Tuesday, November 2.

OUTER HOUSE.

[Lord Low, Ordinary.

GRAHAM (TENNENT'S EXECUTOR) *v.* LAWSON.

Lease — Rent — Legal and Conventional Terms—Fiar and Liferenter—Apportionment.

A liferentrix let a house for five years, with entry at Whitsunday, at a rent payable half-yearly at Whitsunday and Martinmas, the first half-year's rent being payable at Martinmas for the half-year preceding. On her death between Whitsunday and Martinmas, *held* that the half-year's rent due at the following Martinmas fell to be apportioned between the executor and the fiar.

Lease—Rent—Fiar and Liferenter—Apportionment—Effect of Prepayment.

In a lease of grass parks by a liferenter, with rent payable at Whitsunday and Martinmas, when the liferenter dies between Whitsunday and Martinmas, the second half-year's rent falls to be apportioned between his representative and the fiar, and this legal division is not defeated by the fact that the tenant has, under an extrinsic agreement with the liferenter, paid the whole rent at Whitsunday,

Lease—Rent—Terms of Vesting and Payment.

Opinion that in a lease with entry at Whitsunday, and containing no express provision as to the dates at which the rent should be payable, the first half-year's rent vests in the lessor at the date of entry, but cannot be demanded until the succeeding term of Martinmas.

Mrs Tennent was liferentrix of certain property at Stirling consisting of a dwelling-house, called Annfield House, and some grass parks adjoining. The defender, Robert Lawson, obtained from Mrs Tennent a lease of Annfield House for five years from Whitsunday 1894, at a rent of £100 per annum, the rent to be paid "at two terms in the year—Whitsunday and Martinmas—by equal portions, beginning the first term's payment thereof, being £50, at the term of Martinmas next, for the half-year preceding, and the like sum at Whitsunday thereafter, and so forth yearly and termly." Mrs Tennent died on 14th June 1896. Shortly before her death the defender purchased from the fiar the feu of the property under burden of Mrs Tennent's liferent. This action was raised by Mrs Tennent's executor for payment of the half-year's rent of £50 due at Martinmas 1896. The defender admitted liability for the proportion of the rent effeiring to the period from Whitsunday 1896 to Mrs Tennent's death, but denied that he was liable for the proportion for the rest of the half-year. He also pleaded compensation.

The grass parks adjoining Annfield House had been let to the defender by Mrs Tennent for the year 1896 (the grazing period being by arrangement 1st May to 1st December) at a rent of £31, payable half-yearly at Whitsunday and Martinmas. By subsequent agreement, and on receiving 5 per cent discount, the defender paid the whole year's rent at Whitsunday. He now claimed (answer to cond. 4.) . . . "The pursuer is therefore liable to account to him for the proportion thereof corresponding to the period from the death of Mrs Tennent to 1st December," in answer to which the pursuer maintained that "he is entitled to the whole rent of the grass parks for the year 1896 which had vested in and been paid to Mrs Tennent." When the case was debated, counsel for the defender admitted that he had no right to any part of the first half-year's rent of the grass parks due by the lease at Whitsunday, but claimed repetition of a proportion of the second half-year's rent, corresponding to the period from Mrs Tennent's death on 14th June to Martinmas. The arguments submitted and authorities cited are noticed in the Lord Ordinary's opinion.

On 2nd November 1897 the Lord Ordinary (Low) found for the defender both on the question of the rent of Annfield House and on that of the grass parks, and assoilzied him from the conclusions of the action.

Opinion.—"The pursuer is the executor of the late Mrs Tennent, who was liferentrix of Annfield House, Stirling, which she let to the defender on a lease for five years from Whitsunday 1894. The rent was £100 per annum, which by the lease was 'to be paid at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof, being £50, at the term of Martinmas next for the half-year preceding, and the like sum at Whitsunday thereafter, and so on yearly and termly.'

"Mrs Tennent died on the 14th June 1896. Prior to her death the defender had purchased the fee of the property subject to Mrs Tennent's liferent.

"In the present action the pursuer as Mrs Tennent's executor sues the defender for payment of the half-year's rent due at Martinmas 1896. The defender disputes the pursuer's right to the proportion of the rent effeiring to the period between Mrs Tennent's death and the term.

"The defender's contention is that the rent of the half-year current at Mrs Tennent's death falls to be apportioned under the Apportionment Acts. The pursuer's argument on the other hand is, that the whole of the half-year's rent payable at Martinmas vested in Mrs Tennent by her survivance of the term of Whitsunday, and was *in bonis* of her at her death. The pursuer's counsel admitted that there must be some rent to which the provisions of the Apportionment Acts applied, but he contended that that was the half-year's rent payable at Whitsunday 1897. He argued that if he had chosen to do so, the pursuer would have been entitled to claim a part of the latter half-year's rent corresponding to

the period between 15th May and 14th June.

"I think that the test of the soundness of the pursuer's position is whether he is entitled to claim (what in fact he does not claim) a portion of the rent payable at Whitsunday 1897. *Prima facie* there is no basis for such a claim, because it is a claim for a share of rents for which Mrs Tennent, in no view which can be suggested, gave any consideration. During no part of the half-year between Martinmas 1896 and Whitsunday 1897 did the tenant derive his right of possession from Mrs Tennent, because she had died in the previous month of June.

"The pursuer relied in the first place on the case of *Binny* (22nd January 1820, F.C.) in which it was held that the proprietor of a house, dying between Whitsunday and Martinmas, has no right to the half-year's rent for the possession from Whitsunday to Martinmas, although payment is postponed until Martinmas. The judgment in that case has been frequently doubted, but it has nevertheless been followed, and must be regarded as settling the common law. I may say, however, that although the rents of a house for the first half-year vest at the term of entry—Whitsunday—it has never been held that that is the legal term of payment, and I do not think that, in the absence of contract, the tenant of a house entering at Whitsunday is bound to pay the first half-year's rent until Martinmas.

"The pursuer also founded upon the well known case of *Campbell* v. *Campbell* (11 D. 1426) as settling that the Apportionment Act of 1834 did not take from the representatives of a lessor any right which they had at common law, but, on the contrary, gave them a share of the rents of a broken term which they could not claim at common law. The Act of 1834, the pursuer argued, still governed the apportionment of rents in the case of the death of a life-renter or other person having a limited interest. The object of the Act of 1870 was simply to extend the principle of apportionment to all cases of periodical payments, and the Act of 1834 was not repealed.

"It is true that the Act of 1834 was not repealed by the Act of 1870, although the latter Act, having a wider scope, practically superseded the former. Presumably, therefore, the Act of 1870 is not inconsistent with the Act of 1834, although the phraseology used in the two Acts is different.

"The Act of 1834 provides that 'rents . . . made payable or coming due at fixed periods . . . shall be apportioned so that on the death of any person interested in such rents . . . he or she or his or her executors shall be entitled to a proportion of such rents, according to the time which shall have elapsed from the last period of payment thereof, including the day of the death of such person.'

"The Act of 1870 provides that 'All rents . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'

"The question which was raised in the case of *Campbell* had regard to the rights of the executor of a deceased proprietor where the payment of rents had been conventionally postponed.

"The great difficulty which was felt in that case in construing the Act was that it had been framed entirely with reference to the English law, and for the purpose of curing evils which were to a great extent distinctive of the English law.

"From the preamble of the Act and of the previous Act of 11 Geo. II., c. 39 (which was a purely English Act), it may be gathered that the kind of mischief which was struck at was this. If a tenant for life let his lands and died before the day on which the rent was made payable, his representatives had no claim for the proportion of the rent from the last period of payment down to the date of death. It was accordingly enacted that the representatives should 'be entitled to a proportion of such rent according to the time which shall have elapsed from the last period of payment thereof.' The natural meaning of that enactment is that the representatives shall have a proportion of the rents falling due at the next period of payment, and apparently that was sufficient to meet the mischief as it existed in England. So to construe the enactment however in Scotland would, in cases where payment of rent was postponed, not only not have given the representatives of the lessor any portion of the rent payable for the possession of the lands during the broken term, but would have taken from them the rents payable for the possession during the previous term or terms (as the case might be) when the right of possession was wholly derived from the deceased lessor. The Court regarded such a result as directly contrary to the intention of the statute, and accordingly they held that the half-year's rent falling to be apportioned was to be determined (in the case of backhand rents) not by the conventional term of payment, but by the possession (the crop and year) for which it was paid.

"The circumstances in the case of *Campbell* were as follows:—Campbell of Lochnell, heir of entail in possession of the estates, died on 18th May 1846—that is, three days after the legal term of Whitsunday. The farms upon the estate were grass farms. The entry was at Whitsunday, but the first half-year's rent was under the lease payable at Martinmas thereafter, and the second at Whitsunday following, and so on.

"The executor of the deceased Lochnell claimed at common law the rents legally due at Whitsunday, but conventionally payable at Martinmas 1846, and under the Act a proportion of the second half-year's rents of crop 1846, payable at Whitsunday 1847, effeiring to the three days between the term and Lochnell's death. The Court sustained that claim. The view taken was that the half-year's rents payable at Martinmas 1846 had wholly vested in the late Lochnell, being rents for the crop of a half-year during the whole of which the tenants

derived their right from him as proprietor, and which were legally payable at Whitsunday when he was still in life. As to the rents payable at Whitsunday 1847, these were also rents legally due for a half-year, during part of which Lochnell had been proprietor.

"I think that it has been generally recognised that the grounds of judgment were most fully and logically stated in the opinion of Lord Ivory. In the end of his opinion he summed up the results thus—He held (1) that the statute was not to be read as forfeiting any right which the deceased proprietor had at common law; nor (2) as conferring upon the successor any new measure of right; but (3) 'that its true reading is as a statute of apportionment, distributing according to certain equitable proportions, corresponding to each party's possession of the character and right of proprietorship, the rents of a particular term, which term commenced during the proprietorship of the one and ended during the proprietorship of the other.'

"I do not think that the question of the effect of the Apportionment Acts in the case of rents payable by contract forehand was the subject of decision until the case of *Herries* v. *Maxwell's Curator*, 11 Macph. 396. That was a case under the Act of 1870. The proprietor had died on 18th July 1872. It was held that his executor had undoubted right to the rents conventionally payable at Whitsunday before his death, because there is no instance of what is due and exigible not going to executors. As to the rents payable at the Martinmas after the proprietor's death, they were declared in the leases to be 'the rent for the half-year preceding,' and the Act of 1870 declared that all rents should 'be considered as accruing from day to day,' and should be 'apportionable in respect of time accordingly.'

"It therefore appears that both in the case of *Campbell* and in that of *Herries*, an element—and I think an essential element—in the judgment was, that during that part of the broken term the rents effeiring to which were apportioned, there had existed the legal relationship of landlord and tenant between the deceased proprietor and the tenants. In the case of *Campbell* the deceased proprietor had lived for part of the half-year the rents applicable to the crop of which were apportioned, and in the case of *Herries* he had lived for part of the half-year for which the apportioned rents were by contract payable.

"In the present case Mrs Tennent died before the half-year commenced, for which the rent due at Whitsunday 1897 was payable, and I can see no principle upon which her executor could be held to be entitled to any part of that rent. Therefore the only rent it seems to me which could fall under the Apportionment Acts was the rent for the half-year which was current when Mrs Tennant died.

"No doubt in the case of *Campbell* the majority of the Judges stated very emphatically the opinion that the Act of 1834 was intended to give the executors of a deceased lessor a benefit which they did not enjoy at common law, but was not intended to give any benefit to the succeeding lessor. I must regard that as settling the law (so far as the Act of 1834 is concerned) in cases falling within the same category as that with which the Court were dealing. But I do not think that I am bound by the opinions in a case (such as I take the present to be) falling within a different category.

"The purpose of the Act of 1834 was (as regards Scotland) shortly stated thus—When a lessor died, and was succeeded by another lessor between terms, the common law allowed no apportionment of the rents for that term. The Act provided for such apportionment. In Scotland the succeeding lessor generally took the whole of the rents. The apportionment, therefore, generally operated in favour of the representatives of the deceasing lessor. Further, the cases instanced in the preamble of the Act of 1834 and the previous Act of Geo. II. were cases in which the apportionment benefited the representatives of the deceasing lessor. But the preamble of the Act of 1834, besides narrating a particular class of cases, adds—'And other evils arise from such rents not being apportionable—which evil requires remedy.'

"Now, in the present case it is contended that the representatives of a lessor of a house who dies between Whitsunday and Martinmas takes the whole of the rent due for that term, and payable at Martinmas, and that the succeeding lessor takes no part of the rent. But that is precisely the kind of inequity which the Act was intended to cure. It is just as inequitable that the representatives of the deceasing lessor should take the whole rents of the broken term as that the succeeding lessor should take the whole rents. And why should not that be regarded as one of the other evils which it is said require to be remedied? It is further clear that the enacting clause is framed in words apt to meet the case.

"I am therefore of opinion that in this case, even if the question is to be determined under the Act of 1834, the rent to be apportioned is that payable at Martinmas 1896, because by apportioning that rent the representatives of the deceasing lessor and the succeeding lessor each got the rent for the exact period during which they respectively held the position of lessor.

"Even if that result could not be reached under the Act of 1834, I should hold that it was the effect of the Act of 1870.

"All rents under that Act are considered as accruing from day to day, and are apportionable in respect of time accordingly.

"Now, in the first place, the rents which are to be considered as accruing from day are presumably those which are current when the question arises; and in the second place, the principle of apportionment is, in my opinion, based upon the assumption that both the parties claiming have some connection with the subjects during the broken term, and some equitable ground for claiming part of the rents for that term.

"I am therefore of opinion that the pur-

suer is not entitled to the whole of the rent payable at Martinmas 1896, but only the portion of it effeiring to the period between the term of Whitsunday and the date of Mrs Tennent's death.

"The defender in his defences states a counter claim, which, looking to the fact that the pursuer is, in my opinion, entitled to a part of the rents of the house payable at Martinmas 1896, I must now consider.

"The grass parks at Annfield were let to the defender from year to year. The terms upon which they were let are contained in letters passing between the defender and Mrs Tennent's agents. The rent was £31 payable half yearly at Whitsunday and Martinmas. It was also agreed that the grazing term should be from 1st May to 1st December. After the lease was arranged Mrs Tennent's agents wrote to the defender asking him to pay the whole rent in April, as the previous tenant had done. The defender refused, but having inquired into the custom of the district he offered to pay the whole rent either at Whitsunday under deduction of five per cent., or in August under a deduction of three and a-half per cent. Mrs Tennent accepted the first alternative, and accordingly the rent for the crop and year, less five per cent., was paid at Whitsunday.

"The defender's counsel admitted that one-half of the rent (that legally payable for the first half of the crop and year) vested in Mrs Tennent, and that her executor is also entitled to a proportion of the second half-year's rent corresponding to the time which she survived Whitsunday. He contended, however, that the defender was entitled to repayment of the balance of the second half-year's rent from the pursuer.

"The pursuer, on the other hand, maintained that the whole year's rent having been paid to Mrs Tennent by agreement, it was just a case of forehand rents of which the executor had the benefit. Further, the Apportionment Acts did not apply to such a case, and contained no provisions for the recovery of rents which had been paid, to a deceasing proprietor, by a succeeding proprietor.

"Now, in grass parks as in grass farms the rent is legally paid at Whitsunday and Martinmas, and that although the parks are usually let only from May to December, because the rents are paid for the crop and not for the possession during the year, and the whole crop is reaped during the limited period. Therefore at common law, where the landlord dies between Whitsunday and Martinmas, the executor is entitled to the half-year's rent legally due at Whitsunday, and the heir to the remaining half year's rent.

"I think that in this case the agreement under which the whole rent was paid at Whitsunday is not to be regarded as part of the lease but as an arrangement subsequently entered into for Mrs Tennent's convenience, and I do not think that by such an arrangement she could defeat the rights of the proprietor of the lands after the termination of her limited interest. That view appears to me to be consistent with the opinions expressed by the Court in the somewhat similar case of *Swinton* v. *Gawler*, June 20, 1809, F.C.

"I therefore think that at common law Mrs Tennent's representatives had right to the first half-year's rent and to no more. They can only claim a portion of the second half-year's rent under the Acts. What would have been the remedy of the succeeding proprietor may be a question. The learned Judges in *Swinton's* case apparently took the view that he would be entitled to demand payment of the second half-year's rent from the tenant who had chosen to pay it before it was due, leaving the tenant to operate his relief against the executor. Looking, however, to the fact that the defender is both the succeeding proprietor and the tenant, the question is not in this case one of practical interest, and the parties appeared to desire that all the questions between them as to the rents should be settled in this action.

"In regard to the application of the Acts, I think that it is sufficient to say that the Act of 1870 applies to all periodical payments with exception of annual sums made payable in policies of assurance.

"I am therefore of opinion that the defender is entitled to the second half year's rent of the grass parks with the exception of the proportion applicable to the period from Whitsunday to Mrs Tennent's death."

Counsel for the Pursuer—C. K. Mackenzie. Agents—Blair & Finlay, W.S.

Counsel for the Defender — Johnston, Q.C.—Umpherston. Agents—Millar, Robson, & M'Lean, W.S.

Saturday, November 20.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

JOHNSTONE *v.* JAMES STEWART & SONS.

Reparation — Negligence—Dangerous Condition of Property—Liability to Persons Climbing on Wall.

A father raised an action of damages for the death of his son. He averred that the defenders were proprietors of a piece of ground, the site of a demolished foundry, surrounded by walls with a gate; that they let it out as a show ground; that the pursuer's son and two companions entered the show ground by the gate to see the shows; that on returning about eight o'clock they found the gate shut, and then proceeded to climb the wall, at a place where blocks of sandstone were left projecting beyond the wall face forming an easy staircase over the wall; that this was the recognised mode of exit when the gates were closed, and was continually used by the public as such; and