sary that the residence should be in Edinburgh, or that it should have local situation there. That is not said to be the real meaning of the contract, but it is said that the residence must be within such a *radius* as will enable him to give a proper amount of attention to the business. That is rather a curious contention, but it is entitled to some consideration. If the defender merely had a house in Edinburgh that would not make him a resident partner. He, however, not only has a house in Edinburgh, but resides there sufficiently to enable him to superintend and take an active share in the business. The house is for the very purpose of enabling him to carry on the business. It is impossible in these circumstances to say that he is not a resident partner. I think he is clearly a resident partner, for he devotes two or three days every week to the business in Edinburgh.

I have only to add that I do not think the Lord Ordinary has taken a right view of the case. The question is not to be solved by considering and calculating which partner has done the most work and devoted most time to the business.

The Court recalled the interlocutor of the Lord Ordinary reclaimed against, and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Balfour, Q.C. — Low. Agents — Davidson & Syme, W.S.

Counsel for the Defender and Reclaimer—Darling—C. S. Dickson. Agent—A. J. Napier W.S.

Saturday, July 21.

OUTER HOUSE.

[Lord Fraser, Ordinary.

GALLOWAY SALOON STEAM PACKET COMPANY AND ANOTHER *v.* KIRKCALDY HARBOUR COMMISSIONERS.

Harbour—Harbours, Docks and Piers Clauses Act, 1847 (10 *and* 11 *Vict. cap.* 27), *secs.* 33 *and* 83 *—Use of Harbour on Sunday—Byelaw—Harbour Commissioners—Ultra vires.*

A byelaw was passed by harbour commissioners in virtue of the powers conferred by the 83rd section of the Harbours, Docks, and Piers Clauses Act, 1847, by which steamers and other vessels plying from certain ports were prohibited from landing passengers on Sunday at the harbour under the control of these commissioners. In an action of reduction of this byelaw decree was *granted*, in respect (1) the byelaw was inconsistent with the 33rd section of the Act, which provided that on payment of the prescribed rates the harbour should be open to all persons for embarking and landing passengers, without limitation; and (2) it was *ultra vires* of the commissioners to pass a byelaw affecting vessels from certain ports only, while vessels from other ports were free to use the harbour on all days of the week.

The Harbours, Docks, and Piers Clauses Act, 1847 (10 and 11 Vict. cap. 27), provides by section 83 that harbour commissioners "may from time to time make such byelaws as they shall think fit for all or any of the following purposes —That is to say, . . . for regulating the use of the harbour, dock, or pier: . . . Provided always, that such byelaws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or the special Act."

The same Act, by section 33, provides that "upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

The Kirkcaldy Harbour Commissioners, acting under the Kirkcaldy Harbour and Petty Customs Act, 1849, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847, and the Kirkcaldy Burgh and Harbour Act, 1876, enacted certain byelaws and regulations for the regulation of the harbour under the powers conferred upon them by section 83 of the Harbours, Docks, and Piers Clauses Act, 1847.

No. 32 of said byelaws and regulations was in the following terms—"No steamship or other vessel, carrying passengers and plying for fares or hire from any harbour, dock, pier, or jetty in the Firth of Forth shall be permitted to land or embark passengers at any of the quays, piers, or breakwaters, or at any place within the limits of the harbour, between the hours of eight o'clock a.m. and eight o'clock p.m. on Sundays, under a penalty by the party or parties in charge of the said steamer or other vessel of a sum not exceeding five pounds for each passenger landed or embarked: Provided always, that nothing in this byelaw shall prevent access to the harbour within the aforesaid hours to any vessel under perilous stress of weather, or other cause of imminent danger."

The Galloway Saloon Steam Packet Company, formed under the Companies Acts, 1862 to 1880, for the purpose, *inter alia*, of running a service of excursion or pleasure boats in the Firth of Forth, or elsewhere, during certain seasons of the year, and to conduct or carry out trips or excursions generally, either by vessel or by land carriage, and its manager Mr Matthew Pearson Galloway, upon 20th April 1888 brought an action against the Kirkcaldy Harbour Commissioners by which they sought to have the said byelaw reduced.

The said byelaws and regulations had been duly submitted by the defenders to the Sheriff of Fife and Kinross for his approval, in terms of section 85 of the said Harbours, Docks, and Piers Clauses Act. Objections to such approval had been lodged by the pursuers and two other persons, and parties heard thereon upon 31st March 1888 before the Sheriff-Substitute, who had thereafter approved of the said byelaws and regulations.

The pursuers averred that their steamers frequently called at Kirkcaldy and were largely taken advantage of by the public of that town. In summer they carried a large number of passengers both on Sundays and week days between Kirkcaldy and Leith and Kirkcaldy and other places on both shores of the Firth of Forth.

They pleaded, *inter alia*—"(1) The said byelaw is *ultra vires* of the defenders, and ought to

be reduced. (2) The said byelaw is not within the fair meaning and intendment of the statutory authority to the Commissioners to frame byelaws, and ought to be set aside. (3) The said byelaw is illegal, as being in restraint of trade." . . .

The defenders averred that the pursuers' steamers only called at Kirkcaldy at irregular and comparatively rare intervals on week days, but that on Sundays they had recently begun to carry considerable numbers of people to and from Kirkcaldy and Leith, and other places on the Firth of Forth; and that the quiet of the town on the Sabbath had been considerably disturbed in consequence of these excursions, not only by the excursionists themselves, but also by the bells and steam-horns or whistles used on board the pursuers' steamers, more especially when they arrived or departed during the hours of public worship.

They pleaded, *inter alia*—"(2) The byelaws in question, and particularly the byelaw sought to be reduced, being *intra vires* of the defenders, the latter are entitled to be assoilzied with expenses. (3) The byelaw in question having been passed by the defenders in the *bona fide* exercise of their statutory authority, and being within the scope thereof, ought not to be reduced, and the defenders ought to be assoilzied."

Argued for the pursuers—The byelaw was in restraint of trade, and was therefore invalid at common law—*M'Kernan* v. *United Operative Masons' Association*, February 6, 1874, 1 R. 453; *Shanks* v. *United Operative Masons' Association*, March 11, 1874, 1 R. 823. Sunday traffic was lawful in Scotland as well as in England—Bell's Prin., sec. 44. The defenders were not entitled to act *pro salute animæ*, but were bound to act solely for the benefit of the harbour. This byelaw was not solely for the benefit of the harbour, and was therefore bad—*Calder and Hebble Navigation Company* v. *Pilling*, April 23. 1845, 14 L.J., Exch. 223, and 3 Rail. Cases, 735; *Dick*, L.R., 10 Q.B.D. 387.

Argued for the defenders—The 83rd clause of the Harbours, Docks, and Piers Clauses Act, 1847, covered this byelaw. It was *intra vires* of the powers there given to the defenders—*Denny & Brothers* v. *Board of Trade*, June 25, 1880, 7 R. 1019; *Gairns* v. *Main*, March 16, 1888, 25 S.L.R. 428. The tests provided by the Harbours, Docks, and Piers Clauses Act were (1) repugnancy to the law of Scotland. That was not the case here, for Sunday was observed in Scotland—*Phillips* v. *Innes*, May 19, 1835, 13 S. 778—*revd.* February 20, 1837, 2 Sh. & M'L. 465; *Jennings*, 1 Irv. 115. Sunday Acts were not in desuetude—*Bute*, March 24, 1870, 1 Coup. 495; *Nicol*, July 13, 1887, 1 White, 416; *Jobson and Another* v. *Lambert*, Nov. 29, 1828, 7 S. 83. (2) Inconsistency with the provisions of the statute—This byelaw was not inconsistent, for section 33, which provided that the harbour was to be open to the public, said also that this was to be subject to the other provisions of the Act, which therefore included any byelaws made in virtue of powers conferred by section 83.

Upon 21st July 1888 the Lord Ordinary (FRASER) pronounced the following interlocutor:—"Sustains the reasons of reduction, and reduces, decerns, and declares conform to the conclusions of the summons: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—The 83rd section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. cap. 27), enacts that persons in the position of the defenders in this action, the Commissioners of Kirkcaldy Harbour, 'may from time to time make such byelaws as they shall think fit for all or any of the following purposes—That is to say, for regulating the use of the harbour, dock, or pier.' Power is given to pass regulations with regard to a great many other matters, but this power of regulating a harbour, dock, or pier is the one under which the defenders justify the byelaw which is now sought to be reduced. That byelaw is in the following terms:—'No steamship or other vessel, carrying passengers and plying for fares or hire from any harbour, dock, pier, or jetty in the Firth of Forth, shall be permitted to land or embark passengers at any of the quays, piers, or breakwaters, or at any place within the limits of the harbour, between the hours of eight o'clock a.m. and eight o'clock p.m. on Sundays, under a penalty by the party or parties in charge of the said steamer or other vessel of a sum not exceeding five pounds for each passenger landed or embarked: Provided always, that nothing in this byelaw shall prevent access to the harbour within the aforesaid hours to any vessel under perilous stress of weather, or other cause of imminent danger.' The proviso annexed to the 83rd section of the Harbours, Docks, and Piers Clauses Act is in the following terms:—'Provided always, that such byelaws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or the special Act.'

"Now, the question is, whether the byelaw just quoted is repugnant to the laws of Scotland, or is inconsistent with the provisions of 10 Vict. cap. 27?

"Without deciding the question as to the byelaw being repugnant to the laws of Scotland as being in restraint of trade, the Lord Ordinary is of opinion that it is repugnant to the Harbours, Docks, and Piers Act itself (section 33), and was also *ultra vires* of the Kirkcaldy Harbour Commissioners. Section 33 enacts that 'upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.' There is no limitation or qualification in this section as to the days on which passengers shall be entitled to use the pier. The right is absolutely given of 'embarking and landing of passengers' on payment of the harbour rates.

"In the next place, it was clearly *ultra vires* of the Commissioners to pass a byelaw which prohibited all steamships or passenger vessels plying from any harbour in the Firth of Forth to enter the Kirkcaldy harbour between eight o'clock a.m. and eight o'clock p.m., while any vessel carrying passengers plying from Aberdeen or Dundee would have a right to enter the harbour between these hours upon any Sunday. The mistake which the Kirkcaldy Harbour Commissioners have committed is in thinking that they had absolute power to make regulations tending not merely to the proper administration of the harbour, but to the comfort of the church-going population of Kirkcaldy. They expressly state

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-