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No. 43 of 1933.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

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BETWEEN

WILLIAM FRANCIS O'CONNOR - - (Plaintiff) *Appellant*

AND

GORDON WALDRON - - - - (Defendant) *Respondent.*

CASE FOR THE APPELLANT.

1. This is an Appeal from a Judgment of the Supreme Court of Canada given on the 22nd day of December, 1931, affirming a judgment of the First Appellate Division of the Supreme Court of Ontario given on the 15th day of June, 1931, which affirmed a judgment of Mr. Justice Orde dated the 6th May, 1930, dismissing the Appellant's action summarily on the ground that the Statement of Claim disclosed no cause of action.

Record, p. 81
Record, p. 32
Record, p. 18

10 2. The action thus dismissed was an action of slander by the Appellant against the Respondent, in respect of words spoken by the Respondent whilst acting as a Commissioner appointed to take evidence and report under the Combines Investigation Act (Chapter 26 of the Revised Statutes of Canada, 1927), and the only question arising in this appeal is as to whether the occasion whereon the words were so spoken by the Respondent was one of absolute, and not merely qualified privilege. This question turns on the exact position and quality of the Respondent as such Commissioner.

20 3. The Respondent had been appointed under the said Act by an Order in Council dated the 19th July, 1929, as a Commissioner to investigate an alleged combine in the building industry. The Act in question sets up machinery for the investigation of "combines," (meaning thereby combines likely to operate detrimentally to the public interest) (Sect. 2). The Minister of Labour is charged with the general

Record, p. 84

APPELLANT'S CASE.

administration of the Act, and a Registrar is appointed with the duties (inter alia) of making or causing to be made inquiries into, and in relation to, combines or alleged combines, of receiving reports and recommendations of Commissioners, and of making reports to the Minister as a result of such inquiries (Sects. 6, 10, 12, and 13). The Act also empowers the Governor in Council to appoint Commissioners, and gives authority to such Commissioners to investigate the business of any person believed to be a member of a combine, or party or privy thereto, and named in the Order in Council appointing the Commissioner, and to enter and examine the premises, books, papers, and records of such persons (Sects. 6 (3), and 16). The Registrar and every Commissioner may order any person to be examined on oath before him, and to produce books, papers, records, or articles, and is invested, for the purpose of enforcing such orders or punishing disobedience thereto, with all the powers exercised by any Superior Court in Canada for the enforcement of subpoenas to witnesses or the punishment of disobedience thereto (Sects. 22 and 23). The proceedings before the Registrar or Commissioner have to be conducted in private, although the Minister (and only the Minister) may order any portion thereof to be conducted in public (Sect. 25). When the Registrar has held an investigation, he makes a report in writing to the Minister. When the Commissioner has held an investigation, he makes a report in writing and sends it to the Registrar with the evidence taken on the investigation, and the Registrar transmits the report to the Minister (Sect. 27). A Commissioner's report has to be made public within 15 days of its receipt by the Minister, unless the Commissioner thinks this would be against the public interest, and the Minister thereupon in his discretion decides not to make it public (Sect. 28).

No result can follow from the report or the taking of evidence by the Commissioner save indirectly, at the instance of the Governor in Council or the Minister. One such indirect result is that the Governor in Council, if it be made to appear to his satisfaction that a combine exists in respect of any article of commerce, may in certain circumstances reduce or abolish the Canadian import duties on such articles (Sect. 29). The other indirect result is that, if the Minister thinks that there has been an offence against the Act, he may remit to the Attorney-General of the Province concerned, for such action as such Attorney-General may be pleased to institute, the evidence taken and report made on any investigation by the Registrar or Commissioner; and if no action is taken, information may in certain conditions be laid at the instance of the Solicitor-General (Sect. 31). In all these steps, the Commissioner has no part, and there is no provision that the report or the evidence may be used in any manner on any prosecution. (Indeed, it is provided by Sect. 24 that the evidence of witnesses on such investigations cannot be used in evidence against them if they should be prosecuted.)

For wilfully insulting the Registrar or Commissioner, or wilfully interrupting the proceedings, or for being guilty in any other manner of any wilful contempt in the face of the Registrar or Commissioner, any person may be ordered by the Registrar or Commissioner to be removed and detained in custody until the conclusion of the day's sitting; but any punishment of such person is left to the Courts (Sect. 33).

4. It will thus be seen that the Commissioner is without most of the functions and attributes of a judicial tribunal. His activity is in truth that of collecting evidence for his superior officer, the Registrar (himself non-judicial), and reporting thereon; there are in reality no parties before him; no person involved in the matters he investigates has any right to be present or to be represented by counsel; he decides no issue, imposes no duty, and affects no rights; and he cannot set any proceedings or machinery in motion, but can merely transmit his report and evidence to the Registrar, who in turn sends the report to the Minister; action thereon can only be taken by the Minister (who in his turn can take no direct action himself but can merely suggest action by other authorities). He does not normally sit in public, and if and in so far as he does so it is not of his own volition or at his own instance, but on the Minister's direction. The only functions conferred upon him of the kinds normally exercised by ordinary judicial tribunals—functions often enough exercised in modern times by many other bodies not being judicial tribunals—are those of hearing witnesses on oath and calling for and examining documents, with the ancillary powers of compelling witnesses to attend and of punishing disobedience to his orders in connection therewith, powers without which he could not effectively carry out his investigations. He is in truth, it is submitted, simply an administrative officer employed to make investigations, and given the necessary minimum of weapons with which to make his investigation effective. It may be noticed that the (Canadian) Board of Commerce Act, 1919, which is replaced by the Act under consideration here, provided that the Board should be a Court of Record (Sect. 3 (2) of Chapter 37 of the Acts of 1919). There is no corresponding provision in the present Act, either as to the Registrar or as to the Commissioner.

5. Such a Commissioner, it will be seen, is in a position closely resembling that of an Inspector appointed in England to examine and report on the affairs of an Industrial Assurance Company under the Industrial Assurance Act, 1923, which was discussed by the House of Lords in *Hearts of Oak Assurance Co. Ltd. v. Attorney-General*, (1932) A.C. 392 or that of an Inspector appointed to investigate and report on the affairs of a Company in England under Section 135 of the Companies Act, 1929.

6. The action was instituted by the Appellant on the 2nd October, 1929, and on the 10th April, 1930, the Respondent gave notice of motion for an order dismissing the action on the ground (inter alia) that the Statement of Claim disclosed no reasonable cause of action.

Record, p. 18
Record, pp. 12-18

7. This motion was heard by Mr. Justice Orde, who on the 5th May, 1930, gave judgment dismissing the action. In his reasons for judgment, he relied mainly on the cases of Dawkins v. Lord Rokeby, L.R. 7 H.L. 744, and Barratt v. Kearns, (1905) 1 K.B. 504, and concluded that the occasion was one of absolute privilege.

Record, pp. 19-20
Record, pp. 32-3

Record, p. 18
Record, pp. 20-32

8. The Appellant appealed to the Appellate Division of the Supreme Court of Ontario, which Court (Mulock C.J.O., Magee, Hodgins, Middleton and Grant J.J.A.) by a majority, Hodgins J.A. dissenting, confirmed the judgment of Mr. Justice Orde. Their reasons for judgment are printed in the Record.

Record, p. 81
Record, pp. 78-80

9. The Appellant appealed to the Supreme Court of Canada (Anglin C.J.C., Rinfret, Lamont, Smith and Cannon J.J.) which on the 22nd December, 1931, gave judgment upholding the Courts below. In its reasons for judgment the Supreme Court of Canada relied upon the judgment of the Court of Appeal in England in Hearts of Oak Assurance Co. Limited v. The Attorney-General, (1931) 2 Ch. 307, which was reversed by the House of Lords, (1932) A.C. 392, subsequently to the decision of the Supreme Court of Canada. It is respectfully submitted that the Supreme Court would in all probability have decided in the opposite sense if it had had the opportunity to consider the opinions of the House of Lords in the Hearts of Oak Case and in particular the observations of Lord Dunedin at page 405 where speaking of an inquiry held under statutory powers in many respects similar to those of the Combines Investigation Act, he said:—

“ I do not think it is a judicial proceeding which must be held
“ in public; privilege in it would be qualified not absolute
“ privilege.”

10. It is therefore respectfully submitted that the judgment appealed from should be reversed for the following among other

REASONS.

1. Because the occasion on which the words complained of were uttered was not one of absolute privilege.

2. Because the dissenting judgment of Mr. Justice Hodgins in the Appellate Division of the Supreme Court of Ontario is right and should be affirmed.

3. Because the judgments of the Supreme Court of Canada and of the Courts in Ontario were wrong and ought to be reversed.

D. N. PRITT.
I. W. G. BARRY.

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