

MACLEAN  
v.  
FRASER.

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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

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MACLEAN v. FRASER.

1823.  
May 19.

DAMAGES for defamation, by a clergyman at a meeting of Presbytery.


Damages claimed for defamation uttered at a meeting of Presbytery.

DEFENCE.—The defender was acting in discharge of his duty as a clergyman.

ISSUE.

“ Whether, on or about the 21st day of  
 “ March 1821, at Aross, in the island of Mull,  
 “ at a meeting of the Presbytery of Mull, the  
 “ defender did falsely, maliciously, and inju-  
 “ riously say and allege, that the pursuer had  
 “ been guilty of a gross violation of the Sab-  
 “ bath, by having, after coming out of church  
 “ on a Sunday, recently before the said 21st  
 “ day of March, taken his fishing-rod, or other  
 “ implement for killing fish, and gone out to  
 “ take fish, and had been employed in fishing  
 “ during part of that day, or did use or utter

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“ words to that effect, to the injury and damage of the pursuer ?”

This case was tried at Inverary, but the verdict was set aside, and a new trial granted.

At the second trial, a witness was asked, on cross-examination, whether the defender mentioned from whom he got his information ?

An objection was at first taken to the question, but on its being limited to what was stated in the Presbytery, the objection was withdrawn. On the other side, it was maintained, that naming at the time the person giving the information, was a sufficient defence.

Starkie, 245 and 247.

The defender was called as a haver, to produce certain letters, which the pursuer did not give in evidence at the trial.

**LORD CHIEF COMMISSIONER.**—They cannot compel you, the counsel for the pursuer, to produce them, nor could they competently call on you to produce them, but your not producing them entitles Mr Jeffrey to observe upon your withholding them.

*The Solicitor-General*, for the pursuer, maintained to the Jury, That the defender was

not in the exercise of his duty, as the pursuer did not reside within his parish.

That, even where malice was not to be presumed, if the statement was known to be false, it will be held malicious.

The question ought to have originated in the Kirk Session.

*Jeffrey*, for the defender, admitted, That if a person made his public station a cloak for private malignity, he would not be protected; but, in the present case, it is not sufficient for the pursuer to prove error and injury; he must prove malice, or fail in his action. Either direct malice, or some previous ground of malice, must be proved. The proceeding was competent under the statute 1695.

LORD CHIEF COMMISSIONER.—As this is now an action only for what was done in a Church Court, there might be some doubt of its legality; and if the action had been brought on this alone, it probably would not have been here for trial.

In reference to this case, actions for slander may be considered as of two kinds,—either the defender has, or he has not, a right to speak of the pursuer. If he has not, then he is liable if the accusation is false. If he has the right, then he is protected, unless he maliciously makes the

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2 Phillipps, 314.

Hill's view of the  
Constitution of  
the Church.  
Pardovan, B. 1.  
T. 11, and p. 197.  
Act of Assembly,  
1648, 1705, (p.  
271.) and 1707,  
P. 350.

Gillon's Abr.  
Acts of Ass.  
p. 349.

M'Queen v.  
Grant, July 25,  
1781. M. 7466.

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accusation. In the first case, it is not necessary to state malice, as it is sufficient if falsehood and injury is proved; but, in the second, malice must be stated and proved, as it is the ground of the action. Whether a case falls within the one class or the other, is a question for the Court; but whether malice is proved, rests entirely with the Jury.

In the present case, there is no proof of any grudge or act showing malice; but the proof of it is rested on the facts and circumstances;—and, according to your opinion of them, you will find for the pursuer or defender. The former Jury seem to have misunderstood the direction, and returned a verdict which the Court could not record; and perhaps it would have been as well if the case had not been again heard of.

Verdict—“ For the defender.”

*The Solicitor-General and Menzies, for the Pursuer.*

*Jeffrey and Whigham, for the Defender.*

(Agents, *D. Maclean, w. s., and H. Macqueen, w. s.*)