dark.

On the evidence led I think that contributory negligence was proved, and that the pursuer was not entitled to a verdict.

LORD TRAYNER — In dealing with an application of this kind the opinion of the Judge who tried the case is always important. I am impressed with the views which your Lordship has expressed as to the evidence. If the question had turned solely on whether the defenders were in fault in leaving this stair unlit and yet accessible to the pursuer, I think I would not have been disposed to interfere with the verdict.

But on the question whether the pursuer was so negligent of his own safety that the accident from which he suffered was occasioned by such negligence, or that such negligence materially contributed to bring about the accident, I agree with your Lordship. I think in regard to this matter that the verdict was contrary to evidence, even to the evidence led for the pursuer himself.

LORD MONCREIFF—I agree with your Lordship on both points. I do not think that there was fault on the part of the defenders. But there was evidence on the point upon which the jury were entitled to judge.

With regard to the question of contributory negligence, I do not think that there was any evidence on which the jury were entitled to return a verdict for the pursuer. The evidence of the pursuer himself indicates to me a case of contributory negligence. Keeping in mind that the building was in course of reconstruction, and that the pursuer had not been there for six months, we find from the evidence of the pursuer that he went through the door, and proceeded to go down this stair in total darkness. I think that he was plainly negligent of his own safety in going down these steps without a light, and in not getting some-one to direct him aright. This accident was due to his own negligence.

As regards the cases quoted, I think this case resembles that of *Walker*, and that it can be distinguished from that of *Cairns*. The latter case was decided on the ground that an invitation was given to the pursuer, that on opening a door which he was entitled to think was that of the lavatory, he stepped into a trap and was precipitated into a cellar. In that case the plaintiff had no warning, but here the pursuer had warning of the danger, for he found the stair in total darkness and yet went on. While one cannot but sympathise with him, there must in my opinion be a new trial.

LORD YOUNG was absent.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuer—Jameson, Q.C. — Guy. Agents — Clark & Macdonald, S.S.C.

Counsel for the Defenders—Ure, Q.C.— Glegg. Agents—Macpherson & Mackay, S.S.C.