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In the Privy Council.

No. 43 of 1933.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

WILLIAM FRANCIS O'CONNOR ... ... (*Plaintiff*) *Appellant,*

AND

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

CASE FOR RESPONDENT.

RESPONDENT'S CASE.

Record.

1. This is an Appeal by special leave granted on the 25th May, 1933, p. 82.
from a judgment of the Supreme Court of Canada given on the 22nd day of December, 1931 (1932 S.C.R. 183), dismissing an appeal from a judgment p. 81.
of the Appellate Division of the Supreme Court of Ontario (1931 Ont. L.R. 608) pp. 32-33.
which in turn dismissed an appeal from the judgment of Mr. Justice Orde (1930, 65 Ont. L.R. 407) in an action for slander in which the Appellant was p. 18.
Plaintiff and the Respondent Defendant. This last mentioned judgment dismissed the said action.

2. The question involved in this appeal is whether, as all the Courts in Canada have held, the occasion on which the Respondent spoke the words complained of was one which entitled him to rely on the defence of absolute privilege.

3. The facts relating to the occasion in question are as follows :

On 19th July, 1929, the Crown by letters patent under the Great Seal p. 85.
of Canada appointed the Respondent a Commissioner to conduct an inquiry into the business of an association known as the Amalgamated Builders Council and others, with a view to ascertaining whether a combine as defined by the Combines Investigation Act R.S.C. 1927 C. 26, existed.
The Order in Council made on the same date as the Respondent's appoint- p. 84.
ment as Commissioner and incorporated by reference in the said letters

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Record. p. 84, l. 32. patent defines the scope of the inquiry to be held by him. It was to investigate the business of certain named Associations and individuals, which latter did not include the Appellant, and also " any other person who is " believed to be a member of the alleged combine or a party or privy " thereto."

p. 85, l. 38. The Respondent was required and directed to report the results of his investigation together with the evidence taken before him and any opinion he might see fit to express thereon to the Minister of Labour.

4. The Respondent in accordance with the duty enjoined on him by the said letters patent proceeded to hold an inquiry during the course of which evidence was given which in his opinion implicated the Appellant as a party or privy to the formation or operation of a " combine " within the meaning given to that word in the said Act, and while investigating this matter and p. 11, l. 6. interrogating a witness the words which are the subject matter of complaint in the Appellant's action were used.

pp. 4-5. **5.** The Statement of Claim in the action set out the words complained of without reference to the circumstances in which they were spoken. The p. 7, l. 28. Respondent by his Defence admitted having spoken all the said words, with an immaterial exception, and further pleaded that the said words were spoken at intervals during the course of the examination of a witness at the inquiry which he had been ordered to hold under and by virtue of the commission referred to above, and that they were in consequence spoken on an absolutely privileged occasion. The Appellant in his Reply admitted that pp. 8-9. the said words were spoken while the Respondent was purporting to act as Commissioner as aforesaid but challenged the validity of his appointment and traversed generally the allegations contained in the Defence.

p. 11, l. 25. **6.** On these pleadings a motion was made on behalf of the Respondent to dismiss the action on the ground pleaded in the Defence that words spoken by a Commissioner duly appointed under the Combines Investigation Act in the course of the inquiry he is ordered to hold are spoken on an p. 18, l. 20. absolutely privileged occasion and on 5th May, 1930, the motion was allowed by Mr. Justice Orde and the action dismissed (1930, 65 Ont. L.R. 407). The pp. 12-18. learned Judge after pointing out with reference to the question for decision that nothing more could be elicited at the trial of the action than was contained in the pleadings and in the admissions made by the Appellant on his examination for discovery, proceeds to examine the relevant authorities, and to discuss the question as to whether proceedings before a Commissioner under the Act come within the principle under which absolute p. 14, l. 6. privilege exists in respect of " words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law." *Dawkins* v. *Lord Rokeby*, L.R. 8 Q.B. 255 per Kelly C.B. at p. 263. The learned Judge after reviewing the provisions of the Act comes to the following conclusion :—

p. 16, l. 43. " Keeping in mind the underlying principle of the rule as to absolute " privilege that it is designed not for the protection of the individual

" but as a matter of public policy in order to allow freedom of speech Record.
" not only to the members of the tribunal but to Counsel, witnesses
" and parties it would be inconvenient, if not practically impossible, to
" conduct an inquiry under the Combines Investigation Act in the
" public interest if the proceedings are not protected by the rule."

7. On an appeal by the Appellant this judgment was affirmed by the pp. 32-33.
Appellate Division of the Supreme Court of Ontario consisting of Mulock C.J.O., Magee, Middleton and Grant JJ.A., Hodgins J.A. dissenting (1931, Ont. L.R. 608). The leading judgment was delivered by Mr. Justice Middleton, pp. 20-24.
10 who after reviewing the authorities concluded by saying as follows :—

" This case emphasises the impossibility of an individual discharging p. 23, l. 45.
" a duty cast upon him by the law of the land, if at all times he should
" be constantly in fear of actions against him by reason of that which
" he might do in the discharge of his duty."

Mr. Justice Hodgins in his dissenting judgment held that although there pp. 24-32.
was a great preponderance of authority in favour of absolute privilege for those who act or profess to act judicially in performing some statutory duty there was no decision which bound him to hold that statements at a public inquiry of the nature in question were absolutely privileged.

20 **8.** From this decision the Appellant appealed to the Supreme Court of p. 81.
Canada which gave judgment on 22nd December, 1931, dismissing the appeal (1932 S.C.R., 183). The judgment of the Court (Anglin C.J.C., Rinfret, Lamont, Smith and Cannon JJ.) was delivered by Mr. Justice pp. 78-80.
Smith, who expressed his agreement with the views of Mr. Justice Orde and the Appellate Division and refers to a case decided in the Court of Appeal in England *Hearts of Oak Assurance Co. Ltd.* v. *Attorney General* (1931 2 Ch. 370) in the judgments in which and more particularly in the dissenting judgment of Lord Hanworth which was subsequently approved in the House of Lords (1932, A.C., at p. 398) he finds confirmation of the view that absolute
30 privilege exists in the present case.

9. It is respectfully submitted that the question at issue depends entirely upon the powers and duties conferred on a Commissioner by the Combines Investigation Act itself and that when the provisions of this Act, which are referred to below, and also those contained in the Inquiries Act, which are incorporated by reference in the former Act, are considered the view expressed by all the Courts in Canada that a Commissioner presiding at an inquiry is a judicial officer whose duties could not be properly performed unless he was protected from actions for libel or slander in respect of any written or verbal statement made by him in the course of the inquiry he is
40 required to hold is one which is well founded in law.

The Act (R.S.C. 1927 c. 26) by Section 2 defines the word " combine " and by Section 32 makes it an indictable offence punishable by fine or imprisonment for any person to be a party or privy to the formation or operation of a combine.

Section 16 gives power to the Governor in Council to appoint a Commissioner to investigate the business of any person who is or is believed to be a member of any combine or a party or privy thereto.

Section 18 makes all the provisions of the Inquiries Act which are not repugnant to the provisions of the Act applicable to any inquiry or investigation under the Act.

Section 22 provides that a Commissioner may order any person resident or present in Canada to be examined on oath and to produce books papers records or articles and gives him power to make such orders as seem to him proper for securing the attendance of witnesses and the production of books etc. To secure the enforcement of such orders or to punish disobedience thereto the Commissioner is given all powers that are exercised by any Superior Court in Canada for the enforcement of subpœnas to witnesses or punishment of disobedience thereof.

By Section 25, the proceedings before the Commissioner are to be in private unless the Minister of Labour orders otherwise.

In the present case the Minister ordered the Respondent to conduct the proceedings in public if he thought fit to do so and in fact they were so conducted throughout.

By Section 28, the report which a Commissioner is bound to make under Section 27 to the Minister of Labour must be made public within fifteen days unless the Commissioner states in the report that he is of opinion that the public interest would be better served by withholding publication.

Section 31 provides for the institution of criminal proceedings against any person who in the opinion of the Minister has committed any offence under the Act.

Section 33 gives the Commissioner power to direct a constable to arrest and remove any person who is guilty of any wilful contempt in the face of the Commissioner and makes such conduct an offence punishable on summary conviction.

Section 41 provides that the Minister shall lay before Parliament an annual report of the proceedings under the Act.

The Inquiries Act R.S.C. 1927 Ch. 99, by Section 12 provides that Commissioners may allow any person whose conduct is being investigated under the Act and shall allow any person against whom any charge is made in the course of such investigation to be represented by Counsel, and by Section 13 it is provided that no report shall be made against any person until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard in person or by Counsel.

10. It is respectfully submitted that the legislature by enacting the provisions referred to above has clearly expressed the intention of investing the proceedings in question with a judicial character and that the rule of public policy which confers immunity from actions of defamation in respect of words spoken by those who are acting in pursuance of a legal duty in

holding an inquiry conducted in a similar manner to proceedings before a Court of Justice applies to the present case and consequently that the judgment appealed from should be affirmed for the following (amongst other)

REASONS.

1. Because it is admitted that the words which are the subject matter of the Appellant's action were spoken by the Respondent while purporting to act as a Commissioner under the Combines Investigation Act R.S.C. 1927 c. 26.
2. Because the Respondent was duly appointed a Commissioner under the said Act.
3. Because words spoken by a Commissioner while acting as such in reference to the subject matter of the investigation he is conducting are absolutely privileged.
4. Because as all the Courts in Canada have held the Respondent could not properly discharge his duties as Commissioner unless what he said while acting in that capacity was absolutely privileged.
5. Because the judgments of the Courts below are right for the reasons therein appearing.

L. A. LANDRIAU.
RONALD SMITH.

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