newspaper could not of itself be held to be libellous. The writer of that article merely stated what had been said, and gave his opinion upon it, but that did not constitute a libel. The pursuer did not deny that he used the actual language imputed to him, but the imputation of scoffing was merely an opinion of the writer. The press was privileged in making remarks upon the public utterances of public men at such a time as a Parliamentary election—*Davis* v. *Duncan*, April 21, 1874, L.R., 9 C.P. 396; *Cunninghame* v. *Phillips*, June 16, 1868, 6 Macph. 926; *Campbell* v. *Ferguson*, January 28, 1882, 9 R. 467. On the second issue and article—A public breach of Sabbath observance must be something that the person said to have been libelled was himself guilty of. The innuendo meant that Mr Macfarlane was guilty of irreligious conduct, but the article itself would not bear that construction.

The pursuer also proposed the following issue, but finally withdrew it—"It being admitted that on or about 9th July 1886 the defenders wrote and caused to be published in the '*Oban Telegraph and West Highland Chronicle*' of that date the articles contained in Schedules A and B hereto appended, whether the said articles, or any parts thereof, are of and concerning the pursuer, and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt, and ridicule, to his loss, injury, and damage? Damages laid at £1000."

At advising—

Lord Justice-Clerk—In this case the Lord Ordinary has found that there was no issuable matter in the record—that is to say, that the articles alleged to contain a libel upon the pursuer do not really do so. I have come to a different conclusion. I think that the statements contained in the first of these articles are matters upon which a jury may reasonably judge. In the first place, there is the article in the newspaper which is entitled "Macfarlane the Scoffer." Whether the statements in that article of what the pursuer really said are enough to show that he deserved the title or not, is not the question here. I do not think that any man is entitled to write an article in a newspaper and call another man a scoffer in it without being called upon to justify his conduct before a jury. I think that the phrase itself was libellous, unless it can be shown that there was no intention to libel the pursuer upon the part of the defender, and that he cannot be supposed to have had any such intention. I think therefore that we should allow the first issue, but I am not disposed to allow the second issue.

Lord Young—I agree that the case must go to a jury, but I should be disposed to allow the whole case to go to the jury. But we have got into a little confusion as regards the issues to be sent to trial.

In the first place, there was lodged in the print dated 7th April 1887 two issues for the pursuer, one of which related to the article in the newspaper headed "Macfarlane the Scoffer," and the other relating to an article which charged the pursuer with fishing on the Sabbath day. It was suggested, then, that possibly the case might come under a different character, viz., that category of cases in which the pursuer complained that he was being injuriously held up to public contempt and ridicule. In consequence of that suggestion a single issue to that effect was proposed, and was printed in the small print of date 20th May 1887. But at the last discussion of the case Mr Comrie Thomson, as counsel for the pursuer, when asked as to which course he proposed to take in the interests of his client, announced that he meant to proceed with the two issues first lodged. That is, that he meant to treat the case as one of an ordinary libel, and to ask the opinion of the jury upon the second issue also. No doubt he was acting as he thought best for his client's interests, and he was entitled to take that course, although I myself should have thought that it was the more difficult one, but that was his deliberate judgment. In my opinion he was entitled to take that course, and I think that the pursuer should be allowed to go to trial upon both issues. The defender will try to justify them, and although no doubt the language used in the articles was strong, he will try to show that it was no more than fair criticism upon the speeches of a gentleman who was a candidate for the Parliamentary representation of the county. But the language is such that the pursuer is entitled to submit it as false and calumnious language to a jury. Without indicating any opinion upon the merits of the question, my opinion is that both the issues ought to be sent to a jury.

Lord Craighill—I have no difficulty in holding that we ought to allow a trial on the first issue. It is for the jury to say whether there is contained in it a libel upon the pursuer, and if the facts alleged in the issue appear to the jury to be libellous as there stated, then the pursuer is entitled to whatever reparation they may give him.

But I think that the second issue ought not to be allowed. That which is said by the article complained of in the issue to have been done, might have been done, and yet the pursuer have no knowledge of that which had been done, and might not have given any authority for the doing of it.

Lord Rutherfurd Clark concurred.

The Court approved of the first issue for the trial of the cause.

Counsel for the Reclaimer—Comrie Thomson—Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Balfour, Q.C.—Graham Murray. Agents—Gill & Pringle, W.S.

Friday, March 4.

OUTER HOUSE.

[Lord Fraser, Ordinary.

BENNET AND OTHERS (OWNERS OF THE "ROUMANIA") *v.* HENDERSON AND OTHERS (OWNERS OF THE "ARABIA").

Shipping Law—Salvage—Title to Sue—Ship's Articles—17 *and* 18 *Vict. cap.* 104, *sec.* 182.

In an action brought by part of the crew of a vessel to recover a specific sum in respect of salvage services—*held* (1) that the

crew had a title to sue as seamen on board of a salving vessel who had assisted a vessel in distress; (2) that it was competent for all or some of the salvors to sue in one action, concluding for a particular sum, which the Court would distribute according to the proof among the various salvors; (3) that the plea that all parties were not called was unfounded, as the pursuers did not ask for decree against their co-salvors, and were not bound to call them to hear and see decree pronounced in favour of the pursuers; (4) that in view of the Statute 17 and 18 Vict. cap. 104, sec. 182, the action was not barred, although the ship's articles provided that the crew should not be entitled to extra pay in respect of salvage services.

Shipping Law—Damage—Salvage or Towage.

During a voyage a steamship lost her propeller, and resumed her course under sail. Her course subjected her to various possible dangers which as a sailing vessel she was less competent to meet, and as an act of prudence her captain accepted the assistance of another steamer, which towed her into port. *Held* that the seamen of the latter vessel were entitled to payment for salvage services so performed.

The pursuers in this action were part of the crew of the s.s. "Roumania," of Glasgow, and acted on board of her in the capacities of quartermasters, ship-quartermaster, able-bodied seamen, baker, trimmers, firemen, and ordinary seamen. They sued the owners of the s.s. "Arabia" for the sum of £600, as representing alleged salvage services rendered by them personally in saving the defenders' vessel, cargo, passengers, and crew. The circumstances of the case are explained in the Lord Ordinary's opinion.

The defenders pleaded—"(1) No title to sue. (2) The action as laid is incompetent. (3) All parties not called. (7) The defenders should be assoilzied in respect of the terms of the ship's articles."

The Lord Ordinary (FRASER) on 13th January 1887 repelled these pleas.

"*Opinion.*—This action for salvage services is brought by certain persons who describe themselves as 'members of the crew of the s.s. "Roumania," of Glasgow, and acted in the capacities of quartermasters, ship-quartermaster, able-bodied seamen, baker, trimmers, firemen, and ordinary seamen on board the 'Roumania.' The action is met by certain preliminary pleas, which require to be disposed of before considering the merits of the claim. These pleas are—First, 'No title to sue; second, that the action as laid is incompetent;' third, that 'all parties are not called;' and seventh, that the action is barred in consequence of a clause in the ship's articles providing that in the course of the voyage the 'Roumania' 'has liberty to tow and assist vessels in all situations, as part of the ordinary services for which the men are engaged, without any extra pay or claim.' All these pleas the Lord Ordinary holds to be untenable.

"As regards the first—"No title to sue"—it is clearly bad, because the pursuers were seamen on board a salving vessel who exerted themselves to save the vessel in distress, and are therefore entitled to payment for salvage services.

"The second plea—of incompetency—is based upon this, that the pursuers have no joint interest, and cannot therefore sue jointly for one specific sum, but that they ought to have had separate conclusions, each claiming a specific sum for his own service; and that, further, the whole of the crew, if they were all jointly interested, ought to have been pursuers. It has been determined that where two persons allege injury by one calumnious statement it is competent to sue for damages in one action, provided there be separate conclusions applicable to each person who is pursuer—*Harkes* v. *Mowat*, March 4, 1862, 24 D. 701—and in such case, if there were not separate conclusions, the action would be incompetent. But this is not the rule with regard to salvage claims. The whole or a part of the salvors may sue in one action concluding for a particular sum, which the Admiralty Court (now the Court of Session) is authorised to distribute according to the proof among the various salvors. If the whole of the salvors do not concur in the action the result is just simply this, that the sum allotted to those who do not appear will just pass to the owner of the salved property. The point was expressly determined by the Supreme Court of the United States in 1869, the opinion of the Court being thus delivered—'Salvors are not deprived of a remedy because another set of salvors neglect or refuse to join in the suit, nor will such neglect or refusal benefit the libellants by giving them any claim to a larger compensation, as the non-prosecution by one set of salvors enures not to the libellants prosecuting the claim, but to the owners of the property saved'—'*The Blackwall*,' 10 Wall. 12. In a case decided in the Admiralty Court in England in 1872 ('*The le Jouet*,' L.R., 3 A. & E. 556) this was determined—'Two vessels came into collision on the high seas. One of the vessels (a barque) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, and navigated her until he obtained assistance from a steam-vessel. The steam-vessel then took the barque in tow, and brought her into port in safety, the mate still assisting in her navigation. *Held* that in awarding salvage to the owners, master, and crew of the steam-vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the Court, was entitled to rank as a salvor.' The mate in this case had not entered a claim at all. It was clearly shown that he had rendered meritorious service, and the Judge, keeping this in view, deducted from the total sum of salvage money allowed a portion to be reserved for the mate, which the appearing salvors undertook to pay over to him. Of course if he did not take payment of the salvage money it would go, according to the American decision, to the owner of the salved property. Each individual salvor is, in short, entitled to make his own claim, and to bring his action. Of course if separate actions were brought, the Court would interfere and combine them all into one, so as to prevent the proceedings becoming oppressive as against the defender. There is no other course open but to go on with the action brought by one or more out of a number of salvors, and give to the pursuers such a reward as, taken along with what may be

allotted for the non-appearing salvors, will exhaust the salvage compensation allowed.

"The third plea—that all parties are not called—means that there are persons who might be made defenders that are not so. To whom this applies has not been explained. The pursuers do not seek any decree against their co-salvors, but perhaps it is meant that they should have been called to hear and see decree pronounced in favour of the pursuers. The Lord Ordinary does not think that the latter were under any obligation to cite them for this purpose. If the defenders choose to intimate the dependence of this action to the other co-salvors they are at full liberty to do so, and if a motion to that effect be made to the Lord Ordinary he will grant authority to make the intimation.

"The last plea-in-law—founded upon a clause in the ship's articles—is met conclusively by sec. 182 of 17 and 18 Vict. cap. 104, which provides that 'Every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.'"

Upon the merits the defenders pleaded—"(6) The services in question not being salvage, but towage, the defenders should be assoilzied."

The facts which raise this plea are explained in the opinion of the Lord Ordinary *infra*.

The Lord Ordinary (Fraser) on 4th March 1887 pronounced the following interlocutor:—"Finds that on the 25th, 26th, 27th, and 29th of August 1886 the steamship 'Roumania' performed salvage services to the steamship 'Arabia,' and for so doing compensation is due from the 'Arabia' and its owners to the owners, captain, and seamen on board the 'Roumania': Assesses such compensation at £1000, and appoints it to be divided as follows, viz., two-thirds to the owners of the 'Roumania,' one-fifth of the balance of £333, 6s. 8d. to the captain of the 'Roumania,' and the remainder to be divided among the crew according to their rating, and not including in such crew nine Lascars that were on board the 'Roumania': Appoints the cause to be put to the roll in order that the specific sums due to each of the pursuers may be ascertained, and decree pronounced therefor, and reserves the question of expenses.

By a subsequent interlocutor of 9th March 1887 the pursuers were found entitled to expenses.

"*Opinion.*—The claim here is for salvage services alleged to have been given to the steamship 'Arabia' by sailors on board of the steamship 'Roumania.' Both these vessels belong to the Anchor Line. No claim is made (at all events in this process) for salvage compensation by the owners of the salving vessel, nor by the captain or other officers. The only claim that is made is by twenty-one of the seamen on board the 'Roumania,' and the Lord Ordinary has held that such a claim can be advanced by them although other persons having a right to make a similar claim do not think it proper to do so.

"Both vessels left Bombay in the middle of July bound for Glasgow. They discharged their cargoes at Marseilles, which port the 'Arabia' left two days before the 'Roumania.' On the 23d of August 1886, when the 'Arabia' was about 70 miles to the north of Cape Finisterre, her propeller dropped away from her and thus she lost her motive power as a steam-vessel. On this taking place the captain of the 'Arabia' proceeded to turn her into a sailing vessel. Sails were put up, which do not appear to have been over abundant, seeing that it was necessary to turn awnings into sails, a material which is described as not very suitable for the purpose, seeing that it was thinner than the canvas necessary for sails. At all events she proceeded under sails for two days. In order to get away from the land her course first was westward, and then the vessel's head was turned in the direction to which the captain resolved to go, viz., Queenstown. During these two days the vessel sailed 64 miles, and made between 30 and 40 miles in her course to Queenstown. The winds were light and variable. Six or seven vessels approached the 'Arabia' and tendered assistance which was refused, with this exception that two passengers that were on board were transferred to the steamship 'Rubens' bound for London which had accosted the 'Arabia.' The captain's reason for refusing to take the proffered assistance from any one of these vessels was that he believed himself perfectly able to navigate the vessel under sail to Queenstown, and that no assistance therefore was necessary. One of the witnesses for the pursuers, John Bain, gives a different reason for this. He says—'I noticed from the log that she spoke several vessels, and refused several offers of assistance. I account for that by the fact that the captain knew well enough that the 'Roumania' was coming up behind him. I know he never intended and never expected to sail to Queenstown. (Q) And if he says he did you would not believe him?—(A) That is what I mean.' This is a somewhat uncharitable, nay, an unjust surmise, made by the witness consequent upon the very decided opinion he holds that a disabled steamer cannot be navigated safely under sails. This opinion is contradicted by the experience of other masters of steamers who have been examined, and who supply instances from their own experience of such safe navigation. On the other hand, some of the seamen who are pursuers, and who have been examined as witnesses, and certain experts—former captains of steam-vessels—give a very decided opinion contrary to that of the captain of the 'Arabia' as to the probability of the vessel reaching Queenstown under sails. That opinion is based not so much on what the vessel did on the two days before she was picked up by the 'Roumania' as upon what they conclude ought to have been the result of such an attempt. The vessel according to them would have got into Rennel's current, which sets in from the west and sweeps along the southern and eastern shores of the Bay of Biscay at a rate of one knot an hour, and in high winds at a rate of two and a half or three knots an hour, and having got into the Bay of Biscay these witnesses hold that the 'Arabia' would have been driven ashore and wrecked.

"Now, in answer to this we have the evidence of the persons on board the 'Arabia,' who tell us exactly how she acted during these two days, and without referring to the captain who was in command, we may take William Gordon Crockhart, who kept the log of the 'Arabia,' and was an officer on board her, 'During the time the ship was sailing,' he says. 'she behaved very well. We had not much

wind to try her sailing qualities, but she was going three and a half knots through the water. That was the greatest speed she made. She steered beautifully. There was nothing to prevent her steering—no propellor—she was in every inch a sailing ship. We had plenty of steerage way when going three knots. She answered her helm very well indeed. The whole time she was under canvas she behaved beautifully. We were in no danger during any part of the time. When we were picked up we were about 30 miles further from the land than when the breakdown occurred.' But assuming that the vessel was thus acting very well it would have been a gross act of imprudence on the part of the captain if he had not taken the assistance on the morning of the 25th of August of the 'Roumania' which then came up. He had to cross the Bay of Biscay. Although the weather was calm the winds might change, and there was a risk which no prudent man would run of the vessel running upon a lee-shore, then 72 miles distant. The captain and the witnesses for the defence say that no lee-way was made during the two days, which is contrary to the opinion of the witnesses for the pursuers, who hold that lee-way must have been made, and consequently that the statements to the contrary are not true. There was undoubtedly danger, the danger of adverse winds. At all events it was settled on that Wednesday that the 'Roumania' should take the 'Arabia' in tow, which she at once did, the operation of fixing the hawsers occupying 4 hours. The two vessels proceeded on their voyage to Queenstown, which they reached on Saturday evening. On the Friday foggy weather had come on during which the hawsers snapped, and the vessels lay all night without any attempt to join them together—the 'Roumania' 'dodging about' (as one of the witnesses calls it) the 'Arabia' for fear of losing her. In the morning the hawsers were put right, one of them again snapping, however, off Kinsale Head which in its turn was mended, and without any further casualty the vessel was got into port on the Saturday evening.

"The defenders plead that no compensation is due on the ground of salvage, because they say the services 'rendered to the 'Arabia' were not salvage services but merely towage.' The Lord Ordinary cannot adopt this view. Towage service is confined to vessels which have received no damage—'*The Reward*,' 1 Wm. Rob. 174—which was not the condition of the 'Arabia.'

"Therefore salvage compensation being due, the next question comes to be, what ought to be the amount of it? Now it is very plain that there was absent in this case many of the elements which induce courts of law to award high compensation. There was no tempestuous weather from the 23d, when the propeller broke away from the 'Arabia', till the arrival in Queenstown. There was no risking of life in any perilous situation. It cannot be said that the 'Arabia' was in imminent present peril, nor was there any great labour employed in the joining of the vessels together upon the high sea and towing the 'Arabia' to Queenstown. No doubt the pursuers have endeavoured to make out a case of imminent peril by putting suppositious cases. If a storm had arisen the result, they say, would have been disastrous. Perhaps this might have happened and perhaps not, but the fact remains that there was no such storm. No extra labour was expended in the 'Roumania' except the stationing of two men at the stern with hatchets ready to sever the hawsers in the event of any unfortunate occurrence rendering that necessary. The usual watches were kept on the 'Roumania' but nothing more. In short, this is a case which, if it be regarded as one of salvage, must be regarded as one where the compensation ought not to be high. The pursuers say that it should be fixed at £4000, and of that sum they claim in this action £600 as their share. The Lord Ordinary even taking into consideration the fact that the 'Arabia' cost £67,000 and was valued at 31st December 1886 at £58,000, does not think that more should be allowed than £1000. It is plain that the greater part of this ought to go to the shipowners. It was the ship that did nearly all the work, and they suffered loss by prolongation by three days of the voyage of the 'Roumania.' The captain of the 'Roumania's' services are estimated very lowly by himself, but something must be awarded to him beyond the the other officers and seamen. The Lord Ordinary thinks that two-thirds of the £1000 should be awarded to the owners of the 'Roumania,' being £666, 13s. 4d; one-fifth of the balance (£333, 6s. 8d.) to the captain, being £66, 13s. 4d., and the remainder (£266, 13s. 4d.) to the crew according to their rating, excluding the nine Lascars, for they were not seamen at all in the sense of contributing in any way to the salving of the 'Arabia.' The witness Matthew Waddell, the purser on board of the 'Roumania' described these Lascars as follows—'We had nine Lascars on board who had been shipped at Bombay. We discharged eleven in Bombay. The regular complement of Lascars is nine. They act as cooks and stewards and take no part in the management of the vessel.'

"In apportioning the £266, 13s. 4d. a sum must be set aside for the seamen who do not claim and who are entitled to salvage, and it is only after this has been done that what remains over shall be divided among the pursuers."

Counsel for the Pursuers—Salvesen. Agent—Walter R. Patrick, Solicitor.

Counsel for the Defenders—Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, June 4.

OUTER HOUSE.

[Lord M'Laren, Ordinary.

FEA *v.* MACFARLANE.

Agent and Client—Sale of Heritage—Search for Incumbrances—Negligence.

In an action against a law-agent to compel him to purge a small heritable property of a bond, on the ground that he had failed in his duty in omitting to make a search for incumbrances—*held* that as the agent had explained the whole matter to his client, and as it had been deliberately resolved upon by the different parties to dispense with a search, the agent was not liable for breach of professional duty.