count of the pauper. A settlement may be acquired derivatively by adding the residence of the pauper claiming the settlement to that of the person, father or husband, from whom it is alleged to be derived. To this effect see *Allan* v. *Higgins*, 23d December 1864, referred to by the Sheriff-substitute. And on that authority it may, in like manner, be retained should five years elapse without one year's residence of either within the parish.

Whether it would be so in such a case as that stated by me in *Beattie* v. *Adamson*, 23d November 1866, does not seem to have been decided, and it is not necessary to decide it in this case.

The specialties in the facts are conclusive against the plea, supposing it otherwise well founded; for relief was here given to Cruikshank while in the parish of Tullynessle, and afterwards when resident at Premnay, although Fyvie through misconception repaid those advances to Premnay. See *Johnston* v. *Black*, 13th July 1859, &c.

The other judges concurred.

Agents for Advocator—Renton & Gray, S.S.C.

Agent for Respondent—John Auld, W.S.

Saturday, June 6.

FIRST DIVISION.

MACOME *v.* DICKSON.

Landlord and Tenant—Furnished House—Taxes. In the letting of a furnished house, the taxes in respect of tenancy or occupancy are, by the custom of the country, paid by the landlord, unless otherwise stipulated.

Dickson took a three-years' lease of a furnished house from Macome, no special stipulation being made as to the payment of taxes on the house. A question arose as to the tenant's liability for payment of these taxes. The Sheriff-substitute (STEELE) found the tenant liable for the taxes under deduction of the landlord's proportion. The Sheriff (HUNTER) reversed, and found that, "according to the usage of the district, all such taxes are either paid by the landlord or deduction of the amount allowed by him to the tenant: Finds in law, that the usage is to be held to constitute, *ipso jure*, an integral part of the contract; and, *second*, that the defender is therefore entitled to have deduction from the rent of the amount of taxes payable by the tenant."

The landlord appealed.

J. M'LAREN for appellant.

WATSON, for respondent, was not called on.

LORD PRESIDENT—Apart from the seven-pence of income-tax, I have no doubt as to the rest of the case, and I am not disposed very much to refine in such a question, or to affect to decide it on any clear principle beyond this, that there is no doubt of the understanding, not confined to the west country, but very general, that in the letting of a furnished house the tenant pays no taxes. On that simple ground, I think the Sheriff is right.

LORD CURRIEHILL and LORD DEAS concurred.

LORD ARDMILLAN—I am of the same opinion. No exception to the general practice has been established, and it cannot be presumed that a man who takes a furnished house takes it on a different understanding from what is usual. Besides, we have the evidence of the house-agent, who let the house, and who understood that the taxes were, as usual, to be paid by the landlord.

Agents for Appellant—Millar, Allardice, & Robson, W.S.

Agents for Respondent—Tawse & Bonar, W.S.

Saturday, June 6.

SECOND DIVISION.

BONAR *v.* ANSTRUTHER.

Bond of Provision and Annuity—5 Geo. IV., c. 87 (Aberdeen Act) 3d Section—Reddendo and Tenendas Clauses—Increasing Annuity. An heir of entail in possession executed a bond of provision and annuity in favour of his widow, but providing that in no case was she to receive more than one-third of the free yearly rent of the estate. It was further provided by the bond that, when certain preferable burdens should expire, the annuity, if reduced by the previous clause, should be again increased. *Held* (1) that the omission in the bond of annuity of the reddendo and tenendas clauses did not invalidate the deed, there being a valid obligation constituted by it upon the granter and the succeeding heirs of entail to infeft the widow in the annuity; (2) that the 3d section of the Aberdeen Act conferred a power to grant an annuity to expand on the ceasing of any former liferent.

In this action the pursuer, Mrs Louisa Bonar, seeks to enforce a bond of provision and annuity, dated 5th August 1834, granted in her favour by her late husband, Colonel Robert Anstruther of Thirdpart. By this bond he, as heir of entail infeft in the lands, and in virtue of the powers conferred upon heirs of entail by 5 George IV. cap. 87, section 1, bound and obliged himself and the succeeding heirs of entail to infeft the pursuer in a free yearly annuity of £700 per annum out of the said lands of Thirdpart and others; provided, however, that in no case was she to receive more than one-third of the free yearly rent of the estates, after the deduction of all preferable burdens. The deed further provided that whenever these preferable burdens should expire, and, in particular, an annuity of £1000 a-year granted to Lady Anstruther, Colonel Anstruther's mother, that then the annuity to the pursuer should be increased to the full amount of £700, or to a sum amounting to one-third of the yearly rent of the estate.

Colonel Anstruther died in 1856, and upon his death it was discovered that one-third of the free annual rent of the estate, after deduction of preferable burdens, amounted to £425, and this sum has been annually paid to Mrs Anstruther, the pursuer. Lady Anstruther died in 1865, whereupon the pursuer claimed the increased annuity under the bond; and her claim being refused, she brought the present action against the heir of entail in possession of the estate.

The defences were, that the bond of annuity was invalid, in respect of the omission of two essential clauses—viz., the reddendo and tenendas—and that the annuity had not been constituted a burden on the entailed estate in the manner prescribed by the Statute; and that, even if the bond was valid, the Act contained no provision by which the annuity could be increased upon the expiration of another annuity.

The Lord Ordinary (ORMIDALE) repelled both these pleas.

His Lordship added the following note:—

"It was admitted by the defender at the debate, that, on the assumption of the pursuer having a good and effectual bond of annuity, she was entitled to decree as concluded for by her, there being no dispute as to the accuracy or amount of the sums claimed by her, or as to the terms in which they are concluded for in the summons.

"But it was maintained for the defender that the bond of annuity libelled on was ineffectual, in respect—(1) That it does not contain either a reddendo or tenendas clause; and (2) That, in the circumstances, no increase of the pursuer's annuity could have been competently stipulated for, or could take place on the death of the former widow.

"The Lord Ordinary does not think that the pursuer's bond of annuity is in itself exposed to any objection that can be sustained, to the effect of preventing her obtaining decree in the present action. The Aberdeen Act (5 Geo. IV, cap. 87) does not prescribe any particular form of bond; it merely authorises, in general terms, an heir of entail in possession to 'provide and infeft his wife in a liferent provision.' Now, here the meaning and object of the bond are plain enough; and it contains, besides a variety of important clauses, a precept of sasine, to the terms of which, in itself, no objection has been or could be taken. That being so, there can be little doubt that the pursuer—supposing the infeftment already taken by her to be objectionable—could yet adopt the necessary steps for completing a perfectly good title and infeftment. The Lord Ordinary does not see, therefore, that, in the present question with the defender, the succeeding heir of entail to the granter of the bond, there being no competition of sasines or diligence with creditors, the objection which has been urged against the bond can be sustained; *Dickson* v. *Dickson*, 8th June 1855, 17 D. 815 and *Boyd* v. *Boyd*, 5th July 1851, 13 D. 1312. In the former of these cases there neither was nor could have been any actual infeftment, for there was no entailed estate—only a fund which was constructively held to be one; and, in the latter case, an infeftment was held to be effectual, even in a competition with creditors, not only for the annuity which fell due after its date, but for arrears which had become due before the infeftment was taken. And were it necessary to determine the question whether the pursuer's present infeftment is or is not in itself objectionable, in respect her bond contains no reddendo or tenendas clause, the Lord Ordinary would be inclined to negative the objection taken on that ground, in respect that the necessary holding may be implied, although not expressly stated; Stair, 2, 3, 14 and Bankton, 2, 3, 9.

"As regards the objection taken to the competency of increasing the pursuer's annuity consequent on the death of the former widow-annuitant, the Lord Ordinary, on a careful consideration of the Statute, has come to the conclusion that it is not well founded. By the 3d section of the Act it is clear enough that a bond may be granted in such terms as to increase in its operation and effect on the death of a prior annuitant; but the contention of the defender was that, to admit of this, the provision of the prior annuitant must, according to the terms of the Statute, have been constituted under the Act, and not, as here, before the passing of the Act. The Lord Ordinary thinks this too narrow a construction of the terms of the Statute. It must be kept in view that the object of the Statute was to enable an heir of entail to provide his widow in an annuity equal to one-third of the free rent of the entailed estate as at the time of his death; and, although the third section deals in some respects exclusively with provisions created by the Act itself, it also declares, in very general and comprehensive terms, that 'the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent hereinbefore authorised to be granted upon the ceasing or expiration *of any former or existing liferent*, although the same may not take place in the lifetime of the person granting such prospective or increaseed liferent.'"

The defender reclaimed.

D. F. Moncreiff and Webster for him.

Clark and Duncan in answer.

The following authorities were quoted:—

For Pursuer—Ersk. 2, 8, 31; Stair 2, 3, 14, 27, 31; and 4, 35, 24; Bankton, 2, 3, 9; Bell's Principles, § 761; Bell on Purchaser's Title, pp. 16, 17, 259.

For Defender—Craig 1, 9, 2; 2, 3, 32; Ersk. 2, 3, 11; Bell on Purchaser's Title, p. 36; Bell's Abstract of Deeds (published 1814) p. 149; Montgomery Bell's Lec., 2, p. 802; Hope's Minor Practics, (Spottiswoode's edition) p. 217; *Peebles*, 9th Dec. 1825, 4 S. 290; *Rowand*, 30th June 1824, 3 S. 196; and 6th July 1827, 5 S. 903; affd. 14th July 1830, 4 W. and S. 177; *Struthers*, 2d Feb. 1826, 4 S. 418; affd. 28th May 1827, 2 W. and S. 563.

At advising—

Lord Cowan—There are two questions in this case. I am not sure that they have ever been the subject of judicial determination; and the second point requires a careful examination of the Act. The first question raises the point whether this bond of provision has any validity at all. It was granted in 1834 by Sir Robert Anstruther in implement of his marriage-contract; it was therefore highly onerous. He died in 1856, and the pursuer then entered into enjoyment of her annuity. From that time up to the date of the present action the annuity has been paid under the bond. On the death of Sarah Lady Anstruther in 1865, in answer to the demand that the pursuer's annuity should increase in consequence of that event, and the falling in of her annuity, which had been created a real burden by the entail, the reply made was that the bond was bad, and the pursuer not entitled to a farthing. It is thus a vital question for the pursuer. The first section of the Aberdeen Act narrates the hardship under which heirs of entail lay in certain circumstances, and the third gives absolute power to "provide and infeft" their wives. This bond contains a personal obligation upon the heirs in general of the granter, with which we have at present no concern; and further on, after narrating his infeftment in the entailed estate, and the powers conferred by the Act, he binds himself, and the whole heirs of entail succeeding to him, and *subsidiariæ* his heirs and executors whatsoever, upon their own charges, duly and validly to infeft and seise the pursuer in a free yearly annuity of £700. We had no argument from the defender that this obligation upon the heirs of entail was not binding upon them to infeft the annuitant. That is an all-important clause; it is in all the style books, and it alone was necessary in order to enable the grantee to obtain infeftment; and I direct attention to it in case the parties here should think of going further. But it is said that we have here no valid infeftment, because there is neither tenendas nor reddendo in the bond. We have a good precept, and infeftment followed upon it; but, says the defenders, the want of these clauses ren-

ders it defective in a feudal point of view, and the whole affair is a piece of waste paper. I cannot go into that at all. Assuming the obligation upon the heirs of entail to be good and a well constituted obligation, it is not in the mouth of the present heir to state objections to this infeftment. Suppose there had been no precept for infeftment in the bond—which might have occurred, as we have been told that it was prepared in London—the annuitant would have had an action against the heir of entail to give infeftment. The effect of this Act, by giving the powers it does, is just a removal of the fetters of the entail to the extent permitted; and the parties taking after the granter as heirs of entail are liable for all debts so contracted within the powers of the Act. We considered this point in the case of *Callander* in 1866; and in the *Countess of Glencairn's* case (Dic. "Heir-Apparent," Appx. i, 22d May 1800) it was decided that a liferent locality to a wife, granted by an heir of entail dying in apparency after being three years in possession, was held binding on himself and the subsequent heirs—the locality being expressly allowed by the entail. It is difficult to see why the same principle should not apply to the annuity granted under the Act. The principle of *frustra petis* applies to the heir in this case. I do not go the length of giving an opinion that a personal obligation alone, without any infeftment or obligation to grant it imposed upon the heir of entail, would have been sufficient. But the deed may stand perfectly well as a precept without the tenendas or reddendo. Professor Montgomery Bell, in the passage relied upon by the defender, says that this is neither a bond nor a security. Having regard to the peculiar nature of the right under the statutory power, the tenendas in such a bond may well be presumed, upon the authorities quoted, to be a blench-holding. That being so, it would be absurd to hold that this lady was to be laid penniless for want of the expression in the bond of an obligation to pay a penny or a rose.

Upon the second point, I am of opinion that the enlargement of the annuity in terms of the bond must now receive effect, notwithstanding the objection raised that the annuity which has fallen in was not one created under the Act. The Statute is a remedial one, and, according to every principle of interpretation of such provisions, it is to be liberally construed. The meaning of the words I hold to be this, that whenever the expiration takes place of "any" former liferents, whether under the Statute or not—any that has gone to diminish the amount to the widow when the granter died—that then the annuity is to expand.

Lord Benholme—I would not be disposed to assimilate provisions granted under the Aberdeen Act to those granted under the entail itself. Those in virtue of a power in the entail do away with the restrictions of the entail, and, as to them, the heir taking advantage of them is fee-simple proprietor. There are more restrictions in the case of provisions granted under the Aberdeen Act; and there are many cases as to provisions to children granted under the Act where strict principles have been applied. *Lady Glencairn's* case was as to a permissive power under the entail, and it was held that this was to be dealt with as if there had been no entail. We cannot safely look to such a case for analogy, and I rather incline to look to the Act. The heir who takes advantage of the Act must do the thing itself, otherwise it will be ineffectual to bind the heirs or burden the estate. If he did not grant a precept, it is difficult to see how the annuity could be made effectual. But it is a nice question whether infeftment is absolutely necessary to constitute such a provision. I think it doubtful if the bond would be good without it. We are not, however, called upon to decide that. It is a delicate question whether the Act gives two rights, one "to provide," and the second "to infeft." It would be very hazardous to rely upon such a construction. In the case of provisions to children, there is no power to infeft given by this Act. I prefer to avoid that question, and, luckily, the validity of the bond does not depend upon it. We have here an infeftment on the precept of the heir of entail himself. The clauses of tenendas and reddendo are not necessary in a bond of this kind. The Act only requires infeftment, not one that is to affect the fee. A blench-holding would in the circumstances be implied, and it is not therefore of any importance that the reddendo of a rose noble or a pepper corn is unexpressed. Upon the second question, I hold that the provision is elastic, the words of the Act clearly applying to "any" liferent provision.

Lord Justice-Clerk—This is a case of some novelty and difficulty. I have arrived at the same conclusion as your Lordships. The original right under the Aberdeen Act is not a *debitum fundi*, it is rather of the nature of a statutory assignation to the rents of the entailed estate, although these rents are in the hands of the next heir. There is not here required the technical feudal relation of superior and vassal. I do not go the length of holding that there is conferred by the Act a power to direct an obligation against the succeeding heirs—we do not decide that point. In this case we have all the statutory requisites; we have the exercise of the powers in compliance with the Act. From the nature of the transaction, there is room for the presumption that the tenure is to hold of the granter. It is not such as can be conceived to be one from the granter to be held of his superior. It is to be held of the granter himself; and we have authority that this is implied where it is not expressed in the deed. The reddendo in such a tenure would be nominal, and, even if it could be said to be otherwise, the result would be that it would fall to be deducted from the annuity, which would be altogether inconsistent with the nature of the transaction. The object of the infeftment pointed at in the Act is, that it shall be made known that such a burden exists, not that a particular tenendas is inserted in the deed granting it.

Upon the second point, my view is that, reading the first section along with the third, we find that power is given to grant an annuity so that it shall expand on the ceasing of *any* former liferent; and I hold that this power has been exercised, and is available in the present case.

Lord Neaves absent.

The Court pronounced the following interlocutor:—

"*Edinburgh, 6th June* 1868.—The Lords having heard counsel on the reclaiming-note for M.-General Anstruther, refuse the desire of the reclaiming-note, adhere to the interlocutor reclaimed against, find additional expenses due, and remit to the Auditor to tax and report.

(Signed) "George Patton, *I.P.D.*"

Agents for Pursuer—J. & C. Steuart, W.S.

Agent for Defender—Wm. Syme, S.S.C.