this as a ground for the byelaw upon record in the following terms—'The quiet of the town upon the Sabbath has been considerably disturbed in consequence of these excursions, not only by the excursionists themselves, but also through the bells and steam-horns or whistles used on board the pursuers' steamers, more especially when they arrive or depart during the hours of public worship.' The Harbour Commissioners of Kirkcaldy are not entrusted in any way with a superintendence over the spiritual condition of that town. What they were empowered to do was to pass regulations for the proper conduct of the harbour and nothing more, and the byelaw in question has nothing to do with that object. It was therefore clearly illegal, and must be set aside.

"The case of *The Calder and Hebble Navigation Company* v. *Pilling and Others*, before the Court of Exchequer in England (23rd April 1845, 14 L.J., Exch. 223), is one entirely in point. The rubric of that case is in the following terms—'A power given by a local Act to a canal company to make byelaws for the good government of the company, for the good and orderly using of the navigation, and of warehouses, wharfs, &c., and for the well governing of the bargemen, does not authorise them to close the canal on Sundays by a chain suspended across it, and a byelaw for so closing the canal on Sundays is illegal and void.' Baron Alderson stated the grounds of judgment as follows—'The 37th section of the Act enables the canal company to make byelaws for the good and orderly using of the navigation, and for the well governing of the bargemen. The meaning of that is, that the canal is to be used so as to promote the convenience of the public. The Act of Parliament had not in view any moral or religious objects, for those are left to the general law of the land and of God. Its object was to regulate the passing of vessels, the use of the locks and of the water, so that the greatest number of barges might navigate the canal with convenience and safety; and so with reference to the goods and merchandise, it contemplated the mode of packing them, their shape, and other matters of that kind, having regard to the convenience of the public. It did not give the company power of making regulations generally as to good conduct and character, but merely in their capacity of carriers upon the navigation. I do not say the objects of the company were not laudable, but they have taken an improper mode of effecting them, for they have exceeded the powers given them by the Act. The byelaw is therefore illegal, and our judgment must be for the defendants.' The same ground of judgment is applicable in the present case. The Harbour Commissioners of Kirkcaldy have no right to exercise their power of making byelaws for the purpose of providing the quietude of the Sunday in that town."

Counsel for the Pursuers—Sir C. Pearson—C. N. Johnston. Agent—Andrew Wallace, Solicitor.

Counsel for the Defenders—Graham Murray—G. W. Burnet. Agents—Watt & Anderson, S.S.C.

Wednesday, December 7, 1887.

OUTER HOUSE.

[Lord Trayner, Ordinary.

MACLACHLAN *v.* BOWIE.

Sale—Sale of Heritage—Objection to Title—Description by Reference to Missing Plan.

A seller offered the purchaser of certain lands a progress of titles extending beyond the prescriptive period, but containing no description of the lands except by reference to a plan which had gone amissing. *Held* that the title offered was not valid or marketable, and was not such a title as the purchaser was bound to accept.

By minute of agreement dated 6th and 9th May 1887, Neil Maclachlan, residing at Broadlie, in the parish of Neilston, sold the lands and farm of Broadlie, in the parish of Neilston, in the county of Renfrew, to William Hunter Bowie, writer in Glasgow, residing at 16 Eaton Place, Hillhead, Glasgow. The price of the lands and farm was £1300, and the term of entry was to be Whitsunday 1887. By the agreement it was provided that on payment of the price the seller should grant and deliver in favour of the purchaser a valid disposition, together with a valid progress of titles, in virtue of which the subjects were vested in the seller.

The titles of the subjects, consisting of nineteen numbers, conform to the inventory, were on 9th May 1887, so far as in the possession of the seller, sent by his agents to the agents for the purchaser, and they on 2nd June 1887 sent a draft disposition in favour of their client to the seller's agents for revisal. At the same time they stated that they desired exhibition, *inter alia*, of the following documents:—(1) A plan—No. 13 of the inventory—made out by Peter Macquisten, land surveyor in Glasgow, in 1833; and (2) a disposition—No. 17—by Alexander Graham of Capilly, dated 19th February 1834. The seller's agents returned the draft disposition revised, but stated that the writs desired were not in the possession of the seller, and that although he had made every effort to obtain them he had been unsuccessful in doing so.

On 22nd October 1887 the seller raised an action against the purchaser to have him decerned and ordained to implement the contract of sale.

The pursuer averred that the titles offered, which he was ready to deliver to the defender, constituted a valid progress of titles, and that the action had been rendered necessary by the defender wrongously refusing, or at least delaying, to make payment of the price of the subjects.

The defender stated that the price of £1300 offered by the defender for the said lands and farm of Broadlie was a full and adequate price. No good and sufficient title or valid progress of titles had been tendered or exhibited by the pursuer to the defender. The former had, on the contrary stated his inability to exhibit or deliver, *inter alia*, the plan No. 13, and the disposition No. 17 of the inventory annexed to said draft disposition. The pursuer had expressly undertaken and agreed to deliver to the defender, *inter alia*, the said disposition No. 17 of said in-

ventory. These documents, and in particular the plan, were absolutely necessary as part of a good and valid progress of titles. Without said plan the subjects were not sufficiently or properly identified or described, and the boundaries and extent thereof could not be ascertained. The plan, and the various portions and lots therein delineated, were expressly referred to, and were incorporated into the description of the subjects, not only in the whole titles thereof, but in the draft disposition by the pursuer, as showing the particular subjects sold and to be conveyed to the defender. Further, without the plan it could not be seen whether the possession by the pursuer on the titles produced had been sufficient and exclusive possession of the whole subjects forming the lands and farm of Broadlie, as delineated on the plan and sold to the defender. In point of fact none of the writs tendered by the pursuer to the defender contained a description of the subjects (but merely one by reference to the plan), nor had a sufficient or particular description thereof ever entered the record. The want of the plan or description had been specially felt since the bargain had been made, and disputes as to the boundaries thereof had been raised by adjoining proprietors. In particular, Mr M'Connell, an adjoining proprietor to the west and south, had claimed part of Broadlie, and had threatened to interdict the defender from taking possession of said part, although it had been specially pointed out by pursuer to defender as part of the subjects sold. Further, the defender was informed that a part of the subjects sold, and lying at the north-west end thereof, was included and had been possessed as part of the adjoining estate of Nether Kirkton.

He pleaded—"(2) The pursuer having failed to deliver and tender to the defender a proper and valid title and progress of titles to the subjects in question the defender should be assoilzied."

The Lord Ordinary (Trayner) on 7th December 1888 pronounced the following interlocutor:—"Finds that the title offered by the pursuer to the defender in implement of the agreement is not a valid or marketable title to the lands in question, or such a title as the defender is bound to accept in return for payment of the stipulated price, and supersedes further consideration of the cause *hoc statu*.

"*Opinion.*—By the minute of agreement executed in May 1887 the pursuer agreed to sell, and the defender to buy, the lands and farm of Broadlie in the parish of Neilston and county of Renfrew. Under that agreement the pursuer bound himself to deliver to the defender, in payment of the stipulated price, a valid disposition of the said lands, and also 'a valid progress of titles, in virtue of which said subjects are presently vested' in the pursuer. The present action is brought to enforce implement of said agreement, the defender having refused to pay the price of the lands, on the ground that the progress of titles offered to him is not valid or marketable, and is such a progress as he is not bound to accept.

"The progress of titles offered by the pursuer extends back far beyond the prescriptive period, and the objection that it does not contain the disposition No. 17 of the inventory, dated in 1834, seems to me untenable. The only objection which has been stated (and, I should add, the only objection seriously insisted in) which requiries consideration is that based upon the want of the plan No. 13 of the inventory. To appreciate this objection it is necessary to advert to the description of the lands in question as it appears throughout the whole progress, including the conveyance in favour of the pursuer himself. That description is as follows—'All and whole those parts of the lands of Nether Kirkton, known as the farm of Broadlie, partly planted, and marked Nos. 1, 2, 3, 4, 5, 9, and 10, on a plan of the lands of Nether Kirkton, Lambies, Bankholm, Kirkhill, and Costerland, drawn by Peter Macquisten, land surveyor in Glasgow, and subscribed by the trustees of the late John Airston of Greenhill, as relative to certain articles of roup executed by them upon the 11th day of September 1833, . . . which lands and others, as laid down on the said plan, extend to 10 acres 2 roods and 33 falls and six-tenth parts of a fall or thereby Scotch measure, and which subjects are parts and portions of all and whole the twenty shilling land of old extent of Nether Kirkton of Neilston.' This description is followed by the declaration that a part of the land so described and conveyed is not conveyed as absolute 'property,' but is 'common to the said lands and to the fields marked Nos. 6, 7, and 8 on said plan, and to the Mill of Broadley and adjoining lands.' There are other portions of land excepted from the conveyance.

"In this state of the title the defender maintains that the plan prepared by Macquisten, and specially referred to, is essential to ascertain the extent and exact locality of the lands in question; that without it he cannot know or indicate his boundaries (which, he avers, have already been questioned), nor can it be shown that the pursuer has had sufficient or exclusive possession of the whole subjects as delineated on said plan, and sold by him to the defender. The pursuer, on the other hand, maintains that the progress of titles offered by him is sufficient, and that production of the plan in question (which he has not got, and cannot find) is not essential; that he and his authors have possessed upon that title the whole land, which he now sells to the defender, for more than the prescriptive period; that the said lands were fenced, and no dispute about his boundaries has been raised in his time, and that if the boundaries as claimed by him are now disputed (which he does not admit) he is not bound to fight that question on the defender's behalf. He also points to the fact that the extent of the lands conveyed is stated in the titles to be 10 acres, and so on.

"In this controversy I am of opinion that the defender is right. I think the title offered is not a marketable title or such as the defender is bound to accept. The titles tendered (without the plan) contain no such description of the subjects as plainly identifies them or distinguishes them beyond question from the adjacent lands. The pursuer's title is a bounding title—*North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200—but the boundaries can only be ascertained by reference to the plan. Without the plan therefore it is impossible to say whether the land now possessed by the pursuer and sold to the defender is the whole of the land to which the

original title refers, or whether part of it has been lost to the pursuer by adverse possession on the part of an adjacent proprietor. Nor can it be ascertained whether the pursuer has possessed more than was originally conveyed by the title under which he holds. If he has, any land so possessed may be reclaimed, because beyond his boundary he could not acquire by prescriptive possession. Without the plan therefore, it is impossible for the defender to ascertain whether the subjects now offered by the pursuer are more or less than those covered by his title. The necessity for production of the plan is rendered all the greater by the declaration that part of the land undoubtedly covered by the pursuer's title is declared to be his, not in absolute property, but in common only with others, as well as by the declaration that certain lands are excluded from his conveyance.

"The defender having stipulated for a valid progress is entitled to one on which no reasonable doubt or question can be raised. In such a case as this 'the point is not so much whether there is much probability of eviction or of any party challenging the title as whether it would be such a title as would be taken by a purchaser (from the defender) without objection or without some further guarantee, or at least a diminished price'—*per* Lord Mackenzie in *Brown* v. *Cheyne*, 12 S. 178. The defender says that the title offered to him by the pursuer has been rejected by a person to whom he applied for a loan over the subjects in question, and I think that statement may be accepted without proof, its probability is so obvious. But that shows that the title now tendered by the pursuer is not of that character which he is entitled to insist upon in return for a full price—*Dunlop* v. *Crawford*, May 26, 1849, 11 D. 1062."

Counsel for the Pursuer—Dickson. Agent—J. Smith Clark, S.S.C.

Counsel for the Defender—Shaw. Agent—Andrew Newlands, S.S.C.

Wednesday, June 6, 1888.

OUTER HOUSE.

[Lord Fraser, Ordinary.

A B *v.* C D.

Jurisdiction—Declarator of Marriage—Acceptance of Service by Agents under Reservation of all Pleas competent to Defender.

An action was brought against a domiciled Englishman to have it declared that he had entered into a marriage in Scotland by declaration *de præsenti*. The defender had returned to England, and his agents in Scotland accepted service of the summons, but under reservation of all pleas competent to him. *Held* that the Scottish courts had no jurisdiction over him.

A B, a widow, raised an action against C D to have it declared that they were lawfully married to each other in Scotland on or about 24th January 1888, or alternatively for damages for seduction.

The pursuer averred that on the morning of Tuesday 24th January a written declaration of marriage *de præsenti* was drawn out and subscribed by her and the defender before two witnesses, and that in consequence of such declaration of marriage the pursuer permitted the defender to have intercourse with her, which she would not have permitted had she not considered herself legally married to him.

Service of the summons was accepted by the agents of the defender in Scotland, but under reservation of all pleas competent to him, and defences were lodged for him.

In the defences it was averred that the defender, who was born in England, never acquired a domicile in Scotland, and was not subject to the jurisdiction of the Scottish courts.

The defender pleaded—No jurisdiction.

Argued for the pursuer—(1) The contract had been entered into in Scotland, and the matrimonial domicile of the spouses was there. Residence in Scotland for forty days was sufficient to found jurisdiction in actions of declarator of marriage. It was only in actions of divorce that the plea of no jurisdiction had been sustained—Fraser on Husband and Wife, ii. 1275. (2) But here there had been acceptance of service, which was equivalent to personal citation in Scotland. Whatever pleas were reserved, the acceptance of service barred the defender founding upon want of citation, and pleading no jurisdiction—Campbell's Law of Citation—pp. 66, 67.

Argued for the defender—(1) Where an action of declarator of marriage was raised against a foreigner there must be personal citation upon the defender in Scotland—Fraser on Husband and Wife, ii. 1272 (note *a*); *Wylie* v. *Laye*, July 11, 1834, 9 F.C. 495, and 12 S. 927. (2) There had been nothing here equivalent to personal citation, and all pleas, including that of no jurisdiction, had been reserved in the acceptance of service.

The Lord Ordinary on 6th June pronounced the following interlocutor:—"Having heard counsel on the closed record on the procedure roll, sustains the first plea-in-law stated for the defender of no jurisdiction: Dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

Counsel for the Pursuer—Baxter. Agent—William Black, S.S.C.

Counsel for the Defender—Comrie Thomson. Agents—Hope, Mann, & Kirk, W.S.
