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

of the turnpike road, and the advocators allege that by erections and additions made to her house in May 1865 the respondent has brought it within the distance disallowed by the Act. The proceedings were by petition upon six days' *induciæ*, under sections 109 and 110 of the General Turnpike Act, which was incorporated with the Ayrshire Act. The case having been brought before the Justices of the county, was by them dismissed. On behalf of the respondent it was pleaded, that no appeal having been taken to Quarter Sessions from the judgment of the Justices, as provided by section 114 of the Turnpike Roads (Scotland) Act, 1 and 2 William IV., c. 43, their decision is now final and conclusive; and that by section 28 of the Summary Procedure Act, 26 and 27 Vict., c. 53, the jurisdiction of this Court is excluded, in respect that the proceedings are, in the sense of that section, of a criminal nature.

The Lord Ordinary, after having heard parties, dismissed the advocation as incompetent, on the ground of the finality of the Justices' decision in respect of want of appeal therefrom to the Quarter Sessions (Campbell *v.* Strathern, Feb. 9, 1848, 10 D. 655). In regard to the other plea the Lord Ordinary observed in his note—

"Upon considering the provisions of the 28th section of the Act 26 and 27 Vict., c. 53, upon which the plea is rested, the Lord Ordinary has come to be of opinion that, assuming the proceedings of the Justices in such a case as the present to be open to review, the jurisdiction of the civil court is not excluded. At the date of the above Act it had been authoritatively settled that the Court of Justiciary had not jurisdiction to review proceedings under the Act 1 and 2 William IV., c. 43 (Campbell, 33d November 1847, Arkley, p. 386), so that the present question turns upon whether, by the above section of the Summary Procedure Act, the jurisdiction has been taken away from the civil and transferred to the criminal court. Now the provisions of that section are restricted to proceedings "upon summary complaint before sheriffs, justices," &c., and if the present complaint had been brought under sect. 111 of 1 and 2 William IV., c. 43, which authorises prosecutions in a summary form, the Lord Ordinary would have been disposed to hold, notwithstanding the decision in the case of Campbell, that the advocators had applied to the wrong tribunal for redress. The proceedings complained of, however, were not taken in the summary form of procedure prescribed in that section, but upon petition, with a citation on six days' *induciæ*, under sections 109 and 110 of the statute, as expressly distinguished from the summary procedure provided by section 111. And such being the nature of the complaint, review, if competent in such a case at all, must still, it is thought, be in the civil court."

HOUSE OF LORDS.

Monday, Feb. 12.

JACK *v.* ISDALE.

Poor—Relief—Able-Bodied Poor—8 and 9 Vict. cap. 83. Held (aff. Court of Session) that a parochial board has no power to apply the funds raised by assessment under the Poor Law Act towards the relief of the able-bodied poor.

Counsel for Appellant—The Lord Advocate and Mr Rolt, Q.C. Agents—Mr John Galletly, S.S.C., and Messrs Martin & Leslie, London.

Counsel for Respondent—Mr Anderson, Q.C., and Mr Neish. Agents—Messrs J. & H. Cairns, W.S., and Mr William Robertson, London.

This is an appeal against an interlocutor of the First Division of the Court of Session, deciding that the Poor Law Amendment Act of 1845 (8 and 9 Vict., cap. 83) confers no discretionary power upon parochial boards to apply the funds raised by assessment to the relief of able-bodied persons out of employment. The sections of that Act material to the present question are the 33d, 54th, 68th and 91st. The 33d declares it competent to the parochial board to resolve that the funds requisite for relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment. The 54th enacts that in all parishes in which it has been agreed that an assessment shall be levied for relief of the poor, all monies arising from the ordinary church collections shall, from and after the date at which such assessment shall have been imposed, belong to, and be at the disposal of the kirk-session of each parish; but provides that nothing therein contained shall be held to authorise the kirk-sessions of any parish to apply the proceeds of such church collections to purposes other than those to which the same were then in part or wholly legally applicable. The 68th section provides that, from and after the passing of the Act, all assessments imposed and levied for relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor; and provides that nothing therein contained shall be held to confer a right to demand relief on able-bodied persons out of employment. Lastly, the 91st section declares that all laws, statutes, and usages shall be, and the same are thereby repealed, in so far as they are at variance or inconsistent with the provisions of the Act, but that the same shall continue in force in all other respects. Previous to this Act of 1845 the Scottish statutes concerning the regulation of begging and the suppression of vagrancy—enacted as they were in days when work was to be readily had by all who were willing to undertake it—refer to two classes of people only, the one as the "puir, aged, and impotent persons who of necessity must live by alms," and the other as "strong and idle beggars." The former class constituted the permanent poor entitled to claim and receive parochial relief; while the latter class were liable to be scourged and burned on the ear for the first offence, and for the second ordained to be put to death as thieves. In a report, however, made to the House of Commons in 1820 by the General Assembly of the Church of Scotland regarding the parochial administration of the poor laws, mention is made of "occasional" or "industrious" poor as a class who were only assisted when laid aside from work or accidental causes. A subsequent report made by the same venerable body in 1839, after fully explaining that no provision is made by any of the old statutes for relief of the able-bodied poor, proceeds to say that an arrangement was introduced, and for a length of time established by usage only, but in time sanctioned by a proclamation of the Privy Council, and afterwards ratified by Act of Parliament, by which a certain proportion of the church collections were placed at the disposal of the kirk-sessions in order that they in their discretion might be able to afford assistance for a time to such industrious persons within their bounds as should happen owing to temporary sickness, or to a casual failure of work, to be in difficulty and straits. In 1863, and for some time previously, there existed great distress in certain branches of the weaving trade in the manufacturing town of Dundee, and a consequent inability on the part of some portion of the weaving population of the town to find full employment by their labour. In these circumstances applications for relief were made to the Parochial Board by persons, who though perfectly able to maintain themselves and their families by their labour could employment have been found, were reduced to distress by the want of such employment. To two applicants—both able-bodied men, but in difficulties from inability to obtain employment—the board granted relief; to the one for six weeks at the rate of three shillings and sixpence a week, and to the other four shillings a