amenable on the ground that the *locus solutionis* of the contract concurred with personal citation within the territory. There was no doubt that as regarded this Court that was a good ground of jurisdiction. If a contract fell to be performed in this country, and the foreigner bound in performance was cited here, there was undoubted jurisdiction to enforce the contract. But was that ground equally applicable to Sheriff Courts? Now, it fell to be asked, first, whether, supposing the defender here to be a Scotchman, domiciled in a different sheriffdom, the concurrence of these two elements, *locus solutionis* and personal citation, would suffice to subject that domiciled Scotchman to this Sheriff Court in any cause. Now, though there was no direct authority, there was no doubt that that was a good ground of jurisdiction. That was assumed in the case of Logan, decided in the Justiciary Court in 1859 (3 Irv. 323). The next question was, did that apply equally in the case of a foreign defender. There was no difficulty in so applying it, especially looking to the statutes. Foreigners were those "furth of the country." It was true that the Supreme Court was generally spoken of as the *commune forum* of all foreigners, but "foreigners," as a class, mean foreigners out of the country, as to whom the general rule, no doubt, was that you could only cite them edictally to this Court. But there were many exceptions. A foreigner might, in some cases, be cited on a forty days' residence within the jurisdiction of the Sheriff, and there was therefore nothing in the character of a foreigner making him less amenable to local than to supreme jurisdiction. Here the defender was found in the place where, and at the time when, he was bound to perform the contract, and jurisdiction was well founded.

The other Judges concurred, and the interlocutors of the Sheriffs were therefore altered, and the jurisdiction sustained.

Agent for Advocators—James Webster, S.S.C.

Agents for Respondents — Cheyne & Stuart, W.S.

Thursday, Feb. 21.

FIRST DIVISION.

GOUROCK ROPEWORK COMPANY *v.* FLEMING.

Issues—Marine Insurance Policy—Deviation. Issues to try a right to recover under a policy of Marine Insurance, the defence being that the ship had deviated, and the answer to that defence that the defender knew of the deviation when he entered into the contract.

The pursuers of this action sue the defender, who is a merchant in London, for £300, being the extent to which a policy of marine insurance over a cargo of hemp, shipped to the pursuers on board the steamer Cronstadt, was underwritten by him. The steamer sailed from Cronstadt on 19th November 1864, but foundered at sea and was lost, with all its hands and cargo, on 30th November. The defence was, that the defender was liberated from his obligation under the policy, in consequence of the Cronstadt having deviated from her course and towed into Revel Roads a ship called the Agincourt, which was loaded with Government supplies for the Amoor. It was admitted that the owners of the Cronstadt had received £2000 for salvage services in saving the Agincourt. The defender averred that the average voyage from Cronstadt to Leith was six days, and that had there been no deviation the steamer would have reached Leith five days before she was lost. The pursuers' reply to this defence was that the fact that the Cronstadt had gone to Revel was known to the defender when he entered into the policy, but this the defender denied.

The following issues were to-day adjusted for the trial of the cause, viz. :—

"It being admitted that the defender granted the policy of insurance, No. 7 of process :

"Whether, in or subsequent to November 1864, during the currency of the said policy, goods belonging to the pursuers, on board of the steamer Cronstadt, mentioned in the said policy, were lost by the perils of the sea insured against; and whether the defender is, under the said policy, resting-owing to the pursuers in the sum of £300, or any part thereof, with interest thereon at the rate of £5 per centum per annum, from 2d January 1865 till payment?"

Counter Issue for Defender.

"Whether the steamer Cronstadt deviated from the voyage set forth in the said policy of insurance?"

Additional Issue for Pursuers.

"Whether the defender undertook the obligation contained in the said policy in the knowledge that the steamer Cronstadt had deviated from the voyage set forth in the said policy?"

Counsel for Pursuers—Mr Clark and Mr Shand. Agents—Duncan & Dewar, W.S.

Counsel for Defender—Dean of Faculty and Mr Hunter. Agents—Morton, Whitehead, & Greig, W.S.

CARSTAIRS AND OTHERS *v.* KILMARNOCK POLICE COMMISSIONERS.

Statute—Construction. Terms of a local statute which held to authorise the magistrates of a burgh to compel proprietors of buildings in a street to form a footpavement in front thereof.

By the Kilmarnock Police Act, 10 and 11 Vict., cap. 207, sec. 33, it is enacted "That the owners and proprietors of all houses and buildings, or of gardens or grounds adjoining to or fronting any street, square, or public place, or lane or passage already formed or to be formed within the limits of the said burgh, shall, at his, her, or their expense, and in proportion to the extent of the fronts of their respective properties, or of the rents of their houses as aftermentioned, cause the whole of the said streets, squares, or other public places, lanes, and footpaths, and passages, to be well and sufficiently paved, causewayed, or macadamised with whin or other material, of such breadth and in such manner and form as the commissioners, after visiting the grounds and hearing the parties, shall direct and appoint, and shall thereafter, from time to time as occasion may require, repair and uphold and maintain in repair the said streets, squares, public places, lanes, and passages." The next section of the Act (section 34) provides for the mode of enforcing the obligation upon owners and proprietors, and for the recovery by the commissioners of any expense they might incur in paving or repairing streets, in case of the owner's failure to do so.

By section 124 of the said Act it is enacted—"And whereas the personal performance of statute service has not been required for many years in the county of Ayr, a reasonable composition in money in lieu thereof having been found more useful and expedient, and it will farther be more conve-

nient that the said commissioners have the power of levying the composition or conversion hereby authorised within the bounds of this Act; be it therefore enacted, That from and after the passing of this Act, all persons, corporations, or companies, in the natural possession whether as owners, lessees, or occupiers of lands, iron works, factories, and manufacturing establishments, houses, buildings, and other heritages of every description within the said bounds, shall pay yearly, on or before the 11th day of November in each year, as a money composition, or conversion in lieu of statute service, a sum not exceeding one pound for every hundred pounds of the real rent or value of such lands and heritages, and a proportionate sum for smaller rents or values, in conformity with the provisions and exceptions of the Act or Acts regulating, or that may be passed during the present session of Parliament to regulate, the collection of the statute labour of the remainder of the said county of Ayr; which statute labour conversion-money shall, from and after the passing of this Act, be payable to and leviable by the said commissioners and their collector within the bounds of this Act, as far as may be in the same manner as is provided in regard to the collections of the other assessments hereby granted, and the same shall be applied by the said commissioners in upholding and keeping in repair the various thoroughfares within the said limits, with the exception of the following portions thereof—*videlicet*, the part of the road from Glasgow to Kilmarnock lying betwixt Beansburn at a point 84 yards north, and distant from the centre of Henderson's Free Church, in Wellington Street of Kilmarnock; the parts of the road from Stewarton to Kilmarnock, lying betwixt Wellington Street and the boundary of said burgh, and betwixt Garden Street and said boundary; the part of the road from Ayr to Kilmarnock, lying betwixt Riccarton Bridge and a point 54 yards south and distant from the centre of the Relief Church in King Street; the part of the road from Kilmarnock to Mauchline lying betwixt Green Street and the extremity of the bounds of said burgh; the parts of the road in said burgh leading from Grange Street towards Irvine and Troon respectively; and the part of the road within said burgh leading from the east side of St Marnock's Bridge, near King Street, towards Irvine; which shall be held and kept in repair by the trustees of the turnpike roads of the said county of Ayr: Provided always, that in case of there being any surplus of the said conversion-money, after properly upholding said thoroughfares, the same shall be laid out upon the other streets of Kilmarnock, under the direction of the said commissioners, and an account of the receipts and disbursements of said conversion-money shall be kept in a separate book, which shall be open upon all reasonable occasions to the inspection of the road trustees, and every person paying the said conversion-money."

The suspenders are proprietors of the villa of Halkett Park, situated in Hill Street, Kilmarnock. When the Act was passed, Hill Street was one of the roads referred to in section 124, but it is now one of the streets of Kilmarnock. The commissioners having called upon the suspenders under section 33 to repair the footpath opposite their property in Hill Street, they failed to do so, and the footpath was formed by the commissioners at an expense of £23, 16s. 4d. This sum the suspenders refused to pay, and accordingly a complaint was presented to the magistrates, who decerned against them for the amount. A charge of payment was thereafter given, and the present suspension was then brought.

The suspenders pleaded that the "authorities of the burgh were not entitled to require the complainers to pave the footpath opposite their property under sec. 33 of the statute, in respect that said footpath is part of the thoroughfare mentioned in sec. 124, and in terms thereof falls to be held and kept in repair by the Trustees of the Turnpike Roads of the county of Ayr."

The respondents pleaded—"Hill Street being one of the streets within the limits of the burgh of Kilmarnock, the proprietors of property therein fall within the provisions of the 33d section of the Act, and in virtue thereof the present suspenders were bound to repair and causeway the footpath in front of their property. The obligation imposed on proprietors by sec. 33 is not taken away, discharged, or in any way affected by the provisions of sec. 124, which continues a different kind of burden or obligation upon the County Road Trustees." They also pleaded that by Sec. 134 of the act, the only competent court of review was the Court of Justiciary, and that the suspension was therefore incompetent. To this it was answered that this limitation of review was only applicable to cases in which the magistrates acted within their powers under the act, and that in this case, it was alleged, they had exceeded them.

The Lord Ordinary (Jerviswoode) sustained the above plea in law for the suspenders, and suspended the charge with expenses. The following is his

Note.—It appears to the Lord Ordinary that the complainers here have shown sufficient grounds to obtain the remedy for which they pray.

Had the matter rested solely on the provisions of the 33d section of the Local Police and Improvement Act, as quoted in the 6th reason of suspension, there could have been little doubt, looking to the admissions contained in the answers to the 7th and 8th reasons, that the complainers would have been liable to pave and uphold the footpath and roadway adjoining their property in Hill Street of Kilmarnock.

But the real difficulty in the way of the respondents, and that which, as it appears to the Lord Ordinary, is fatal to their case, arises under the application of the special exceptions from the general provisions of the 124th section of the statute. It will be seen that that section (the 124th) authorises the collection of the composition or conversion-money leviable in lieu of statute-labour within the bounds of the burgh by the commissioners thereof, to be applied "by the said commissioners in upholding and keeping in repair the various thoroughfares within the said limits." There follow certain exceptions, which include, *inter alia*, "the parts of the road from Stewarton to Kilmarnock, lying betwixt Wellington Street and the boundary of the said burgh, and betwixt Garden Street and said boundary," which it is declared shall be held and kept in repair by the trustees of the turnpike roads of the said county of Ayr.

It is not, as the Lord Ordinary understands, made matter of dispute that the subjects belonging to the complainers here have in fact their frontage to the road thus mentioned, which, in terms of the provision just quoted, is to be held and kept in repair by the county trustees; nor will it, as the Lord Ordinary presumes, be doubted that as a consequence of this obligation the road trustees must, in terms of the 82d section of the General Turnpike Act, 1 and 2 Will. IV., cap. 43, make

and maintain *a footpath* at the locality in question. If this be so, can it be reasonably held that the proprietors of tenements fronting these excepted thoroughfares are also to make and maintain footpaths, under the provisions of the local Act, in the identical localities which lie within the bounds, and are under the charge of the turnpike trustees?

The Lord Ordinary thinks otherwise, and that the only just and consistent interpretation of the local statute is to read it so that the exception shall be held to include the whole roadway and footpath thereof which is within the control and management of the road trustees. And this construction appears to be the more just and reasonable if it be further borne in mind, as the Lord Ordinary thinks is clear, that while the commissioners of the burgh are entitled to levy statute-labour conversion money over the *whole* district within their bounds, and to expend the same upon the thoroughfares within the bounds of the burgh *other than* those in the position of the road here in question, the complainers, according to the contention of the respondents, are to be compelled to pay statute-labour conversion money for the sole benefit of the rest of the community, and to remain under obligation to pave their own frontage, towards the expense of which that conversion money cannot, in any circumstances, if the respondent be right, be applied at all.

If the view which the Lord Ordinary thus takes be sound in relation to the true intent and effect of the statute, it, it is thought, suffices to dispose of the present question on its merits.

It it true it is also maintained, under the first plea for the respondent, that this action is excluded by force of the provisions of the 134th section of the statute, but the Lord Ordinary has been unable to bring himself to the conclusion that the proceedings here complained of fall within that special enactment, which, taken as a whole, seems to apply to matters of a criminal character only. C. B.

The commissioners reclaimed.

YOUNG and GIFFORD were heard for them.

RUTHERFURD CLARK and F. W. CLARK for the suspenders.

The Court to-day unanimously recalled the Lord Ordinary's interlocutor, and refused the suspension with expenses.

Lord CURRIEHILL—This is a question as to the construction of the two sections of the statute founded on, and does not appear to me to be attended wiih difficulty. The 33d section is very comprehensive in its scope; and if there is nothing else in the subsequent clauses limiting its operation, the only matter for inquiry is, whether this property is comprehended in the description of "houses, buildings, gardens, or grounds," &c., contained in sect. 33. Now, I don't doubt that this description comprehends the suspenders' property, which is a house fronting a street admittedly within the limits of the burgh. The question comes then, Is there any exception in the 124th section? As I read it, that section has no application whatever to the 33d. What it provides for is the districts to which the statute labour composition-money is to be applied, and what it does by way of exception is merely to point out the districts on which the commissioners are not entitled to expend the funds. But that is no exception to the burden imposed by sect. 33, and that appears to me to be the whole question. Therefore I think the commissioners have not exceeded their powers, and that the reasons of suspension are not well founded.

Lord DEAS concurred. The first question was as to the 33d section of the Act, and the second was whether the 124th impeded its operation. There was in sect. 33 a description of the properties which were liable, and added to it the places to which they must be adjacent, to insure that liability. Houses, gardens, or grounds must adjoin a street, a square, a public place, lane, or a passage. It was contended for the commissioners that this power applied to every part of the excepted ground, and that whatever its condition, even were it a road, it was a street in the sense of the statute. He was of opinion that that was not the true interpetration of the Act. The ground must adjoin a street, &c. If, therefore, it had been disputed that the suspenders' ground was adjacent to a street, he thought the magistrates would have been without their jurisdiction, and that their judgment would have been bad; but here it was not disputed that the subject was adjacent to a street. It did not matter whether it was then built, or now built. It was said in the opening argument of Mr Clark that this Hill Street was excepted, because it was not then built on, and that this was changed now; but it being admitted that Hill Street adjoined, it came within the very description in the 33d section. The commissioners were entitled to exercise their discretion, and unless they went egregiously wrong the Court could not interfere with them. If it had been disputed that Hill Street was a street, in the sense of the statute, it would have raised a different question. The whole question, therefore, was this—Hill Street being a street, was it taken out of the category by section 124? He thought with Lord Curriehill it was quite clear that the 124th section did not in the least interfere with the 33d section, and that therefore the judgment of the magistrates was right and final.

Lord ARDMILLAN said that the 33d section sufficiently supported the whole claim made by the commissioners. The words were wide and comprehensive. The suspenders' property adjoined one of the streets of the town, and was therefore liable, unless section 124 had the effect of relieving the proprietors in that street. He did not think it had. That section was intended to affect not the incidence but the application of the revenue. It left untouched the whole matters of the Act except the fund which, when collected by the commissioners, was separated in its application. The whole fund was to be payable to and leviable by the commissioners, and they, having collected it, were to apply it in keeping in repair the thoroughfares, excepting, among others, Hill Street; but the parts so excepted were not excepted from the incidence of the statute, nor excepted from the jurisdiction of the commissioners. Now, there could be no exception beyond what was the obligation of the road trustees. When a road became a street, in whatever way, the obligation of the trustees to maintain it as a road was seriously affected. Nothing could be plainer than that the road trustees had no liability to pave. Thus, when the commissioners called on the suspenders to pave, they were calling on them to do something which the road trustees were not bound to do, and therefore they were in the very position contemplated for enforcing the provisions of the 33d section. He was therefore quite clearly of opinion that the magistrates were right in their decision.

Agent for Suspenders—Andrew Fleming, S.S.C.
Agents for Commissioners of Police—M'Ewen & Carment, W.S.

Thursday, Feb. 21.

SECOND DIVISION.

M.P.—MONTEATH DOUGLAS' TRUSTEES *v.* DOUGLAS AND OTHERS.

Process—Multiplepoinding—Executor—Res Judicata. A claimant in a multiplepoinding was *in foro* ranked and preferred in terms of her claim; but did not for some years enforce the decree. After her death her executor was sisted and moved for decree of new in his favour. This was opposed by another claimant in respect of an alleged change of circumstances. *Held*, that the final decree in favour of the claimant could not be gone back upon and decree pronounced of new.

In this multiplepoinding, the Lord Ordinary in 1862 sustained the claim of Miss Margaretta Monteath, one of the claimants, "no objections thereto being stated," and decerned and granted warrant to, authorised and ordained the trustees, the raisers, to make payment thereof to her. This decree was pronounced *in foro*, and became final, but was not enforced during Miss Monteath's life. She died in 1865, leaving a will whereby Mr John Spark was nominated her sole executor.

Mr Spark, having made up his title, moved the Lord Ordinary to sist him as a party to the process, and to pronounce decree of new in his favour as executor of Miss Monteath. The motion for decree was opposed by Mr Donald Lindsay, judicial factor on the trust estate of Mr Archibald Douglas Monteath, on the ground that since 1862 it had become doubtful whether the fund *in medio* would be sufficient to pay all the claims upon it.

The Lord Ordinary (Jerviswoode) sisted Mr Spark, but refused the motion *quoad ultra*.

Mr Spark reclaimed.

The Court unanimously recalled the interlocutor of the Lord Ordinary, and pronounced decree of new in favour of Mr Spark as executor of Miss Monteath. They could not go back on the interlocutor of 1862, which was not only a decree of preference, but also for payment, and pronounced *in foro*. It was *res judicata*. When the parties to the action allowed that decree to be pronounced and to become final they took their chance of the consequences. If it should now turn out that they have undertaken too great a risk the result might be unfortunate but it was unavoidable.

Counsel for Reclaimer—Mr Burnet. Agents—Lindsay & Paterson, W.S.

Counsel for Respondent—Mr Adam. Agents—Lindsay, Howe, & Co., W.S.

ANDERSONS *v.* ROBERTSONS TRUSTEES AND MURDOCH.

Deed—Delivery. A disposition of heritage held ineffectual in respect it had not been delivered by the granter, but retained by him in his own custody.

This is an action to have it declared that a deed executed by the late Andrew Robertson, sometime residing in Pitt Street, Portobello, in 1856, by which he conveyed certain house property there in favour of his illegitimate daughter, the pursuer, in liferent, and her children in fee, was a valid conveyance. The deed had not been delivered, and was found at Robertson's death in his repositories. He also left a testamentary writing, leaving his property to trustees, which contains *inter alia* a declaration holograph of him in the following terms:—"1856. Elisbeth Robertson or Anderson has got No. 5th house in James Street, in Portobello, with charter;" which the pursuer says refers to the conveyance of 1856 in favour of herself and children. The pursuer maintains that Robertson the granter of the deed held it for her behoof and that of her children, and she makes the following averments:—

"On or about 4th March 1854, the said Andrew Robertson executed a *mortis causa* disposition, whereby he conveyed the piece of ground described in the summons to the pursuer, Mrs Anderson, in liferent, and her children in fee. After the execution of this deed, the said Andrew Robertson resolved to give the pursuers an immediate right to the said subjects, and gave the necessary instructions to his agents, Messrs Mackenzie & Baillie, Writers to the Signet in Edinburgh, for having this done. Accordingly, in terms of these instructions, Messrs Mackenzie & Baillie prepared a disposition of the said subjects in favour of the pursuers, which was executed by the said Andrew Robertson on 16th February 1856.

"The fact that he had executed the said disposition was communicated to the pursuer, Mrs Anderson, and a list of the fixtures in the house was handed to her by the said Andrew Robertson, who, at that time and frequently afterwards, told her that the property belonged to her, and that nobody could deprive her thereof. The disposition was held by the deceased Andrew Robertson from the execution thereof until the time of his death on behalf of the pursuers, Mrs Anderson and her said children, and was acted on, both by him and Mrs Anderson and her family, as giving them right to the said subjects. Mrs Anderson exercised various acts of possession and ownership, and was regarded and recognised after the execution of the said disposition as proprietor of the said subjects, and the same were dealt with as her property, as after mentioned.

She then goes to say that from the term of entry specified in the disposition the subjects were let by the deceased in the pursuer's name, and that her name was entered in the books of the superior as proprietor, and that after 1859 her name was entered in the books of the assessor of the burgh as proprietor at the request of Robertson, who also insured the premises against fire in her name.

The Lord Ordinary (Jerviswoode) allowed a proof, and afterwards gave effect to a plea maintained for the defenders the heir-at-law and trustees of the deceased, to the effect that the deed was invalid by reason of its non-delivery.

The pursuers reclaimed.

PATTISON and STRACHAN for them.

GIFFORD and SCOTT in answer.

At advising,

The LORD JUSTICE-CLERK said that the grantee in the present disposition was not in pupillarity or minority. She was a married woman, and the proper custodier of all deeds for her was her husband. The averment of the pursuers was that Robertson, the granter of this deed, deliberately changed his mind, and, instead of a *mortis causa* deed conveying the property to Mrs Anderson, he executed a deed to have the effect of giving her an immediate interest in the property, with entry at Whitsunday 1856. Admittedly this deed was never delivered, but remained in the custody of the granter until his death. It had no clause dis-