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

that the wall was in a dangerous condition, so that while one of the pursuer's son's companions was climbing over it one of the top corner stones and a quantity of rubble fell on the pursuer's son and caused injuries from which he died.

The pursuer did not aver that his son had requested the persons in charge of the show ground to open the gate, or that the defenders, although they knew of the use of the wall made by the public, sanctioned or permitted the alleged practice.

Held that the action was irrelevant.

James Johnstone, labourer, 224 Garscube Road, Glasgow, raised an action in the Sheriff Court at Glasgow for £500 damages against James Stewart & Sons, house factors, Glasgow, as acting for the proprietor or proprietors of the plot of ground and gable walls situated between Garscube Road and Port Dundas Canal, formerly occupied by the Phœnix Foundry.

The pursuer averred:—"(Cond. 3) About June 1896 the buildings forming the Phœnix Foundry were demolished by the defenders, or those for whom they are responsible, with the exception of certain of the gable walls, which were left partly standing, to form the boundary walls of said plot of ground. The old gates of the foundry were also left. (Cond. 4) The gable walls thus partly demolished were negligently left by the defenders, or those for whom they are responsible, in a rough, unfinished condition, irregular in height, and without coping or dressing of any kind. (Cond. 5) The south-western boundary of said plot of ground consists of an irregular brick wall (being one of said partly-demolished gables). This wall ends at the gate leading into Sawfield Place, and is terminated with large blocks of sandstone, placed at right angles to each other alternately, in order to dovetail into a former gable at right angles to the said wall, which gable is now entirely demolished. (Cond. 6) Alternate pairs of the said blocks of sandstone were left projecting a very considerable proportion of their length beyond the face of the brick boundary wall, and formed an easy staircase over the wall into Sawfield Place. They have been constantly so used by the public going to Sawfield Place when the said gates were locked—since the demolition before mentioned. The operations of defenders, or those for whom they are responsible, caused the said wall to be left in a dangerous condition. (Cond. 7) No means were taken to secure the top projecting stones, which were deprived of much of their support by the removal of the bricks below them in the demolition of the wall formerly at right angles to the boundary wall, nor was the cement, which is old and in a crumbling condition, in any way renewed. (Cond. 8) After the demolition of the buildings thereon, the said plot of ground was let as a show-ground, and continues to be so let. (Cond. 9) The principal means of entrance to the show-ground from Garscube Road is the said gate at Sawfield Place. This gate stood open all day, and was shut and locked at irregular hours in the evening, irrespective of the number of people in the show-ground. When this gate was shut the recognised mode of exit from the grounds to Garscube Road was by means of the steps formed by the said projecting stones; said steps were an inducement and invitation for people inside to climb the wall to get out when the gates were shut. This mode of exit was in regular use, and was known by the defenders to be so. (Cond. 10) On the evening of Friday the 7th August 1896, between seven and eight o'clock, the pursuer's son William James Johnstone (otherwise James Johnstone), thirteen years of age, went into the show-ground by the Sawfield Place gate to see the shows. (Cond. 11) On returning with two companions about eight o'clock they found the gate shut, although there were still numbers of people in the grounds. (Cond. 12) The two companions then proceeded to go over the wall by the steps formed by the projecting corner stones. Pursuer's son was at this time standing at the foot of the wall. (Cond. 13) Before they reached the top, one of the top corner stones and a large quantity of rubble and cement suddenly fell on the pursuer's son and knocked him down, the stone breaking over and crushing one of his feet. (Cond. 14) As the result of said accident, the pursuer's son died in the Royal Infirmary upon 26th August 1896. (Cond. 15A) The accident was caused through the negligence on the part of the defenders, or those for whom they are responsible, in allowing said wall to remain in a dangerous condition as aforesaid; also negligently closing the gate (without first giving notice to the public inside to leave the ground), necessitating the public inside the ground climbing the wall to get out to Garscube Road. Had they left the wall after the demolition in a sufficient state of repair, or before closing the gates given notice to the people inside to leave the ground, the accident would not have occurred. (Cond. 15) The defenders, although they knew or ought to have known the dangerous condition of the wall, took no steps to have it made secure, or to give warning against persons using it as a means of exit from the show-grounds. (Cond. 16) The defenders, although they knew or ought to have known that boys were constantly playing on said wall and loosening the bricks and stones, took no efficient means to prevent them doing so. (Cond. 17) The defenders, although asked, refuse or at least delay to compensate the pursuer for the loss of his son."

The pursuer pleaded—"(1) The pursuer's son having been killed through the fault or negligence of the defenders, or of those for whom they are responsible, the pursuer is entitled to reparation from the defenders."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the petition."

On 18th October 1897 the Sheriff-Substitute (BALFOUR) pronounced the following interlocutor:—"Allows the parties a proof of their averments."

Note.—"I think this is a case which should go to proof. It is averred—(1st) That the wall in question has been constantly used as an access and exit to and from the vacant ground by the public when the gates were locked, and was known by the defenders to be so used; (2nd) that the wall was in a dangerous condition, and although the defenders knew this they took no steps to secure it or to warn persons against using it; (3rd) that on the night in question the pursuer's son and his two companions, who had been visiting the shows on the ground (for which the defenders had let the premises), found the gate shut, and the two companions proceeded to go over the wall, and brought down stones, &c., from the wall on the pursuer's son who was standing at the foot of the wall; and (4th) that the defenders closed the gate without giving notice to the public inside to leave the ground as they were bound to do. These alleged facts are a sufficient averment of fault on the part of the defenders."

The pursuer having appealed to the Court of Session for jury trial, the defenders took advantage of the appeal to object to the relevancy of the case.

LORD JUSTICE-CLERK—Whether it would be possible to present to the Court a relevant case of this kind I do not say. It would at least require very distinct allegations on record to make such a case relevant. Here it is stated that the pursuer and other boys went into a show ground through a gate, that on coming back they found the gate shut, and that in order to get out they climbed on to the top of a wall, so as to get on to the roofs of some outhouses and from thence drop into the street. Now, it is quite plain that that was not a proper mode of exit. In the ordinary case a person attempting to get out in such a manner must do so at his own risk. No exceptional circumstances are alleged here showing any necessity for the pursuer using this mode of exit. It is said the gates were shut, but the gates of a show ground are shut to prevent more people getting in, and not to prevent those who are inside getting out, and it is not averred that the boys ever requested the person in charge of the gate or of the field to let them out, or even tried to find him.

The owner of walls and buildings cannot be held responsible for injury resulting from an unauthorised use of them by climbing over them. I am therefore of opinion that the action is irrelevant and ought to be dismissed.

LORD TRAYNER—I am of the same opinion. The pursuer's case is this—that his son being lawfully on the enclosed ground in question, found himself shut in by the gate being locked, which was the regular and ordinary means of obtaining access to or exit from the ground; that there was another mode of exit commonly used by those who frequented said grounds, namely, by climbing over the boundary wall on to the roof of adjoining outhouses, and thence dropping (several feet) on to the street; that his son, along with two companions, adopted this mode of exit, and in endeavouring to leave the ground in this way was injured in the manner and to the extent averred in the condescendence. Now, if the pursuer's son adopted the mode of exit over the wall, I think he did it at his own risk. It was obviously not a proper or regular mode of exit; the boundary wall was there to bar exit as well as to prevent intrusion. The pursuer further avers that the wall was in a dangerous condition. Perhaps it was if persons climbed on it, but it is not averred that its condition was dangerous to any person who let it alone, or only used it for the purpose which a boundary wall is intended to serve.

The Sheriff-Substitute, in his statement of the grounds on which he thinks the case must go to proof, gives what seems to me to be an incomplete view of the case. He says that it is averred "that the wall in question has been constantly used as an access and exit to and from the vacant ground by the public when the gates were locked, and was known by the defenders to be so used." Now, the defenders may have known that people went over their wall and disapproved of it; it is not said that they permitted the boundary wall to be used with their approval as a means of access and exit. Then the Sheriff refers to the averment that the wall was in a dangerous condition, "and although the defenders knew this they took no steps to secure it or to warn persons against using it." But I think they were not under any obligation (so long as it was quite safe as a boundary wall) to make it secure for other purposes, nor to warn people not to use it for a different purpose.

LORD STORMONTH DARLING concurred.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer on the appeal, Dismiss the same: Sustain the first plea-in-law for the defenders, dismiss the action, and decern," &c.

Counsel for the Pursuer—Watt—Trotter. Agent—R. W. Gardiner, Solicitor.

Counsel for the Defenders—Jameson, Q.C. —M. P. Fraser. Agent—F. J. Martin, W.S.