

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 supposititious 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 batchets 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 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 salvaging 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.

In 1879 the pursuer bought a house in Halleraig, Lanarkshire. The defender acted as his agent, and prepared the disposition of the property. The articles of roup contained the following clause:—"And it is hereby provided and declared that the exposers shall not be bound to deliver or exhibit searches of incumbrances over the said subjects; but in the event of any incumbrance being found by a purchaser to exist, and of the same being intimated to the exposers within six weeks after date of purchase of said subjects, the exposers shall be bound to purge the said lands and others thereof, and pay the expenses of the searches, or repay the purchaser the purchase price of the subjects, with interest from the date of purchase: Declaring, however, that if no such intimation be made to the exposers within said period of six weeks from date of sale, they shall not be bound to remove any incumbrances that may be found to exist, or to be at any expense in connection therewith." The missive of sale also bore that searches were not to be required at the expense of the sellers, but that if the purchaser made search and found any burdens, and intimated the same, in terms of the articles of roup, then the obligations thereby laid on the sellers should have full effect. The missive was framed and written by the defender. The defender was agent for the sellers, but according to agreement and to save expense he acted for all parties.

In the year 1885 a demand was made upon the pursuer, as proprietor of the subjects, for payment of the principal sum of £30, due to John Nimmo under a bond and disposition in security granted in his favour, dated the 23d, and recorded in the New General Register of Sasines at Edinburgh the 24th, both days of June 1857, extending over said subjects, together with a claim for interest thereon from its date at the rate of five per centum per annum till payment. The total sum due under the said bond and disposition in security was £73, 10s.

This action was brought to have the defender ordained to purge the property of this bond, or alternatively for payment to the pursuer of a sufficient sum to enable him to pay off the bond and interest.

The pursuer pleaded—" (1) The defender having, by his gross carelessness or culpable neglect of his professional duty as law-agent, in carrying through the transaction condescended on, failed in his duty to the pursuer, as condescended on, he is bound to make payment of the contents of the bond and disposition in security described in the summons, and the interest due thereon, and to obtain the record purged thereof, in terms of the first conclusion to that effect. (2) Failing the defender making such payment, and purging the record as aforesaid, the pursuer is entitled to decree, in terms of the alternative conclusion of the summons, in order that he may have the said bond discharged."

The defender pleaded—" (1) There having been no failure of duty, or want of professional skill on the part of the defender, he should be assolizied. (2) The pursuer . . . having authorised the defender to dispense with searches, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary (M'LAREN) after a proof assolizied the defender.

"*Opinion.*—Mr Dickson having fully entered into the merits of the case has not removed the impression made on my mind by all the evidence in the case. It is an action against a solicitor to compel him to purge a small heritable property of a bond, and the ground of the claim is that the solicitor failed in his professional duty in not having caused a search for incumbrances to be made which would have led to the discovery of the bond. If this was a case of negligence—if the defender had forgotten to order the search—I should not accept readily an excuse that the client had not called on him to make the search. At all events in such a case I should require very clear evidence that the matter had been explained to the client, and that in the knowledge of his rights he had agreed to dispense with the performance of the duty. But in the present case my view is that the expense of a search was really disproportionate to the value of the property, and that the omission to require searches was not the result of negligence, but was a variation of the usual course of professional business common to larger transactions deliberately resolved upon by the different parties. Mr Macfarlane did not proceed rashly in the matter just assuming that the expense should be kept down, but he was at pains to ascertain whether in any reasonable probability there were existing bonds, and I think the explanations made to him (which were true in fact) were in the case of a property of such small amount sufficient to satisfy a reasonable man that searches might be dispensed with. I therefore fail to see that the advice given was unsound, or such as to render the party giving it liable in damages. If it was sound advice, and if Mr Macfarlane did his best to explain the matter to his client, I think he performed his professional duty. The loss which has resulted is therefore the loss of the pursuer, and he may recover part of it from the party who is liable primarily in payment of the sum secured by the bond. As to what that part may be we have no evidence, and this circumstance would have rendered it difficult for me to give an operative decree if I had come to the conclusion that the defender was liable."

Counsel for Pursuer—Dickson. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—Wallace. Agent—Alex. Morison, S.S.C.

Wednesday, July 6.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY (LIMITED) AND OTHERS
v. MACPHERSON.

Road—Right-of-Way—Character of Use.

In an action of declarator of a public right of way for passengers on foot and horseback, and also for driving cattle and sheep, through a highland glen, brought against a proprietor through whose lands the alleged road ran—*held*, upon the evidence, that the