

justified in refusing to unload so much of the cargo already loaded, so as to permit of the machinery and coals being stowed together. On the whole, I am opinion that as there was no breach of obligation on their part the ship-owners are entitled to receive the full amount of the stipulated freight.

LORD CRAIGHILL was absent on circuit.

The Court adhered.

Counsel for Reclaimers—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Lord M'Laren Ordinary.]

MACFARLANE v. BLACK AND COMPANY AND ANOTHER.

Reparation—Slander—Issue.

A newspaper published an article regarding a candidate at a Parliamentary election headed "Macfarlane the Scoffer." The article contained, *inter alia*, this passage—"Is the man who would stand up before a respectable audience and speak sarcastically about 'God Almighty's earth' a man whom you could admire?" In an action of damages for slander, held that the pursuer was entitled to an issue.

Another article in the same newspaper stated that it was alleged a boat from the candidate's yacht was observed fishing on Sunday. Held (*diss.* Lord Young) that there was no issuable matter in this statement, as it was not alleged in the article that there was fishing on Sunday with the consent or authority of the candidate.

This was an action of damages for slander by Donald Horne Macfarlane, East India merchant, 62 Portland Place, London, against Alexander Black & Company, designed as printers and publishers, 83 and 85 George Street, Oban, and John Stewart of Coll, in the county of Argyll, jointly and severally, the publishers and printers of a newspaper called the *Oban Telegraph and West Highland Chronicle*, on the ground that they had published certain articles in that newspaper of and concerning the pursuer, who was at the time candidate for the Parliamentary representation of the county of Argyll, which were false and slanderous.

The pursuer averred that during the whole period of his candidature the defenders had persistently inserted and published, and caused and allowed to be inserted and published, abusive malicious, calumnious, and untrue statements regarding him, not only in his public capacity, but also in his private character as a gentleman, and in regard to his religious views. That a paragraph was inserted by the defenders in the issue of the said newspaper for 9th July 1886 entitled "Macfarlane the Scoffer." That the para-

graph was couched in most offensive terms, and proceeded—"The Irish people tolerate a few vices, but a political quack they at once dismiss. He talks to the 'rabble' in a vulgar and morally offensive way." The same paragraph also put the question—"Is the man who would stand up before a respectable audience and speak sarcastically about 'God Almighty's earth' a man you could admire? The most ignorant crofter in the Highlands would blush to the roots of his ears if he had in an unguarded moment publicly used the same words." That the said paragraph referred to the pursuer, and falsely, calumniously, and maliciously represented him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine government and Providence.

The pursuer further averred that in the same issue of that newspaper the defenders had inserted and published a paragraph headed, "Mr D. H. Macfarlane's doings" in which, *inter alia*, it was stated—"It is also affirmed that a boat from Mr Macfarlane's yacht was observed fishing near the Lochy on Sunday. Mr John Boyd and other members of the local Land League are reported to be incensed at this conduct, and to have refused to give further support to Mr Macfarlane's candidature."

The pursuer averred that it was untrue that any boat from his yacht fished or was observed fishing near the Lochy on Sunday.

The pursuer pleaded—" (1) The defenders having published in said newspaper a paragraph or paragraphs containing false and calumnious statements in reference to the pursuer, are liable in reparation. (2) The paragraphs libelled being calculated and intended to injure the pursuer, and having had that effect, the pursuer is entitled to reparation for the loss and damage thereby caused."

The defenders pleaded—" (1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (2) The articles libelled having been only fair comment on the pursuer's political attitude the defenders should be assoilzied. (3) The statements of the defenders not having been false they are entitled to absolvitor. (4) The defenders not having slandered the pursuer are entitled to be assoilzied."

The pursuer proposed the following issues—" (1) 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 article contained in Schedule A hereto appended, whether the said article or part thereof is of and concerning the pursuer, and falsely and calumniously represents him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine government and Providence, or contains similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? (2) 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 article contained in Schedule B hereto appended, whether said article or part thereof, is of and concerning the pursuer, and falsely and calumniously represents him as a person guilty of a public breach of the Sabbath observance, who was

irreligious, and disregarded and outraged the religious opinions of others, and as guilty of such indecorous and improper conduct as rendered him unfit to represent the constituency of Argyllshire in Parliament, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

The Lord Ordinary on 7th December 1886 pronounced this interlocutor:—"Disallows the issues proposed by the pursuer: Finds further that there is no issuable matter in the record: Dismisses the action and decerns, &c.

"*Opinion.*—In this case I am clearly of opinion that I ought not to allow any issue. There is no issuable matter on record, in my view.

"I take the two charges separately—the charges that are made the subject of the first and second issues. Under the first of these charges the alleged libel is contained in an article which alludes to Mr Macfarlane in connection with his candidature for the Parliamentary representation of Argyllshire, as having used the expression 'God Almighty's earth;' and the writer asks whether 'a man who would stand up before a respectable audience and speak sarcastically about "God Almighty's earth" was a man whom you could admire.' It is not denied that Mr Macfarlane used the expression. I do not know whether he used it or not, but he does not deny it, and it is not said that the expression is in itself exceptionable. We may not admire it, and I think it is an expression which has come from the New World, and has not yet been fully naturalised in our country. Anything said about the use of it in this article is simply an imputation regarding the good taste and literary qualities of the candidate who used these words; and I am of opinion that the article will not bear the interpretation that is put upon it in the first issue, as representing Mr Macfarlane as 'a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine government and providence.' Nor do I think that by any amendment of the issue it is possible to spell a libel out of this article. I regard it as a mere vituperative attack, such as is common at election times, and as meaning nothing but opposition and dislike to the candidate. Of course if there had been anything really libellous, the imputation of a crime or anything that would outrage the public conscience or sense of propriety, the fact of it being made at an election time would not excuse it. But I really do not think this goes beyond the licence of newspaper comment upon election speeches. It is to be observed that the editor quotes the words 'God Almighty's earth,' and whilst he gives his opinion upon them he does not impute to Mr Macfarlane any intention beyond what he deduces from the words used.

"Now, with regard to the second issue, the alleged libel is of a different character because it is founded upon an erroneous statement of fact. The statement is in substance that Mr Macfarlane, by himself or his servants or guests on board the yacht, fished on the loch on a Sunday. It is said by the pursuer that the statement is untrue, and I must take it that the pursuer comes into Court offering to prove its untruth. But the question is, whether this imputation is not only false but calumnious? It is not necessary, in order that the statement should be calumnious, that it should impute a crime; a statement may

amount to a libel if it accuses a person of what is universally considered to be an immoral act, or if it imputes conduct which is contrary to the generally accepted standard of honour or propriety amongst gentlemen—amongst the class of persons to which the individual aggrieved belongs. But I cannot look at this statement as falling under either of these categories. No doubt the denunciation of a candidate on a charge of fishing on the Sunday was calculated to be prejudicial to his election prospects, but I cannot regard the statement as charging something contrary to the generally accepted standard of morality in the community. Many persons hold that fishing, playing cards, or engaging in lawful sports are perfectly innocent when engaged in on Sunday, as much so as on any other day of the week. Others think quite the reverse. There is no statute against engaging in sport on Sunday, and the matter of Sabbath observance on the first day of the week is a matter on which there is a great difference of opinion in the community. Indeed, there are great differences even amongst theologians as to the degree in which the first day of the week may be lawfully devoted to recreation or amusement. That being the case, I think that however offensive this article may have been to Mr Macfarlane, it does not accuse him of anything criminal or immoral, and I do not think the article bears the interpretation put upon it in the issue. The act is not charged in the article as a breach of Sabbath observance, or as having been done from irreligious motives. I think it is quite possible that the editor knew that Mr Macfarlane was a Roman Catholic, and that a person of his persuasion would not feel bound by the views that prevailed in Argyllshire as to Sabbath observance.

"On the whole, I think that this article is nothing more than an exhibition of the usual licence of election articles. It differs from the other article in so far that it represents Mr Macfarlane as having done something which he did not do. But it does not follow from this that it is actionable, and the remedy for verbal or written attacks of this sort is, that the gentleman may defend himself in the same way, which I have no doubt Mr Macfarlane is quite able to do. I shall therefore find that there is no issuable matter in the record, and dismiss the action, with expenses."

The pursuer reclaimed, and argued—The first issue ought to be allowed. The title of the article was a libel in itself, and it did not matter if the statements in the article which was complained of were not such as to make every person consider the pursuer to be a scoffer; the innuendo was to be gathered from the article itself taken along with the title of the article. The article and title represented him as being a scoffer at religion—*Coghill v. Docherty*, October 18, 1881, 19 S.L.R. 96; *Davis v. "The Witness" Newspaper*, July 5, 1855, 17 D. 1050. The second issue ought also to be allowed. It was necessary to innuendo that the pursuer was regardless of the religious feelings of the people among whom he was, and it was for the jury to say whether the innuendo was justified.

The respondent argued—There was nothing stated in the first issue to justify the innuendo put upon it, and the title of the article in the

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