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

only brother, and were payable to him on his reaching the age of twenty-five years. The brother, if now alive, is aged twenty-seven, but it was stated that in 1853, when he was fifteen years old, he went abroad as an apprentice seaman; that when the ship was at Callao, in South America, in 1854, he was left in the hospital there on account of ill-health, and after getting convalescent he left to seek employment, but that he had not since been heard of, although every inquiry had been made. It was also stated that he had received a good education and was perfectly able to communicate with his friends by letter, but that since he left this country no communication had been received from him, although he was well aware that there was considerable heritable and moveable property in this country in which he had an interest. The petitioner offered to find caution to repay to his brother in the event of its being found afterwards that he was still alive. Answers were lodged by Mr William Wood, C.A., who was in 1862 appointed factor *loco absentis* for the brother, on the application of the present petitioner. He referred the Court to the following cases in which applications similar to the present had been granted —viz., Fettes, 7th July 1825; Hyslop, 15th June 1830; Campbell's Trustees, 1st February 1834, Garland, 12th November 1841; and Fairholme, March 1858; and to the following cases in which they had been refused—viz., Campbell 17th June 1824; Fife, 16th June 1855; and Barstow, 14th March 1862. The petitioner founded upon the case of Ruthven (M. 11,629, and Dickson on Evidence, p. 228).

The Court refused the petition. They knew of no case in which a person who had been only absent for twelve years, and would be now, if alive, only twenty-seven years of age, had been presumed to be dead, and to have left no issue.

SOMMERVILLE *v.* MAGISTRATES OF LANARK.

Process—Advocation ob contingentiam—Competency. Circumstances in which an advocation *ob contingentiam* held incompetent.

Counsel for Advocator—Mr Patton and Mr W. N. M'Laren. Agent—Mr W. Mackersy, W.S.

Counsel for Respondents — Mr D. Mackenzie. Agents—Messrs Maconochie & Hare, W.S.

This is a question as to the competency of an advocation *ob contingentiam* of an interlocutor of the Sheriff of Lanarkshire in an action of sequestration for rent, which was reported by the Lord Ordinary on the bills. The objections were (1) that the interlocutor is a final judgment, and advocation *ob contingentiam* was excluded by the decision in the case of Hamilton, 11th February 1848 (10 D. 678; (2) that there is no contingency; and (3) that advocation *ob contingentiam* is excluded by section 24 of the Sheriff Court Act, 16 and 17 Vict. c. 80, which excludes review of all interlocutors of the Sheriff "not being an interlocutor sisting process or giving interim decree for payment of money, or disposing of the whole merits of the cause;" and at the same time repeals the provisions of the Act 5th George III. c. 112, and of 6th George IV. c. 120, in so far as inconsistent with the above enactment. In the case of Harrington *v.* Richardson, 20th January 1854 (16 D. 368), it was held that this provision of the Sheriff Court Act did not exclude an advocation with a view to jury trial under section 40 of the Judicature Act.

The action to which the present was said to be contingent is one of reduction of certain decrees pronounced by the Sheriff in regard to previous rents of the same subjects, and the same defences which were stated in these actions were applicable to the one now proposed to be advocated.

The Court, after hearing counsel for the advocator, refused the advocation as incompetent.

The LORD PRESIDENT said—I think this proceeding is not competent. The position of the case is this—A sequestration has been awarded, and a warrant of sale granted by the Sheriff. It is said that this is a final judgment, and that the advocation is not brought for the purpose of obtaining review; but if it is not brought for this purpose it has no meaning. It is not a suspension of execution. Lord Rutherfurd, in the case of Harrington, said that the object of advocating *ob contingentiam* was that two cases relating to each other might be heard together, but he did not say *reviewed* together. Section 40 of the Judicature Act is a very peculiar one. The object of it is not to obtain a judgment, but to collect materials for a judgment by means of a jury trial. That, therefore, is held not to be precluded by the Sheriff Court Act. But that is not the case here. What is here proposed is to obtain review by means of a form of process in which no caution is required of a judgment, review of which can only be obtained on caution being found.

Tuesday, Feb. 13.

FIRST DIVISION.

RICHARDSON AND OTHERS *v.* WILSON AND CO.

New Trial. A new trial granted on the ground that the verdict was contrary to evidence.

Counsel for Pursuers—Mr Fraser and Mr F. W. Clark. Agent—Mr W. Mackersy, W.S.

Counsel for Defenders—Mr Gifford and Mr Macdonald. Agent—Mr George Cotton, S.S.C.

The pursuers in this action are the widow and children of Joseph Richardson, a furnace-filler at Kinneil Iron Works, who received certain injuries on 18th May 1864 while in the defenders' employment, of which he died. The pursuers alleged that the injuries were received "through the fault of the defenders," and were allowed an issue to prove this allegation. This issue was tried before the Lord President and a jury on 25th and 26th July 1865, when a verdict was returned for the pursuers by a majority of 10 to 2, the damages being assessed at £350.

The defenders having obtained a rule on the pursuers to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence, and the pursuers having been heard thereon, the Court to-day made the rule absolute and granted a new trial, being of opinion that the verdict was not warranted by the evidence. The expenses of the trial were reserved.

OUTER HOUSE.

(Before Lord Mure.)

SMITH AND GILMOUR *v.* CONN.

Process—Advocation—Competency—Justice of Peace—Summary Procedure Act—Jurisdiction. Held (per Lord Mure) (1) that an advocation of a judgment of Justices for a contravention of a Road Act which had not been appealed to Quarter Sessions was incompetent; (2) that the Summary Procedure Act does not apply to a petition presented under sections 109 and 110 of the General Turnpike Act.

Counsel for Advocator—The Solicitor-General and Mr Millar. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

Counsel for Respondent—Mr Gifford and Mr P. Blair. Agent—Mr Thomas Dowie, S.S.C.

This is an advocation of a judgment of the Justices of the Peace for the county of Ayr, assoilzieing the respondent, who is the proprietrix of a house in Kilwinning, from a petition presented against her by the advocators, who are the clerks to the Irvine Road Trustees, for an alleged contravention of section 12 of the Ayrshire Road Act, 1847. By that section it is enacted that without the consent of the trustees no house or building shall be erected within a distance of less than 25 feet from the centre