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