is also attended with considerable difficulty. I think we are called on to consider that this gentleman in his deed is not only dealing with a landed estate, and making an entail which we have already found to be an existing entail in the person of the last party, but he describes his reason for his procedure to be "for the continuance of my inheritance with John Collow and his posterity." Probably he was a great feudalist, and wished to adhere to feudal law, but I think it very plain that his object was to make an entailed destination, giving his estate, with the single exception of heirs-portioners, to one person after another in the succession; and I think that much aid is got from the consideration of the case of Roxburgh, and some of the other cases. Therefore, I think we are entitled to hold that what he meant here was the succession of one person after another. Then at the close of his deed, he says, "whom all failing, to any person or persons as shall be called and nominated to the succession to the lands." I think that that means any person, if I nominate one, or persons, if I nominate several, in succession. It does not mean any one or dozen of persons, but it means any one person, or any succession of persons, one after another, "to the succession of the lands." I think that plainly means to the succession of heritable property according to the Scotch law of heritable succession. Then follows, "And in case of no such nomination"—that is, no such nomination to the succession of the lands—"then to my own nearest of kindred." And without occupying time by more fully explaining my views upon that, I have come to the conclusion that it does not mean exactly the same as our technical phrase next of kin, but that here it must mean my nearest heir in heritage who is of the blood of the entailer, or the nearest heir of the blood of the entailer who would take the succession of the lands according to the law of Scotland applicable to such succession. Whether that would mean ultimately a succession to the nearest of kindred one after another, or whether the entail would be at an end in the person of the first party taking the estate, is a question not now before us, and I give no opinion on it at present. There are strong grounds for holding that it might be a succession to a series of nearest of kindred being of the blood of the entailer, so long as there were such persons, but that matter is not at present before us. It is enough for the decision of this case that we are all of opinion that the nearest of kindred here means the nearest of kindred who would succeed to the heritable estate, being of the blood of the entailer.

Lord Curriehill—Lord Deas has indicated his opinion as to the estate of Auchinchain, and I have only to say that I entirely concur in his Lordship's view. I believe Lord Ardmillan does the same. It it quite unnecessary, therefore, to repeat what we have already said in the other action.

I think it is right to mention that I have the authority of the late head of the Court to say that he entirely concurred in consultation in the opinion which we have now expressed.

Millar, for the pursuer, moved for expenses.

Lord Curriehill—The opinion of the Court is that this is not a case in which to give expenses. On one very important question the defender has been successful, and we think it is a case in which there should be no expenses found due to either party.

The interlocutor of the Lord Ordinary was therefore altered.

Agents for Pursuer—A. & A. Campbell, W.S.

Agents for Defender—Mackenzie & Kermack, W.S.

Wednesday, Feb. 20.

FIRST DIVISION.

ADV.—PIRIE AND SONS *v.* WARDEN.

Jurisdiction—Sheriff—Foreigner—Locus Solutionis—Personal Citation—1 *Gul. IV.*, *c.* 69—1 *and* 2 *Vict.*, *c.* 119. Held that a Sheriff had maritime jurisdiction over a foreigner personally cited within his territory in regard to a contract, the *locus solutionis* of which was also within it.

This was an advocation from the Sheriff Court of Aberdeenshire. The pursuers are Alexander Pirie and Sons, paper-manufacturers, Aberdeen, and the defender called is Captain John Warden, designed as "owner, or representing the owner or owners, and as master of the ship or vessel called the Emily and Jessie, of Liverpool, presently in the harbour of Liverpool."

The following are the conclusions of the action:—"The defender (as owner, or representing the owner or owners, and as master of the said ship or vessel) ought to be decerned to make delivery in Aberdeen to the pursuers of one hundred and forty tons six hundredweight of esparto or Spanish grass, shipped at Aquillas in Spain, to be delivered at Aberdeen, conform to bill of lading dated 25th January 1865, signed by the said defender, and endorsed to and held by the pursuers, and which bill of lading was signed in terms of a charter-party dated at Alexandria the 22d day of November 1864, between W. J. Wynands, shipbroker, Newcastle-upon-Tyne, and the defender; or otherwise, and in the event of the defender failing to make delivery to the pursuers of the foresaid esparto or Spanish grass within such space as may be appointed by me, the defender ought to be decerned, as owner, or as representing the owner or owners, and as master foresaid. to pay to the pursuers the sum of £1000 sterling, being the value of said esparto or Spanish grass, and the damages sustained by the pursuers, or which they may yet sustain and incur, in consequence of the defender's failure to deliver said grass; and generally, in consequence of his non-implement of said charter-party and bill of lading held by the pursuers, with interest on the foresaid sum, at the rate of £5 per centum per annum, from the date of citation to follow hereon till payment, with expenses." By a minute put into process the pursuers admitted that the defender was a foreigner not domiciled in this country; and arrestments to found jurisdiction had not been used.

The summons was served personally on the owner of the vessel, and afterwards the charterer of the vessel claiming to be owner of the cargo was sisted as a defender in the action. Besides pleas on the merits, the defender pleaded that the defender Warden, the defender called in the summons, being a foreigner not domiciled in Scotland, the Court had no jurisdiction to entertain the action. The pursuers answered that the defender having been resident and having been cited personally within the territory where the contract libelled on was to receive effect, he was liable to the jurisdiction of the Court; further, that the Sheriff Court as in place of the High Court of Admiralty had jurisdiction in the case in virtue

inter alia of the provisions of the Act 1 Will. IV., c. 69, and 1 and 2 Vic., c. 119.

The Sheriff-Substitute (Comrie Thomson) dismissed the action on the ground that the Court had no jurisdiction.

His Lordship added the following note :—

"This action has been brought for the purpose of compelling delivery of a quantity of esparto brought to Aberdeen by the ship Emily and Jessie. The summons contains an alternative conclusion for damages in consequence of the defender's alleged failure to deliver. The summons was served upon the defender personally at Aberdeen. It has been admitted by the pursuers (minute No. 11 of process) that the defender is a foreigner not domiciled in this country. It is also admitted that arrestment *ad fundandam jurisdictionem* has not been used. It was maintained on behalf of the pursuers that the Sheriff Court was competent to entertain the action on various grounds—(1.) The 521st section of the Merchant Shipping Act of 1854 (17 and 18 Vict., c. 104) was founded on. But that section merely provides for the extension of the jurisdiction which any court may have over a district situate on the sea-coast—to ships and their crews lying off such coast 'in the same manner as if such ship, boat, or persons were within the limits of the original jurisdiction of such court.' That statute does not bring under the jurisdiction any party who would not otherwise have been amenable to it, if found within its original limits. (2.) The 522d section of the same statute provides that personal service shall be 'good service;' but that applies only 'to legal proceedings under this Act,' which the present is not. (3.) It was maintained that this is an action which would have been competent in the High Court of Admiralty, and that under the 22d section of 1 Will. IV., c. 69, the Sheriff Court now holds the same jurisdiction as that formerly possessed by the Court of Admiralty. Without inquiring whether this is properly an Admiralty cause or not, it seems to the Sheriff-Substitute that a sufficient answer to the argument based on the statute of Will. IV. is to be found in the provision of the Act 1 and 2 Vict., c. 119, sec. 21, which declares that 'the said recited Act' (1 Will. IV., c. 69) 'shall be construed and held to mean that the powers and jurisdictions formerly competent to the High Court of Admiralty of Scotland in all maritime causes and proceedings, civil and criminal, shall be competent to the said Sheriffs and their Substitutes, provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised.' It appears to the Sheriff-Substitute that there is nothing in these enactments to support the pursuers' contention, unless there be in the present case some 'legal ground of jurisdiction' apart from the statutes. It was maintained on behalf of the pursuers that there was jurisdiction here *ratione contractus*, on the ground that this country was the *locus solutionis* of the contract entered into between the parties, and performance of which is now sought; but it seems difficult to understand how jurisdiction can have the least operation when neither the person nor the estate of the defender is within the judge's power."

The Sheriff (Jameson) adhered.

The pursuers advocated.

KEIR (with him CLARK), for them, argued that the defender was subject to the Sheriff's jurisdiction, because Aberdeen was the *locus solutionis* under the bill of lading, and the defender was personally cited there. The intention of the parties to be subject to the courts of this country and not of Spain, where the contract was entered into, was clear, because, even if the defender should return to Spain the action to compel implement *at Aberdeen* naturally falls to be disposed of there. That jurisdiction is well founded by personal citation within the *locus contractus* was settled in the case of Sinclair, July 17, 1860, 22 D. 1475, the decision of that case being independent of the element of *forum originis*.

The *locus contractus* founds jurisdiction, because, where no different place is specified, it is presumed that the contract will be implemented where it was executed. It follows that, when the *locus solutionis* is different, personal citation there founds jurisdiction. Kames' Law Tracts, *voce* Courts, p. 234; Erskine, p. 38; Ivory's Note; Pothier ad Pandectas, v. I., 35, 36, 43, fol. ed. p. 182; Vinnius Com. Inst., IV., 6., sec. 10, p. 858; Voet. Pand., v. I., 73.

The defender, while objecting to the jurisdiction as a foreigner, does not state where his domicile is, or that he has a domicile. The fact is peculiarly within his knowledge; and, in objecting to jurisdiction in this case, he should have stated it. His profession, in these circumstances, rendered him subject to the jurisdiction of any place where he was personally cited. Ersk. 1, 2, 16; M'Niven *v.* M'Kinnon, Feb. 14, 1834, 12 S. 453.

The case being maritime, the Sheriff has jurisdiction as in place of the High Court of Admiralty. Bernard *v.* Connor, June 11, 1811, F.C., 11 Geo. IV., and 1 Will. IV., c. 69, sec. 21, 22, which applies to persons furth of Scotland. In cases below £25 this jurisdiction is privative. Morrison, July 11, 1837, 15 S. 1293; Bruhn, 2 Macp., 335. The Act 1 and 2 Vict., c. 119, sec. 21, did not repeal this jurisdiction as to foreigners, but explained it so as to be applicable only when the defender upon any legal ground was amenable to the jurisdiction. The personal citation in the *locus solutionis* is such a legal ground of jurisdiction as is contemplated by the Act.

YOUNG and GIFFORD in answer.

At advising,

The LORD JUSTICE-CLERK, after stating the parties to the action, the claim sought to be enforced, and the pleas stated by the defender, went on to say that, this being a maritime cause, it was necessary to look to the statutes applicable. The Act 1 Will. IV., cap. 69, abolished the High Court of Admiralty, and conferred upon the Court of Session original jurisdiction in all maritime civil causes of the same nature and extent as that formerly held by the Admiralty Court. And it enacted, also, that Sheriffs should have original jurisdiction in all maritime causes, civil and criminal, including such as may apply to persons furth of Scotland, of the same nature as that formerly held by the Admiralty Court. The important words here were, "including persons furth of Scotland." Then the Act 1 and 2 Vict., cap. 119, was passed to remove doubts as to the extent of the Sheriff's jurisdiction, and it declared the meaning of the former Act to be that Sheriffs should have jurisdiction in maritime causes "provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised." That could not be held as repealing the clause in the former Act as to "persons furth of Scotland." It only required that such persons should, on any legal ground of jurisdiction, be amenable in the Sheriff Court. In the present case it was contended that the defender was

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-