

To the Editors of the
"Sydney Herald" with
Mr Clark's. Compl^t
Received from Mr Stephens

REPORT. 10th Dec^r 1835

J. Mel^y.



F. 1900

L I B E L!!!

CLARKE
versus
MACFAUL

September 4th. 1835.

Compiled by

W. N. CLARK. Solicitor.

FREMANTLE WESTERN AUSTRALIA.
PRINTED at the OFFICE of W. T. GRAHAM.
(The First Book Printed in the Colony.)

TO THE PUBLIC.

An Old Woman (says the Fable,) seeing all her wrinkles represented in a large looking Glass, threw it on the ground in a passion and broke it in a thousand pieces, but as she was afterwards surveying the fragments, with a piteful kind of pleasure, she could not forbear uttering the following soliloquy: What have I got by this revengeful blow of mine? I have multiplied my deformity, and see an hundred ugly faces, where before I saw but one

SPECTATOR.

It was the intention of the compiler of this pamphlet, merely, to have published a correct and true report of this trial at the request and expense, of the Plaintiff; and leave the Public to judge, whether, the insinuations cast on the Jury, were or were not founded on fact. — But as Mr. Macfaul is still persisting in his slanderous attacks; a more lengthened publication has been rendered necessary. In the following remarks, Mr. Macfaul is handled as a public character, on whose acts the public have a right to sit in judgement, — and he will do well to ponder on the motto, prefixed to these pages; and remember that he is only multiplying his own deformity by this defamatory system; and that numerous enemies start up, where before there might be only one. The sneering attack in a late “Gazette” is treated with contempt, on the conviction, that Mr Macfaul is writhing under the lash of the remarks made by the Plaintiffs Counsel regarding his public Character; and for Mr. Macfauls benefit he is informed that no “Rules and Orders,” of any Court go-

verned by the principles of the Law of England, can gag the mouth of counsel in addressing a Jury; and throwing back a loathsome and slimy stream of slander on the source from which it has incessantly flowed.

The Editor of the Perth Gazette, may be assured that in a moment of emergency, a FREE PRESS can at all times be procured to hold up the mirror of Truth to the world.—expose and unveil for public censure, all existing abuses,—curb the licentiousness of HIS press; and advocate the cause of the people.—He may also be assured that his “weak effusions” (to use the language of the Morning Herald,) can never be tolerated by a free, and intelligent community.—For the present, he is left to his own consolations; and those of his “adviser!” at the utter failure of abortive attempts to slander the Plaintiff, by subsequent publications, in his absence; pervert the truth, and stigmatize the highly respectable Jury, that Convicted him of LIBEL.

Let the Editor; pause!—in his “woeful” career; and endeavour, to regain that confidence with the people which is his surest safeguard.

The Perth Gazette, was commenced under the fairest auspices; and in the Editors address to the Public, it was stated his constant, and unremitting study should be, to advance the true interests of the Colony. Instead of which he has, by his own foolish acts; arrayed against him, the shipping interest, the Gentlemen of independent principles here and the Public in general. To distant

friends it must appear, on perusing the Gazette, since its commencement, that this Colony, is convulsed with internal broils.— It is not the case; but what can tend more to foster the idea, of our disunion, than the fact, that the Perth Gazette has been the vehicle, for slander, against many respectable individuals here; and in the publication of the 5th. of September, a gross case of LIBEL, against the Editor, seems to be most wilfully mangled, for the purpose of impressing on his "Brother Editors;" that the verdict of the Jury, was wrong.

It is hoped that every Editor of independent principles will disavow a brotherhood based on such grounds.— For their information; numerous copies, of this publication; the germ of a Free Press, in West Australia; have been widely circulated.

It has been a subject of frequent remark that a secret hand, behind the curtain guides and directs; the Editor, in all his movements. — Whether this report is true or false, it is most desirable a change should now take place in the tone, and spirit, of the Perth Gazette! and that the Editor, in future adhere to the Watch word.— "Advance Western Australia! and take a high place amongst the Colonies of England."

In conclusion,—As Mr. Macfaul, has commenced hostilities, He has only to be told, "Lay on Macduff, and damned be him; that first cries HOLD ENOUGH!

W. N. C.

CIVIL COURT.

SPECIAL SITTING PERTH. *Sept. 4th.*

BEFORE W. H. MACKIE, Esqr. *Commissioner*

AND A SPECIAL JURY.

LIBEL

Francis Clark v Charles Macfaul

The Jury consisting of the following highly respectable Colonists being sworn,

THOMAS YUIE, Esqr. FOREMAN
JOSEPH HARRIS.
WILLIAM SHAW.
JOSEPH HARDY.
BERNARD CLARKSON.
T. R. C. WALTERS.
W. R. STEFL.
W. H. SMITHERS.
J. SOLOMAN.
J. STOKES.
ROBERT HARGOOD.
J. DRUMMOND, Esqrs.

Mr. CLARK, for the plaintiff stated. That this was an action at the instance of Capt. Clark, of the Brig "Skerne," against Mr. Charles Macfaul, Editor, Printer and Publisher, of the "PERTH GAZETTE and W. A. JOURNAL;" for a gross Libel which appeared in that Newspaper on the 29th. August 1835, reflecting on Capt. Clark's character as Master of the Skerne; and as a Navigator.—The Damages were laid at Five Hundred Pounds.

The plaintiff is the son of a retired Commander in His Majesty's Navy, and is himself a second Master, and has served his Country, in the Mersey Sloop of War, the Ranger sloop of War, and the Shannon

Frigate. He was also a shipmate of the Surveyor General of this Colony, in the "Tamar Frigate, and that Gentleman will give evidence respecting his nautical talents if the jury think it necessary. The Plaintiff is now Master of the Brig Skerne, and in the employ of Messieurs Borrodailes Thomson and Pillans; the most respectable merchants at the Cape of Good Hope. That House lately sent him to this Colony, with a valuable investment of goods; and although the plaintiff was a stranger to the coast, he brought the Vessel to a safe anchorage, at the commencement of a heavy gale of wind without the aid of a pilot. Since his arrival here he has likewise brought the vessel four times from Cockburn sound to Gages roads without a Pilot; and with indefatigable assiduity he landed the cargo in his own boats, thereby saving his owners, an expense of sixty pounds; and consignees all the wharfage dues.

Several persons hearing that the vessel was laid on for the Isle of France and the Cape, expressed a wish to go in her, the plaintiff was at first unwilling to take passengers, but, by the advice of Mr. G. Leake, (the agent for the vessel) he consented to do so, and accordingly Mr. Waylen, Mrs. Donaldson, and Miss Robinson, took their respective passages.

Mr. Toby did not go as a passenger, for with that kind feeling which exists with seamen, the plaintiff only required him to pay five pounds; and that he should officiate as a mate during the voyage.

Before the vessel sailed the plaintiff purchased and shipped for the use of the passengers, stores of every description,

sued for their comfort during the short voyage to the Isle of France. Captain Clark weighed anchor with every prospect of good weather, but the vessel had not proceeded more than 150 miles from land, when one of the most tremendous gales of wind came on, that has ever visited this coast. Every precaution was taken by the plaintiff to ensure the safety of the Ship, and from the commencement of the gale until the vessel was safely anchored in Cockburn sound he never once shifted his clothes. On the morning of the 25th, of August land was discovered about 5 miles to leeward, and on consultation; it was found to be the west end of Rottenest Island. The plaintiff immediately bore up, and rounded the north east corner of that Island; and I am instructed to state, that Mr. Toby, asked the plaintiff to give up charge of the Vessel to him but it was refused. *C. M.*

Under the plaintiff's directions the ship was brought safely into Cockburn sound and anchored there. Captain Clark immediately sent a Boat ashore for fresh provisions, to supply the deficiency occasioned by the delay which had taken place and intended to have sailed again the following Sunday, but what was his surprise when he read the "PERTH GAZETTE" which was published in Fremantle, on that day. On seeing the Infamous LIBEL complained of, he burst into tears and exclaimed "I am a ruined man!"

He immediately proceeded to Perth with the full intention of Horsewhipping Mr. Macfaul, but by the advice of a valued friend he was dissuaded from doing

so and adopted the more prudent method of an Action at Law to vindicate himself from the foul aspersions, thus cast so wantonly on his Character.

—Mr. CLARK here read the paragraph complained of, which was as follows,

“The Brig “SKERNE,” Captain CLARK, which vessel left this on Tuesday last, the 18th. Inst. after encountering a heavy gale off the Coast for one Week, put back to Garden Island on Tuesday last, but, we are happy to find, without having sustained any injury. The passengers were seriously inconvenienced, the accommodations being very indifferent, and the supplies of suitable necessaries wastefully indifferent. This will form the subject of Legal investigation on the arrival of the vessel at the Mauritius.

We are indebted to one of the passengers for the following short narrative. The Mr. Foby alluded to was the Captain of our Colonial Schooner ELLEN, previously to her being condemned and sold, on her last trip to Hobart Town; than whom no person is better acquainted with our Harbours and Coast;— it was a most providential circumstance that he chanced to be on board, otherwise the vessel must inevitably have been lost, and probably many Lives would have been sacrificed.

In justice to the Colony, we feel it our duty to state, that we are informed Captain Clarke went to sea without regulating his Chronometer, and when they sighted land on the Tuesday morning, until he was instructed by Mr. Foby, was perfectly ignorant as to what part of the Coast they had been driven to.

The Publication was admitted.

Walter Pace, examined. I have been a long time Master of a vessel, I have seen the paragraphs in the News paper and consider they reflect greatly on plaintiff's Character, and tend towards his injury in life professionally, at the time he came in sight of land a Chronometer, or fifty would not be of much use to him, he should be guided by his latitude, the statements are injurious to plaintiff as Master of a Vessel and a navigator.

Cross examined. Was not aware that plaintiff's Chronometer was down before

he left this place, would feel no hesitation in giving up charge to a competent person considers Mr. Toby the only person well acquainted with all the channels, would feel annoyed and hurt at the same thing being said of himself as defendant had of plaintiff, considers the paragraphs injurious in every way.

JACOB TOBY.

Was on board the Skorne a short time saw nothing which reflected discredit on plaintiffs character as a Master or a navigator, took the bearings and sights in the usual way with plaintiff, has seen the paragraphs and does not consider them injurious to plaintiffs character, as a seaman or navigator, but it would be injurious to him with persons not acquainted with navigation,— Cross examined. Heard the Chronometer was not in correct rate does not know if it was actually down, took sights and the time with plaintiff on leaving the port, could not have done so if Chronometer was down, it was his own plaintiff said so, considers it an act of negligence not regulating it, was an officer on board the plaintiffs Vessel,

DANIEL SCOTT.

Has been Master of a Vessel for many years; thinks the paragraphs would not affect plaintiffs character with his owners if he had been a long time with them, but if not, it might. — Cross Exd. Was aware plaintiff had a Chronometer remembers he told witness he had not time the day before he sailed to regulate it, if it belonged to the ship he ought to have regulated

it, but if it was his own, he might do as he pleased, and no negligence ought to be ascribed to him. Re-ex'd. Many merchant ships sail without Chronometers, the Eagle and David Ogleby do so, Is not aware how long plaintiff has been in the employment of his owners.

ALFRED WAYLEN.

Part of the letter now produced is his writing, the INTERLINEATIONS now in it are not his. It was addressed to Macfaul, gave a note to Capt. Clark for Macfaul to deliver up the Letter, considers the paragraph has an injurious tendency as regards his owners & strangers.

TOBY. [recalled] The Book now produced is the Skernes Log-book,

(Here the plaintiffs case closed)

DEFENCE.

The Defendant (who pleaded in person) READ, the following Address.

Gentlemen of the Jury.—I appear before you this day, as the defendant in the present action, strongly influenced by feelings sensitively alive to any charge or imputation of having designedly or maliciously traduced the character of any individual. The general tenor of my conduct as the Editor of a Public Journal, it must be within your own knowledge has for near 3 years exempted me from such a reflection and I trust I am not arrogating too much to myself, in assuming that the caution I have exercised, has

gained me the confidence and good opinion of my brother colonists. I stand here this day, not in a private character, but as Editor of a Public Journal, and the charge against me is founded upon an article inserted in that Journal, — observe this, Gentlemen, — not for my private benefit, or intentionally to injure any man but for the benefit of the Colony; that it might be seen abroad, that vessels visiting this port, well found, and judiciously managed, by persons acquainted with our harbours and coast; even at this dreaded season, may be rescued from impending dangers; and that a check might be offered to the many practices which it is notorious some masters of vessels resort to.

In my effort to accomplish this object which is the subject of the present action it must be evident, that I was not actuated by any motives of malice; caprice, or revenge; Captain Clark being a total stranger to me, indeed scarcely known to me by sight. Under such circumstances is it to be presumed that I could have wantonly trilled with his character? I cannot for a moment suppose that you will entertain such a view of the case; I therefore, without any further remark on this head; conjure you to reflect; before you deliver a verdict that it will decide, whether the Public Press is to be fettered and restrained from the exercise of its just privilege — the exposure of abuses of a public nature — when the facts can be proved to be true. This is the position in which the Public Press of the Colony is now placed before you; — it is in your

power either to liberate or crush it.

—Pause, Gentlemen and consider well the consequences of offering any violence to this bulwark of your rights—the palladium of your liberties.

The facts I shall submit to you, substantiated by evidence, in justification of the article which forms the subject of the present Action, are—

1st.—That the accommodations, and the supplies of suitable necessaries, were in different,

2dly. That it was in contemplation, at the time the article, was written, to proceed against Capt Clarke at the mauritius

3dly.—That Capt, Clarke did go to sea without regulating his Chronometer.

4thly, That Mr. Toby did “instruct” or made Capt. Clarke acquainted that the land they were nearing was Rottenest and that Mr. Toby from his knowledge of the harbour, was the means of bringing the vessel safe to an anchorage, in asserting which fact no reflection can possibly rest upon the seamanship of Capt Clark.

Bearing all these facts in your minds Gentlemen, I call upon you to preserve to me the character as a Public Journalist; I have hitherto enjoyed, and which it is of the most vital importance I should continue to retain.

I come now Gentlemen, to a point which I feel persuaded will weigh strongly on your minds, my having evinced (from the first moment an application was made to me on the subject) a strong disposition to afford Capt. Clarke, through the medium

of my Journal, an opportunity of refuting the statement; and further, in compliance with a proposal made to me by Captain Clarke, through Mr. Leake & Mr. Wm. Samson. Having made further inquiries into the case, but not so minutely as I have since been enabled to pursue them, I expressed my willingness to offer every refutation, by publishing in my next Journal, that there was no imputation upon his character as a seaman. This concession on my part, was conveyed to Capt. Clarke in the following letter. And you will have evidence that he acknowledged it as a sufficient amend, for any actual or other injury his character might sustain.

Gazette Office, Sept. 2d 1835.

SIR.— Being informed by Mr. G. Leake and Mr. W. Samson, that you will waive your action commenced against me, in consideration of my acknowledging that the information upon which the statement which appeared in the Perth Gazette was incorrect, and on my undertaking to discharge the expenses already incurred, up to this time belonging to said action, I beg to apprise you that I will accede to this offer; and further, that in my next publication I will endeavour to make every reparation in my power, by inserting the following paragraph, in explanation of the remarks made in the Gazette,—and have only to regret, that this proposal, which was made by me at our first interview was not entertained.

“In our notice of the return of the Skerne last week, we made some observations which have been considered by

Capt. Clarke as reflecting upon his nautical experience and ability; we are happy to find on further inquiry, that there is no foundation for any such imputation, and have to express our regret that we were too hastily misled by public rumour.

This letter, Gentlemen, must not have any other influence on your minds, than to satisfy you of the inclination and the disposition I entertained [having unconsciously wounded the feelings of that Gentleman] to make every reparation in my power, consistant with my own, HONOR and CHARACTER! This letter was rejected by Captain Clarke, on only one ground,—namely, that I had not absolved him from the imputation of having gone to sea with indifferent supplies. Thus far (as you will soon perceive from the evidence I shall bring forward) I could not conscientiously yield. This Gentlemen, I submit to you, is the principal point to which you must direct your attention, and if I can clearly prove to you that the statement I published was founded on facts of common notoriety, I safely rely upon the favourable issue of this cause, which every true supporter of the liberty of the Press must anticipate and desire.

Into your hands, Gentlemen, I commit myself, praying you, by a verdict in my favour, to liberate me from this charge.

The Defendant called the following witnesses.

WILLIAM SAMSON.

The letter now produced I presented to Capt. Clarke, at Fremantle; it contains

an apology, he said " I will accept this," but his Solicitor Mr. Clark, said "no it will not do," but it would do if something was introduced about the provisions. the apology was not absolutely accepted. was on board the Skerne the day she sailed, did not think the live stock on board sufficient considering the number of passengers, understood that Legal proceedings would be entered against the Captain by one or two of the passengers, at the Mauritius. The day after the return of the vessel received a letter from Mr. Toby to send him and Mr. Waylen supplies, ordered beer, beef, bread, and a case of Brandy, Capt. Clarke said he would pay for them to go on board.

Cross exd. Capt. Clarke said he would consult with his friends and give an answer in half an hour, the form of apology now produced, if inserted by defendant would have stopped further proceedings, knows nothing of the stock of stores on board. never saw fewer heads of live stock for the voyage, as was on board.

Form of the proposed apology

"In our last weeks publication a statement appeared, respecting Capt. Clarke of the Brig Skerne, which we are sorry has had a tendency to cast a slur on his character as master of a vessel and a navigator; and which was totally unfounded.

We were quite in error regarding the accommodations of the vessel, and the supplies to the passengers, and beg to apologize to him, for inserting it. We understand Mr. Toby did not act as pilot on

board the Skerne; but that Capt. Clarke brought the vessel to anchor.

GEORGE WAGSTAFF.

Is not acquainted with the duty of ships Steward, did not take any particular note of the stores put on board, there was 1 doz. fowls, 4 pigs, 6 or 8 ducks, better part of a cask of flour about 3 cwt. when full, and 1 sheep which was killed the day of sailing, there was about 130 lbs of sugar, & more than a bag of coffee, and about 4 lbs; of tea, on returning there was about 1½ lb. left, 10 lb; of flour was consumed daily, there was a full ton of most excellent Biscuit, will not swear there was more than 20 lb, of flour left on the vessels return, there was one cask of Porter & ¼ cask of wine & 1 of Brandy of about 25 bottles, 3 baskets of Potatoes, & 1 of Onions, 1 case of Raisins & 1 of dried Fruits. There was also plenty of salt Beef & Pork pickles, Table utensils, &c. The Sow had 10 young ones. There was 36 lb. of kangaroo, 6 dined at the Cuddy Table 3 passengers and 3 Officers, considers there was sufficient and suitable provisions for 6 persons for 30 days — The passengers had every attention paid them by the Captain, and me as Steward, after the vessel put back there was 4 doz of porter, 5 doz. cape wine, and about 22 or 23, bottles of brandy left, also 2 baskets of potatoes and most all of the Onions & raisins, there were generally dampers for Tea and Breakfast.

DANIEL SCOTT, (recalled)

Took provisions on board the day Brig sailed, was told by some of the passengers

they considered the live stock very scanty
thinks 12 months sufficient time to gain
owners confidence, considers 1 lb. of fresh
meat per day, quite sufficient for each pas-
senger with other stores. It is usual
for passengers to see the accommodations
before engaging, Mrs. Donaldson did so.

Mrs. DONALDSON.

Was a passenger in the Skerne, was
aware that 6 were to be at the Cuddy ta-
ble daily, Was in bed most of the time.
there was plenty of fresh meat, there was
poultry enough with other fresh stock.
took Bread with witness as biscuit only
was agreed to be allowed, does not com-
plain of having only Cape wine, opened
some private stores, but there was no oc-
casion. Cross exd. Capt. Clarke's con-
duct was kind in the extreme to all.

ALFRED WAYLEN. (recalled)

Considers the supplies were inadequate
to the voyage, sent for some provisions
never found however any deficiency in
the locker when Capt. Clarke returned
he immediately laid in very handsomely,
never entertained the idea of taking legal
proceedings, but such were SUGGEST-
ED! to him, 1 lb. of fresh meat a day for
each, is quite enough, there were 2 pigs
slaughtered weighing 30lb. each, took a
receipt for 25£ for passage to the Mau-
ritius, when land was seen, does not think
it was recognised at first, heard Captain
Clarke refuse to give the command to
Toby. TOBY acted as mate, considers
the paragraphs have an injurious tenden-
cy; they might not with nautical men

JACOB TOBY. (*recalled.*)

There was other stock on board, and has no doubt Capt. Clark would have purchased them if required, assisted Capt. Clarke to bring his vessel in only as his Officer.

LIONEL SAMSON.

Intended to have taken a passage in the Skerne, but was not satisfied with the report of the supplies on board, was applied to, and did draw, a receipt, so worded that an action would lie against the Capt. at any port, IF, the supplies proved insufficient. It was common rumour before and since the Skernes return, that she was short of provisions. Thinks Capt. Clarke is a second "RODAM." means Captain Rodam of the "Mary."

Hon. J. S. ROE, Esq

Went with Capt. Clarke to Mr. Macfaul to endeavour to clear up the business, to which he replied "He did not see sufficient grounds to contradict it" and declined

Has sailed with plaintiff in the Tamar Frigate, and is his friend; considers the paragraphs very injurious to plaintiff if not contradicted.

GEORGE LEAKE.

Is agent for the Skerne, advised Capt Clark to accept a sufficient apology, the one offered was only sufficient as regards seamanship, plaintiff expressed unwillingness to take passengers at all. looks upon the paragraphs uncontradicted, as injurious to plf, & will write to the owners on it.

THOMAS PARR.

Sunday evening last went with plaintiff to defendant's house, there was some talk about the next week's paper. Has no recollection what it was. If witness was a ship owner, would not employ plaintiff after such news paper statements.

The evidence having closed.

Mr. CLARK in reply stated.—That the defendant had attempted to prove a justification of the Libel, which had totally failed.—It was proved by two witnesses that 1lb per day of fresh meat was quite enough for each cabin passenger, & it appeared that the plaintiff had on board the Skerne when she first sailed, 1 sheep which on an average would weigh 30 lbs 2 pigs weighing 60lb. Kangaroo 30lb. 12 Fowls; 40lb. & 6 Ducks; making in all 184lbs, of fresh meat; and as the voyage to the Isle of France; would not exceed 30 days, there was thus an overplus of 4lb allowing 6 lbs. each day to the 6 persons that dined at the Cabin Table;—This was independent altogether of the ship's stores of salt Beef and Pork; and the other stores which had been laid in at this port for the comfort of the passengers.—It was not the custom in small vessels to allow passengers foreign wines; or fresh meat every day and he (Mr. Clark) knew that in the ship " Eliza " of 500 Tons (Capt. Weddell) the cuddy passengers had only Cape wine from the Cape of Good Hope, to Swan River. — Mr. Clark in continuation

stated that the defendant had through the means of his press insulted several other Commanders of vessels; Mr. Pratt of the Eagle. Mr. Johnson of the Cape Breton Mr. White of the Fanny. and Mr. Eastmure of the Patriot. And uniting as he does, with the Editorship, the important office of Postmaster, (a thing unprecedented and dangerous,) the Captains of vessels will not take a mail from him; which is attended with a serious injury.

Mr. Macfaul had boasted in his address that his Press, was useful for the correction of public abuses; but it is well known that if any abuse exists on the part of the Government; a sacred veil is thrown over it; and if any Gentleman of liberal principles chooses to write a letter to the Editor reflecting on any Government measure or abuse; it has either been silently rejected or an insulting paragraph in allusion, inserted in the Notices to Correspondents.

Such a system could not last long, and he felt himself bound to state that if Mr. Macfaul, persisted in these slanderous attacks, against persons of respectability in the Colony, and Commanders of Vessels touching here; the next person so insulted would in all probability handle him very severely.

Mr. Clark, then stated to the Jury: that in cases of Libel; they were the sole Judges of the law and the facts. — That where the natural tendency and import of of the language used in the publication is to defame and injure another, it was a Libel and actionable. — And that when a publication is defamatory, the law pre-

states it-n-ally. He concluded by observing, that he left the Honor and Character of his client, with confidence in the hands of the Jury.

Mr Commissioner Mackie. Summed up with great perspicuity; and in a luminous manner explained the nature of libel, and left it to the Jury to determine how far the defendant had succeeded in establishing his plea of justification.

The Jury retired; and in one hour returned a verdict for Plaintiff.
Damages, **TWENTY ONE POUNDS.**

The Verdict was hailed with satisfaction by all classes. The Court was crowded to excess, and there was a numerous attendance of Ladies.

FINIS