defence founded upon the want of a statutory notice, but *quoad ultra* adhered.

The LORD JUSTICE-CLERK said—The aggregate sum sued for in this case by the pursuer amounts to £137, 15s. 7d. The defender pleads want of notice and *mora*. The account begins on 26th February 1853, and ends on 29th January 1864, thus extending over a period of nearly eleven years. No statutory notice was given to the defender until 24th August 1853, and the portion of the account before that date is not insisted in. The paupers continued to receive aliment from August 1853 till 23d February 1854, and if there be no good defence on the ground of *mora*, Barony is entitled to recover the advances betwixt these dates. But from February 1854 to November 1855 there is nothing charged in the account. This interval of rather more than twenty months is an important element in this question. It is averred by the defender that during this time the paupers had ceased to be proper objects of parochial relief, and that is admitted by the pursuer. In that state of the facts the question arises, whether, in February 1855, it was necessary to give another notice, under section 71 of the Poor-Law Act, in order to preserve recourse against Dailly. This is a very important question, and it has been argued to us both upon the construction of section 71, and also on the ground of expediency. I am not inclined to give very much weight to the argument *ab inconvenienti*, but I am disposed to give a fair and reasonable construction to the statute, having regard to the subject with which it is dealing. By the section, notice is required to be given by the relieving parish "of such poor person having become chargeable." The question is whether these poor persons, having been from February 1853 to February 1854 in receipt of parochial relief, having in February 1854 ceased to be objects of parochial relief, and having again in November 1855 become chargeable, this is within the meaning of the section, the occurrence a "poor person becoming chargeable." It was represented to us that to hold that it was would render a new notice necessary after every short period of cessation from receiving parochial relief. I should be very sorry to construe the section in that way. I am aware that there are *often* breaks in the continuity of paupers receiving relief without his ever getting effectually restored to the position of a person of industry, capable of acquiring an industrial settlement. It would not do to say that after such a break the pauper had *again* become chargeable. But the other extreme was also put to us. Suppose a person, after being in receipt of relief, becomes self-supporting for twenty years, and then again falls into pauperism. The pursuer's argument was, that a notice once given was a standing notice for the poor person's life. I can just as little adopt that construction of the statute. We were told that, if we were to take any middle course, the matter would always depend on the discretion of the Court, and that uncertainty would thus be introduced in the administration of the poor law. I am not in the least afraid of that. I think we may fix on a construction which will be perfectly intelligible. We cannot foresee every case which may occur, but we may lay down a general rule which will apply in most cases. Wherever it can be fairly and distinctly alleged that for a considerable period of time a person has acquired an industrial character, if that person becomes an object of parochial relief, he is a person "becoming chargeable" in the sense of section 71. I don't think such a rule will entail the slightest hardship; and I am therefore of opinion that in this case, after the period of twenty months, the chargeability of the paupers was a new chargeability, requiring a notice in order to preserve recourse against the parish of settlement. This view defeats the pursuer's claim from 1855 to 1860, when a new notice was given. As regards the aliment since 1860, and the aliment before 1855, there remains the defence of *mora*. We are told that in 1854 Dailly repudiated liability. I am not much moved by that. I don't see how the plea of *mora* could arise in any other case. If there is an admission of liability, the relieving parish becomes the agent of the parish of settlement. But in the circumstances of this case, I think there is nothing on which to found the plea of *mora*. There is nothing but the mere lapse of time, and I know of no case in which the lapse of time which occurred here has of itself been held sufficient.

The pursuer was found entitled to expenses up to the date of closing the record, and the defender to expenses since that date to the extent of three-fourths.

KIERNAN *v.* CAMPBELL'S TUTORS.

Entail—Clause—Construction. Terms of a clause in a deed of entail which held (aff. Lord Barcaple) not to confer a right on the heir in possession to burden succeeding heirs with the payment of an annuity to his widow out of the rents of the estate accruing after her death.

Counsel for Pursuer—Mr Gordon and Mr J. T. Anderson. Agents—Messrs Baxter & Mitchell, W.S.

Counsel for Defender—Mr Dundas and Mr Macpherson. Agents—Messrs Macnaughton & Finlay, W.S.

This action of declarator and payment has been instituted by the pursuer, Mr Kiernan, as executor nominate of the now deceased Mrs Mary Shearer Hemsworth or Campbell, widow of the late Lieutenant-Colonel John Campbell, some time heir in possession of the entailed estate of Blackhall, in the county of Kincardine, and administrator of her personal estate, against the tutors of Alexander Douglas Campbell, the heir of entail now in possession of that estate, in order to have it found and declared that the arrears of annuity payable to Mrs Campbell for the period from 16th April 1856 to 9th May 1860, during which she survived her husband, amounting to £445, 0s. 10d., due under a bond of annuity, dated 3d May 1832, granted by him in her favour, and periodical interest thereon, form a charge on the rents of the said estate, due and to become due; and further, that the said arrears and interest form a just debt of, and may be recovered from, the heir of entail in possession, to the extent of the rents which have been, or may yet be, drawn by him from the said estate. The action further contains a petitory conclusion for payment of such arrears and interest against the defenders.

The action is resisted by the defenders on the ground that no liability attaches to the present heir of entail in possession of the estate, or to his estate, for the arrears of annuity thus claimed; and that the security conferred by the bond of annuity was limited to the rents of the estate which fell due between the death of Colonel Campbell, the granter thereof, and the death of his widow, the annuitant, or, at all events, did not extend to rents which fell due after the death of the annuitant, or after the death of the heir in possession of the estate at the terms when the annuity became payable.

The pursuer, on the other hand, maintains that in virtue of the annuity granted and secured to Mrs Campbell under the power conferred in the deed of entail, he, as her representative, is entitled to payment of that annuity, in so far as the same is due and unpaid, from the heir at present in possession of the estate, or at least to the extent to which he has drawn the rents of the estate; and this on the ground that the annuity is a good charge on the rents of the estate, by whomsoever the estate may be possessed, and the rents may be levied and uplifted; and that the heir in possession, represented by the defenders, having intromitted with and uplifted rents to an amount greater than the sum claimed by the pursuer, they are liable to make payment of the arrears of annuity sued for.

The Lord Ordinary (Barcaple) assoilzied the defenders, and to-day the Court adhered. The following is the opinion of Lord Cowan, who delivered the leading judgment of the Court.

Lord COWAN, after narrating the circumstances in which the case arose, said—The primary question is—Whether the deed of entail gave power to the heir in possession for the time to grant bonds of provision or annuity in such terms as to have the legal effect in a question with succeeding heirs of entail asserted in this action? For unless the deed of entail conferred power on the heirs in possession for the time so to deal with the estate and its fruits, it can scarcely be contended that the bond of annuity, however expressed, can impose any obligation upon an heir taking the estate under the destination. From the statements in the record it will be seen that the estate of Kilmartin, over which this annuity was originally constituted, was, in virtue of statutory powers obtained for the purpose, sold for payment of debts by which the lands were burdened, and that with the surplus of the price other lands now forming the entailed estate of Blackhall were purchased and settled on the same heirs and under the same provisions and fetters in all respects as those contained in the original entail of Kilmartin, and subject also to the same burdens of liferent provisions, *inter alia* of the annuity in question, and which was accordingly of new created a burden on the estate of Blackhall to the same effect as it stood over the estate of Kilmartin. As regards the present question, it is of no consequence whether the terms of the Kilmartin or those of the Blackhall entail be taken, as they are in every essential respect the same. The deed of entail contains all the provisions and fetters necessary for the constitution of a strict entail in terms of the Act 1685. There is a prohibition against the alteration of the order of succession, against alienations, either irredeemably or under reversion, and against the burdening of the lands with infeftments of annual-rent, or any other servitudes or burdens whatever, "excepting only as is hereinafter excepted;" and there follows a prohibition against the contraction of debt, and other usual provisions, all of which are protected by the usual resolutive and irritant clauses. Clear it is that under such a deed of entail, had no premissive power followed, each heir succeeding to the estate must have been effectually restrained from imposing any burden or creating any debt that could possibly affect the succeeding heirs called to the succession, or the lands themselves, and the rents thereof. It is vain to say that each heir as he succeeded was fiar of the estate; for, although he was truly such, it was impossible for him to shake himself free of the fetters that the deed of entail, by which he was called to the succession, had legally and effectually imposed on all the heirs of the destination. The deed, however, goes on to except and reserve from the limitations and clauses irritant full power and liberty to the heirs in possession of the estate "to provide and secure their lawful wives and husbands respectively" in competent liferent provisions out of the lands and others above-mentioned, and to grant bonds or obligations for the same, not exceeding one-fourth part of the free rents." It appears to me that it was to this power of providing and securing a liferent provision out of the lands that the exception to the limitation against the creation of infeftments of annual-rent or other servitudes or burdens had special reference. There is no other permissive power in the deed to create any rights of that kind. But, however that may be, it is certain that the burden allowed to be created was not of a permanent character. It was merely a liferent annuity to be secured by infeftment in favour of the wife or husband. Such a right could only subsist during the lifetime of the annuitant. The widow or widower was clothed with a real security which could be made effectual out of the rents as they fell due, preferably to any other burden that could be created by the heir at the time in possession. But as the annuity terminated with the life of the annuitant, the infeftment by which it was secured necessarily terminated with it. It ceased to exist as a burden on the lands, and could have no legal effect or operation subsequent to the annuitant's death. No more than that the infeftment of a liferenter to whom an estate has been conveyed in liferent while the fee is given to another, or that of a widow infeft in locality lands can exist beyond the life of the liferenter or widow, can it, upon any sound principle, be maintained that the infeftment created in security of a liferent annuity out of lands continue to subsist after the death of the annuitant. The estates created by them, or the rights secured are so far essentially of the same character. Now, it will scarcely be pretended that in a question with the fiar the rents of the estate falling due after the liferenter's death could be attached for arrears of rent accruing during the liferenter's life, and which had been omitted to be uplifted. Or, in the case of a liferent constituted by locality, would the fiar after the liferenter's death be open to have his rents attached for arrears of rent due out of the locality lands. I can see no principle for this. But on the same principle, the liferent annuitant, secured over the whole rents, must make the annuity effectual out of the subject of it while the infeftment subsists; and if this is not done, it is vain to attempt the attachment of rents subsequently accruing, and which are now the property of another. And it will be seen that the several provisions in the deed which relate to the liferent annuities permitted to be granted by this entail, on which the parties found, are consistent with this view of their true character, and no other. There is the power to grant bonds or obligations for the liferent provisions. This obviously has regard to the character of the right, and must be held as intended merely to enable the annuitant to recover the annuity as it fell due—that is, from the rents of the lands accruing during the subsistence of the annuity, and from the heirs of entail in the enjoyment of the estate and drawing those rents out of the lands over which the annuitant's real security extended. No obligation of any more extensive character is either expressly or impliedly permitted to be executed. There is no power conferred to direct these bonds and obligations against all the heirs of entail as they succeed; and this is the more remarkable, because the permissive power to grant bonds of provision to children is so expressed as to present a striking contrast to this power of providing and securing liferent provisions to wives and husbands. For while in the latter case no power whatever is given by the entailer to bind and oblige subsequent heirs of entail, the bonds for the children's provisions are allowed to be granted in such terms as to be binding on all the substitutes and heirs of tailzie succeeding to the estate, and to be effectual against the rents and profits of the same to the effect thereinafter mentioned. The reason of this difference obviously is that the liferent annuity which the widow was entitled to draw year by year out of the rents was not intended to subsist as a debt after her death against any of the heirs of tailzie other than those intromitting with the rents during its subsistence, while the provisions to children were to subsist as debts till paid off, but which it was provided should take place within ten years after the death of the granter. There is farther an express provision that neither the annuities to wives or husbands nor the bonds of provision to children should be any burden upon or anywise affect the property of the tailzied lands and estate, which it is provided are only to be a ground for affecting the rents, maills, and duties of the same, without prejudice to legal diligence and execution against the persons and estate of the said heirs; and there follows a declaration with regard to the preferable ranking of the claims of the annuitants and children in competition with the private debts of the heirs or substitutes of tailzie. This part of the deed is founded on by the pursuer as if it expressly conferred a special right by preference over the rents of the estate no matter when falling due, whether during or after the subsistence of the annuities, but the clause cannot be so read. Its

terms relate not merely to the liferent provisions of wives or husbands, but to the provisions of children also, and the true reading of what is provided for by the entailer is that the rents which according to the character of the right, are unpledged for payment of the annuities or provisions shall be preferably devoted to that purpose, and be open to be attached for payment of the annuities while they subsist, or of the provisions to children during the ten years within which they must be finally discharged. Any other view would be inconsistent with the provisions of the deed as to the heir's taking the estate not being burdened with more than one liferent provision, or at least with a second of a restricted amount and no more. And such a view of the clause might have the effect of arrears being allowed to accumulate during the widow's lifetime to such an extent as might deprive the succeeding heir of his enjoyment of the rents and estate for a series of years, and militate against his power of providing for his own wife and children while such burdens subsisted over the rents. This is a result plainly inconsistent with the terms of the leading clause conferring the power, with the character of the provision out of the lands allowed to be secured by infeftment, and with the allowance given simply to grant bonds and obligations for those annuities. Altogether, I cannot but regard the power conferred by this deed of entail to be of the limited character and effect which I have endeavoured to explain. It is not a permanent but a temporary burden that was allowed to be created. The right ceased to exist when the liferenter died. The infeftment which secured it could not but cease also. It behoved to do so from its very nature as a limited estate burdening the radical right given to the heirs successively called to the enjoyment of the estate. No obligation was permitted to be imposed upon any of the heirs-substitute of tailzie for such liferent provisions, although those that were in possession while the liferent subsisted might become personally liable from their intromitting with the rents without paying the liferent provisions with which they were burdened. No express decision bearing upon the question raised by this record, and disposed of by the interlocutor under review, has been referred to; and I do not doubt if any such authority existed it would have been brought before the Court in the course of the elaborate argument contained in these written pleadings. It was thought not improbable that some question of the kind might have occurred with regard to liferent provisions granted under the Aberdeen Act; but this does not seem to be the case, and upon examining the several provisions of that statute it is not surprising it should be so. Those provisions are very carefully expressed so as to confine the liferent provision and infeftment to the rents and profits of the estate during the subsistence of the liferent and the relative infeftment. I see no reason to think that a preference could be claimed in virtue of a bond of annuity under the Act over rents accruing subsequent to the liferenter's death. I think it would be inconsistent with the provision so to hold. The decision in Boyd *v.* Boyd, to which reference is made by the pursuer, has certainly no application to the present. The competition was between the widow founding upon her liferent infeftment and a creditor adjudger of the liferent interest of the heir in possession founding upon an adjudication, led subsequent to the date of the widow's liferent. As both the widow and the heir who succeeded the granter of the liferent provision, and whose creditor it was that had led the adjudication, were in existence, it is plain that, however instructive otherwise, the decision can have no application here. The other decisions referred to, and founded on by the pursuer, related either to obligations created by the entailer himself, or to provisions allowed to be created so as to affect the lands, or to debts and obligations which the deed of entail specially declared should affect the heirs of entail personally, as they successively took the estate, or to bonds of provision to children, which from their nature could not raise any such point for decision as that which we have now to decide. It is not necessary to allude more specially to these authorities. The true effect of them on the argument, and their consistency with the general principles laid down by our institutional writers in treating of that class of rights affecting lands to which this belongs, are satisfactorily demonstrated in the able pleading for the defender, and to the anonymous author of which I must tender my thanks for the perusal of a well-considered and interesting argument. The particular terms of the bond granted by Colonel Campbell to his widow do not require much observation. The bond, it is said, professes to bind the whole subsequent heirs of entail. This cannot, however, be of any avail, assuming that the true construction of the deed of entail is that no heir is liable for the annuity who does not represent the granter of the bond, and who has not intromitted with the rents accruing during the lifetime of the widow, and the subsistence of her right. Such heir takes the estate by virtue of his own right under the destination, free of every burden which the preceding heirs may have attempted to create, without any power to do so by the terms of the deed of entail. In this bond of annuity, however, it is not immaterial to observe that the assignation to the rents—a very important clause in such a bond—is so expressed as to be entirely consistent with that view of the burden allowed to be created by this entail in virtue of wives or husbands, for which the defender contends. It would seem, therefore, that the framer of this bond of annuity, if not the granter, never contemplated that the widow should have any right to attach the rents of the estate for payment of her annuity, excepting those that should become due during her own lifetime. The pursuer has referred in some parts of the argument to the terms of the entail of Blackhall, executed under the statutory powers obtained for the sale of Kilmartin, and the reinvestment of the surplus price, after payment of debts, as if there was thereby constituted a higher right than that which could have been constituted in favour of his widow by Colonel Campbell under the powers contained in the Kilmartin entail. To this matter the Lord Ordinary has referred at the close of his note to the interlocutor. It seems to be doubtful whether any such plea is properly raised by the summons and record. But supposing it to be so, I cannot think it open to serious question that the extent of the obligation of the heirs of entail must be measured exclusively by the second construction of the original entail. In the first place, any more enlarged right apparently conferred by the terms of the Blackhall entail would be objectionable as inconsistent with the statutory powers on which the granters of that deed acted in its execution; and, in the second place, the words on which the argument is based, when the whole instrument is read, are not incapable of being construed in perfect consistency with an intention that no higher or other right or interest in the lands or in the rents thereof was truly intended to be conferred, or has in fact been conferred, than that which was permissible under the original entail of Kilmartin. On the whole, I am of opinion that the interlocutor should be adhered to.

Saturday, Feb. 10.

FIRST DIVISION.

PETITION—W. H. TAIT.

Proof—Presumption of Life. Circumstances which held insufficient to overcome the presumption in favour of life.

Counsel for Petitioner—Mr Charles Scott. Agent—Mr A. Hill, W.S.

Counsel for Factor—Mr Park. Agent—Mr R. M'William, S.S.C.

This was a petition by a party for authority to uplift certain funds which had been destined to his