69, 1934

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.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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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.*

RECORD OF PROCEEDINGS.

In the Supreme Court of Ontario.

No. 1.
Writ of Summons, 2nd October 1929.

No. 1.

Writ of Summons.

No. 2365, A.D. 1929.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

Issued October 2nd, 1929.

ENDORSEMENT ON WRIT.

The plaintiff's claim is for damages for slander. The slander complained of was the speaking of and concerning the plaintiff in the way of his profession or calling as a barrister the words following—(words set out as in Statement of Claim). The said words were so spoken by the defendant on the 27th day of September, 1929, at Toronto, in the County of York, Province of Ontario, while the defendant was wrongfully purporting to act as a statutory commissioner under the Combines Investigation Act of the Dominion of Canada, whose powers are by the said Act

In the Supreme Court of Ontario.

No. 1. Writ of Summons, 2nd October 1929—*continued.*

limited to the procuring, hearing and reporting of evidence, with the conclusions of the Commissioner to the Registrar under the said Act. The defendant, who was not then a court nor acting as or for a court, nor as a judicial officer nor performing any judicial function, acted without jurisdiction or in excess of the jurisdiction of a commissioner under the said Act, and without reasonable and probable cause, and falsely and maliciously spoke the said words of the plaintiff, who was not then charged before the defendant, nor named in any Order-in-Council appointing the defendant a commissioner under the said Act, and the said words were spoken otherwise than in a report of evidence and conclusions thereon made under the said Act.

No. 2. Statement of Claim, 1st November 1929.

No. 2.

Statement of Claim.

IN THE SUPREME COURT OF ONTARIO.

(Writ issued the 2nd day of October, 1929)

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - - *Defendant.*

1. The plaintiff, who is, and at the time hereinafter mentioned was, a barrister-at-law duly qualified to practice the profession of a barrister-at-law under the laws of the provinces of Ontario and Nova Scotia, has suffered damage from the defendant, on the 27th day of September, 1929, at the City of Toronto, in the County of York, Province of Ontario, falsely and maliciously speaking and publishing of the plaintiff with relation to the plaintiff's said profession or calling and his practice and mode of practice thereof, to Louis M. Singer, F. W. Griffiths, Roy E. Belyea, Harry A. Weinraub, F. A. McGregor, Garrett Frankland, William Winfield and many other persons whose names are unknown to the plaintiff, the words following (spoken and published with relation as aforesaid and imputing to the plaintiff the commission of crime, punishable by imprisonment), that is to say :—

> " A very odious counsel. A lawyer cannot advise a wrong or a crime any more than anybody else. He has no privilege to do that. Well, then, you had full knowledge of the scheme. Was it you who gave to O'Connor the contrivance of effecting a crime without effecting a crime, of making a false pretence to the public and to the law ? Was it you who gave that to O'Connor or did he give it to you ? I will describe it more clearly. Did you give to O'Connor the idea

that you might beat the law by false pretense? I say it is a thing any lawyer ought to be ashamed of. I do not care who he is. It is an outrageous, scandalous exhibition. It ought to be reported to the Law Society. Anybody who had an evil mind or disposition to commit crime would be completely carried away by the eloquence of Mr. O'Connor."

2. The defendant by the said words, addressed and spoken to Louis M. Singer, above named, meant that the plaintiff in relation to and in the course of practice of his, the plaintiff's, said profession or calling had advised the commission of a breach or breaches of the Combines Investigation Act, Chapter 26 of the Revised Statutes of Canada, 1927, which breach or breaches would constitute a crime or crimes punishable by imprisonment, and that the plaintiff was himself guilty of such crime, so advised, as party or privy thereto, and that in consequence and because of such advice so given by him, the plaintiff could be and ought to be reported to the Law Society of Upper Canada and its Benchers as a person guilty of unprofessional conduct and as a person unfit to practise the profession of a barrister-at-law and as a barrister-at-law who ought to be disbarred because of his having advised the commission of, and himself committed, a crime or crimes punishable by imprisonment.

3. The plaintiff claims the sum of $25,000 damages, and the costs of this action and such further or other relief as to the Court shall seem just.

4. The plaintiff proposes that this action be tried at Toronto aforesaid.

DELIVERED this first day of November, 1929, by J. G. Kelly, 1613 Metropolitan Building, Toronto, Ontario, Solicitor for the Plaintiff.

No. 3.

Demand for Particulars.

No. 3. Demand for Particulars, 5th November 1929.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

The defendant demands particulars within two days from the date hereof of the plaintiff's claim so that the defendant may properly plead thereto, as follows :—

1. The place in the City of Toronto where the words referred to in the plaintiff's statement of claim were uttered and published and under

In the Supreme Court of Ontario.

No. 3. Demand for Particulars, 5th November 1929 —*continued.*

what circumstances, and whether or not the said words are alleged to have been spoken by the defendant during his examination of a witness appearing before him while the said defendant was acting as a Commissioner holding an investigation under The Combines Investigation Act.

DATED at Toronto this 5th day of November, 1929.

KILMER, IRVING & DAVIS,
10 Adelaide Street, East,
Solicitors for the defendant.

To J. G. KELLY, ESQ.,
Solicitor for the Plaintiff.

No. 4. Reply to Demand for Particulars, 7th November 1929.

No. 4.

Reply to Demand for Particulars.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

The plaintiff in reply to the defendant's demand for particulars delivered herein the 5th day of November, 1929, says that—

1. As to the demand for particulars shewing "the place in the City of Toronto where the words referred to in the plaintiff's Statement of Claim were uttered and published" they were uttered and published in a room on the ground floor of Osgoode Hall, Queen Street; as to the demand for particulars shewing "under what circumstances" the said words were uttered and published the plaintiff is unable, because of the generality of the terms of such demand, so to understand the nature of the particulars required as to enable a reply thereto; as to the demand for particulars shewing "whether or not the said words are alleged to have been spoken by the defendant during his examination of a witness appearing before him while the said defendant was acting as a Commissioner holding an investigation under the Combines Investigation Act," the plaintiff's Statement of Claim does not so allege and was not intended so to allege.

DATED at Toronto, this 7th day of November, 1929.

J. G. KELLY,
1505 Concourse Bldg.,
Solicitor for Plaintiff.

No. 5.

Statement of Defence.

In the Supreme Court of Ontario.

No. 5. Statement of Defence, 9th November 1929.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

1. The defendant admits that the plaintiff is a barrister-at-law under the laws of the Province of Ontario.

2. The defendant spoke all the words quoted in paragraph one of the plaintiff's statement of claim except the words " it ought to be reported to the Law Society."

3. The defendant when he spoke the said words, other than " it ought to be reported to the law society," was acting as a commissioner appointed by an order of the Governor-General-in-Council of Canada bearing date the 19th day of July in the year one thousand nine hundred and twenty-nine made by virtue of the Combines Investigation Act, Revised Statutes of Canada, Chapter 26, and empowered by his commission to summon before him any witnesses and to require them to give evidence on oath or solemn affirmation if they were persons entitled to give evidence in civil matters and orally or in writing and to produce such documents and things as he the defendant acting as such commissioner should deem requisite to the full investigation of the matters into which he was appointed to examine and the defendant was by the said appointment and commission required and directed to report to the Honorable the Minister of Labor the results of his investigation together with the evidence taken before him and any opinion he might see fit to express thereon.

4. The said words, other than " it ought to be reported to the law society," were spoken by the defendant on the 27th day of September, 1929, in the court room of the Second Appellate Division, otherwise called the Master's Court room on the ground floor of Osgoode Hall, in the City of Toronto, in the ordinary course of the investigation committed to him and at intervals during the course of the examination under oath of a witness named Louis M. Singer upon a written counsel or opinion of the plaintiff to the said Singer.

5. The defendant will submit to this Honorable Court at the trial of this action the said Order-in-Council and his said commission.

6. The defendant submits that when speaking the said words, other than " it ought to be reported to the law society," he spoke them in his said

No. 5. Statement of Defence, 9th November 1929 —*continued.*

office while he was acting judicially, and that the speaking of the said words was absolutely privileged.

7. The defendant denies the statements made in the second and third paragraphs of the plaintiff's statement of claim.

DELIVERED this 9th day of November, 1929, by Messrs. Kilmer, Irving and Davis, 10 Adelaide Street East, Toronto, solicitors for the said defendant.

No. 6. Reply, 19th November 1929.

No. 6.

Reply.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - - *Defendant.*

The plaintiff, as to the defendant's Statement of Defence, says that—

1. The plaintiff joins issue thereon.

2. The defendant spoke the words complained of in the Statement of Claim falsely, wantonly and with express malice; and they were not spoken with any manner of privilege nor upon any species of privileged occasion nor otherwise justifiably.

3. The plaintiff pleads and will object on the trial of this action that no absolute privilege was attached to the speaking of the words complained of in the Statement of Claim either for the reason set up in the Statement of Defence or at all, and that such words were not spoken upon an absolutely privileged occasion, because the defendant, when he spoke the said words—

(a) purported to act as a statutory commissioner appointed to procure, hear and report evidence, with his conclusions, to the Registrar of the Combines Investigation Act of Canada, pursuant to the terms of the said Act, whereas the said Act could not and did not in law authorize him, whether as the result of appointment of him by commission issued under it or otherwise, to so act, because the said Act was and is one beyond the legislative competency of the Parliament of Canada, which enacted it, wherefore the Governor-General-in-Council of Canada had not lawful right nor any power to appoint or to commission the defendant as a commissioner to exercise any of the rights, authorities or powers claimed or relied upon by him in this action as incidental to his claimed appointment as a commissioner under the said Act;

(b) was unlawfully purporting to act as a statutory commissioner appointed to procure, hear and report evidence, with his conclusions to the Registrar of the said Act pursuant to the terms thereof, but the Governor-General-in-Council of Canada had not lawful right or power to appoint or

to commission the defendant to be a commissioner to conduct any investigation under the said Act because prior to the defendant's alleged appointment as Commissioner, Sections 11 to 13, inclusive, of the said Act had not been complied with, nor have such sections ever been complied with, and because the Order in Council whereunder the defendant claims to have been appointed a commissioner purports to authorize him to investigate, pursuant to the said Combines Investigation Act, the businesses of Amalgamated Builders' Council and of its members, which Council is a trade union, registered as such under the Trade Unions Act of Canada and which last mentioned Act exempts the said Council and its members and their businesses from such and the like investigation;

(c) was not acting in performance of any jurisdiction, under the said Combines Investigation Act, but, instead, acting in excess of and apart from such limited jurisdiction, if any, as he had under that Act, in that he was at the time when he so spoke, announcing in advance, before hearing all the available relevant evidence, and publicly, conclusions which the terms of the said Act authorized and required or purported to authorize and require him to report only secretly and privately and personally for the ultimate consideration of such conclusions by the Minister of Labour of Canada, who might, under the terms of the said Act, either adopt or reject the said conclusions;

(d) was not a court or a judge nor acting as or for a court or a judge nor as a judicial officer or official, nor in manner like to that in which courts or judges act, nor was he then performing any judicial function or duty, but he was then authorized to perform and performing merely ministerial functions, to wit the collecting of evidence (the use whereof in any judicial proceeding the Combines Investigation Act forbids) for the purpose of reporting such evidence, as taken, with his conclusions to the Registrar of the said Act, for the consideration of the Minister of Labour of Canada, who is not a court or a judge or a judicial functionary, and who might adopt or reject the said conclusions as reported. The said Act does not by its terms purport to vest in any commissioner appointed under it nor in the said Minister of Labour the power to render any decision or judgment nor to determine any matter as between party and party or otherwise, nor to impose any duty or obligation upon, nor to affect the property or other rights of any person;

(e) was, for the reasons already set forth in this pleading, acting without any jurisdiction, or without, or in excess of, the jurisdiction of a commissioner appointed under the said Act, and as a trespasser *ab initio* in or upon the office which he purported to fill exercising its powers and duties.

DELIVERED this 19th day of November, 1929, by J. G. Kelly, Concourse Building, corner of Adelaide and Sheppard Streets, Toronto, Solicitor for the said plaintiff.

In the Supreme Court of Ontario.

No. 7. Evidence of Plaintiff for Discovery, 7th April 1930.

No. 7.

Evidence of Plaintiff for Discovery.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

The Examination for Discovery of WILLIAM FRANCIS O'CONNOR, the above named Plaintiff; taken before me, John Bruce, Special Examiner, at my Chambers in the City Hall, Toronto, on the 7th day of April, A.D. 1930.

W. F. O'CONNOR, Esq., K.C., Plaintiff in Person.

H. H. DAVIS, Esq., K.C., Counsel for Defendant.

The said WILLIAM FRANCIS O'CONNOR, having been duly sworn and examined, deposed as follows:—

By Mr. DAVIS:

1. *Q.* Mr. O'Connor, you are the Plaintiff in this action?—*A.* Yes sir.

2. *Q.* And in your statement of Claim you set out certain words which you allege the defendant spoke concerning you?—*A.* Yes sir. I was present and heard them.

3. *Q.* Where were the statements made?—*A.* In a room on the ground floor in Osgoode Hall.

4. *Q.* Mr. Waldron was at the time sitting or purporting to sit under a Royal Commission?—*A.* Yes; well under a Statutory Commission issued under the Combines Act; he was appointed under a Statute and not by power proceeding from the Crown.

5. *Q.* Well a commission issued—I think you appreciate this—a Royal Commission issued pursuant to a Statute?—*A.* Not a Royal Commission; no.

6. *Q.* Well a commission?—*A.* A commission; that is the distinction —one proceeds from the Crown without Statute.

7. *Q.* Without statutory foundation?—*A.* With the Crown's own power; that is a Royal Commission.

8. *Q.* But at the time the words were spoken as you say, they were spoken by Mr. Waldron while sitting as a Commissioner?—*A.* Yes, sitting or purporting——

9. *Q.* Sitting or purporting to sit as Commissioner?—*A.* Yes.

10. *Q.* And you have seen the original commission?—*A.* Yes. You may put it in as far as I am concerned when you have it, as if it were here now.

11. *Q.* And may treat the original commission——?—*A.* As here.

12. *Q.* As before us now?—*A.* And that being the one that you will subsequently put in.

13. *Q.* And the Order in Council under which it was authorized—or whatever is the proper term to use?—*A.* Exactly.

14. *Q.* And the words which you allege to have been spoken were spoken at Osgoode Hall by Mr. Waldron while purporting to act under his commission?—*A.* Yes.

15. *Q.* And you do not in this action allege the speaking of the words at any other place?—*A.* No.

Mr. DAVIS: I would like to have this Examination stand adjourned until after Mr. O'Connor makes his Motion on the examination of Mr. Waldron, pending the result of that motion.

Mr. O'CONNOR: That is satisfactory to me.

Examination adjourned sine die.

I hereby certify the foregoing to be the depositions of the said W. F. O'Connor, taken before me in shorthand on his Examination so far as proceeded with.

Certified correct:

M. L. McEVOY,
Reporter.

JOHN BRUCE,
Special Examiner.

No. 8.

Notice of Motion to dismiss action.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

TAKE NOTICE that the Court will be moved on behalf of the plaintiff at Osgoode Hall, Toronto, on Monday, the 14th day of April, 1930, at the hour of eleven o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an Order dismissing this action with costs, upon the ground that the Statement of Claim discloses no reasonable cause of action or that the said action is frivolous or vexatious, in that the defendant was absolutely privileged on the occasion in which it is alleged he spoke the words complained of or upon such other grounds as appear from the material, or for such other order as to the Court may seem just.

In the Supreme Court of Ontario.

No. 8. Notice of Motion to dismiss action, 10th April 1930—*continued.*

AND TAKE FURTHER NOTICE that in support of the said motion will be read the Writ of Summons, the pleadings and proceedings in the action, the examination of the plaintiff for discovery and the COMMISSION and the Order-in-Council authorizing the same therein referred to, and such further and other material as Counsel may advise.

DATED at the City of Toronto this 10th day of April, 1930.

KILMER, IRVING & DAVIS,
Solicitors for the Defendant.

To the plaintiff and to his solicitor,

J. G. KELLY, Esq.,
Toronto.

No. 9. Reasons for Judgment of Mr. Justice Orde, 5th May 1930.

No. 9.

Reasons for Judgment of Mr. Justice Orde.

S.C.O.
O'CONNOR
v.
WALDRON.
Delivered 5th May, 1930.

H. H. DAVIS, K.C., for the defendant.
The plaintiff in person.

(Motion before Mr. Justice Orde in Weekly Court, Toronto, the 17th April, 1930.)

The defendant moves under Rule 124 for the dismissal of the action upon the ground that the statement of claim discloses no reasonable cause of action, or that the action is frivolous or vexatious.

The action is for damages for certain statements alleged to have been made by the defendant on the 27th September, 1929, with relation to the plaintiff's profession as a barrister, and it is alleged that the statements imputed to the plaintiff the commission of a crime punishable by imprisonment.

The ground for the motion is "that the defendant was absolutely privileged on the occasion on which it is alleged he spoke the words complained of."

The statement of claim alone fails to allege or disclose the occasion when the alleged defamatory words were spoken. If the motion were limited simply to this first branch of Rule 124, namely, that the Statement of Claim disclosed no reasonable cause of action, the motion would fail.

The defendant contends, however, that upon the allegations in the statement of defence and in the plaintiff's Reply thereto and upon certain admissions made by the plaintiff in the Particulars furnished by him, and on his examination for discovery, it is clearly established that the alleged defamatory words were spoken upon an occasion which was

absolutely privileged and that the action ought therefore to be dismissed as frivolous or vexatious.

The pleadings and admissions already mentioned make it quite clear that the words were spoken by the defendant during the course of certain proceedings which he was conducting as a Commissioner appointed by Letters Patent under the Great Seal of Canada by the Governor General under the authority of The Combines Investigation Act, R.S.C. 1927, ch. 26, and of The Inquiries Act, R.S.C. 1927, ch. 99. The purpose of the Commission was to conduct an inquiry with respect to certain matters set forth in the Order in Council which is attached to the Commission, those matters consisting of certain representations which had been made to the Minister of Labour to the effect that the operations of certain organizations constituted a combine within the meaning of The Combines Investigation Act. The Order-in-Council authorized the appointment of the defendant as a Commissioner to investigate the businesses of the organizations in question and of their members and of any other person who might be or be believed to be a member of the alleged combine or a party or privy thereto. And by the Commission the defendant was directed to report to the Minister the results of his investigation, together with the evidence taken before him and any opinion he might see fit to express thereon.

It is quite settled I think, that even where the statement of claim is so framed, as it is here, as not to disclose such facts as if disclosed would justify the dismissal of the action, as unfounded upon any reasonable ground, the Court may, if the unquestioned facts disclose that there is no reasonable cause of action, dismiss the action as frivolous or vexatious not only under the latter part of the Rule but by virtue of its inherent power to prevent the abuse of its own process. *See* The Annual Practice, 1930, pp. 423 and 424, and Holmested's Judicature Act, 4th ed., p. 546.

If, for example, an action for slander were brought against a Judge of the Supreme Court for words spoken in Court during the course of a trial, but the statement of claim were so framed as not to disclose the occasion when the words were spoken, there could be no question in my opinion, as to the power and duty of the Court, as soon as it was made clear that the words had been spoken in Court to dismiss the action as vexatious for the simple reason that it must be hopeless because the plea of absolute privilege would be a complete defence. It would be improper that in those circumstances the defendant should be harassed by any further proceedings in an action which could not possibly succeed.

The same procedure is applicable here, and while the defendant is not a Judge, he is entitled to the same protection if by reason of his status as a Commissioner, the occasion in question was absolutely privileged.

That, therefore, is the sole question for my determination. Nothing more could be elicited at a trial than is now before me, necessary for a decision upon that point.

The rule of law as to the defence of absolute privilege is well settled. " No action will lie for defamatory statements, whether oral or written,

In the Supreme Court of Ontario.

No. 9. Reasons for Judgment of Mr. Justice Orde, 5th May 1930—*continued.*

made in the course of judicial proceedings before a Court of Justice or tribunal recognized and constituted according to law, even though such statements were made maliciously without any justification or excuse, and from personal ill-will or anger against the party defamed." Gatley on Libel and Slander, 2nd ed., p. 187. Or as put by Kelly, C.B., in *Dawkins* v. *Lord Rokeby* (1873), L.R. 8, Q.B. 255, at p. 263: "The authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law."

This rule of law is not designed for the personal protection of the judge or counsel or witness or party. It is founded on public policy in order that those engaged in the administration of justice may proceed unhampered by the fear that some unguarded or hasty statement might subject them to an action for defamation. And in order to afford that protection and guarantee that freedom from restraint the rule is made applicable even when the defamation is deliberate or there is actual malice. Were it not so, the privilege would be merely qualified and not absolute. As put by Fry, L.J., in *Munster* v. *Lamb* (1883), 11 Q.B.D. 588, at p. 607, "It is not a desire to prevent actions from being brought in cases where they ought to be maintained, that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty."

Or as put by Channell, J., in *Bottomley* v. *Brougham* (1908), 1 K.B. 584, at p. 587, "The reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for enquiry into them merely on the allegation that they are malicious."

It is equally well established that the rule applies not only to proceedings before an ordinary Court of Justice whether it be a superior or inferior Court of Record or an inferior Court not of Record (with some qualification where a judge of an inferior Court knowingly acts beyond his jurisdiction), but to proceedings before a tribunal recognized by law, which though not a Court in the ordinary sense of the word, exercises judicial functions, that is, acts in a manner similar to that in which a Court of Justice acts in respect of an enquiry before it. Gatley, 2nd ed., p. 200. The only question here is whether or not the proceedings had before the defendant during the course of his enquiry or investigation by virtue of his commission fall within this category. If they do, he is entitled to the protection afforded by his plea of absolute privilege. If not, the action must go on to trial.

I am clearly of the opinion, having regard to the nature of the defendant's Commission and the purposes for which it was issued and to the Statutory provisions designed to accomplish those purposes, that the proceedings before the defendant were absolutely privileged.

The plaintiff, who appeared in person, argued that for the defence of absolute privilege there must be a Court, or tribunal acting judicially, that is, as a Court, and he suggested that as the defendant had no power under his Commission to pronounce any judgment or decision which affected the status or rights of any person but was required merely to report the result of his enquiry, his functions were merely administrative and not judicial.

There is a passage in Gatley, 2nd ed., at p. 201, which by itself might lend some colour to this argument. It is there stated that "the fact that its decision (*i.e.*, the decision of the tribunal) affects the status of those who come before it is also an important factor." At first blush this statement might indicate that in examining the powers and functions of the tribunal, over the status and rights of persons, the question would be limited to the extent of those powers over those who might, by some analogy to an ordinary law suit, be considered to be parties or that something in the nature of a judgment or decision upon some issue was necessary. But the authority referred to by Gatley for the statement quoted gives it no such limited meaning. The statement was based upon something said by Sankey, J. (now Lord Chancellor) in *Copartnership Farms* v. *Harvey-Smith* (1918), 2 K.B. 405, at p. 412. That case decided that a local Military Tribunal appointed under the British Military Service Acts (1916) was a judicial body and that defamatory statements made by a member thereof in the course of its proceedings, were absolutely privileged. In dealing with its functions in order to determine the character of the tribunal, he pointed out at p. 412, that the tribunal had power to interfere with a man's status and had power to impose the penalty of imprisonment for making false statements even though not under oath. He further deals with the procedure before the tribunal and with its powers over persons attending it, and describes all these powers as attributes of a judicial tribunal. I think it is clear that when Sankey, J., was there discussing the power to affect a man's status he had in mind not only the person claiming exemption but all others who might be judicially penalized for some breach of the statute under which the tribunal was acting or of the procedure governing its sittings.

Just where is the exact dividing line between those tribunals which exercise judicial functions and those which do not, has probably not yet been definitely determined, but it is clear from the authorities that the test is not whether or not the purpose of the tribunal is to come to some effective conclusion in the nature of a judgment binding upon or affecting the rights or status of one or more persons. If, during the course of its proceedings and for the purpose of rendering them effective in accomplishing the objects or purposes for which the tribunal was constituted it is clothed with powers such as are given to or are inherently possessed by Courts of Justice then the tribunal may be acting judicially and the proceedings before it may consequently be absolutely privileged.

On the other hand, if in the exercise of its functions a body, which for certain other purposes may be clothed with judicial powers, is in the

In the Supreme Court of Ontario.

No. 9. Reasons for Judgment of Mr. Justice Orde, 5th May 1930—*continued.*

particular matter merely acting in an administrative character, then its proceedings may not be absolutely privileged. For example, it was held in *Attwood* v. *Chapman* (1914), 3 K.B. 275, that a body of justices of the peace when hearing an application for the renewal of a tavern license was not a court of law or acting judicially. That case followed *Royal Aquarium &c. Society* v. *Parkinson* (1892), 1 Q.B. 431, where it was held that the London County Council when hearing and dealing with applications for music and dancing licenses, was acting administratively, and that its proceedings were not absolutely privileged so as to give absolute immunity to one of its members for a defamatory statement.

In *Collins* v. *Whiteway* (1927), 2 K.B. 378, it was held that a court of Referees constituted under the Unemployment Insurance Act, 1920, for the purpose of deciding claims upon the unemployment insurance funds, was a court discharging administrative duties only, and that communications to it were not absolutely privileged.

On the other hand there are several cases which establish that a tribunal whose purpose is merely to make an inquiry or investigation is entitled to the protection of the rule of absolute privilege if in the conduct of its proceedings it is clothed with powers such as those exercised by a Court. In *Dawkins* v *Lord Rokeby* (1873), L.R. 8 Q.B. 255, (1875) L.R. 7 H.L. 744, a military Court of inquiry which was merely empowered to investigate and report, was held to be within the rule. In *Barratt* v. *Kearns* (1905), 1 K.B. 504, a commission was issued by the bishop of a diocese under certain English statutes to inquire into the inadequate performance of his duties by a clergyman. It was held that the commission created a judicial tribunal, that the proceedings under it were absolutely privileged, and that consequently no action for slander would be maintained against a witness for defamatory statements made before the Commissioners.

The defendant, in my judgment, was clearly performing judicial functions in carrying out the objects of his commission. By sec. 16 of the Combines Investigation Act, he had authority to investigate the business of any person named in the Order-in-Council appointing him, and to enter and examine the premises, books, papers and records of such person. By Sec. 22 he was empowered to order the attendance of witnesses for examination upon oath and the production of documents, and to " exercise for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any Superior Court in Canada for the enforcement of subpœnas to witnesses or punishment of disobedience thereof." Section 33 gives power to preserve order by immediate punishment for contempt in the face of the Commissioner. In addition to the foregoing, the Commissioner was clothed with all the powers conferred upon a Commissioner under the Inquiries Act.

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 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. It is not merely the Commissioner who is to be considered, but counsel, witnesses and parties. Absolute privilege cannot be denied to one and granted to the others, and it would clearly not be in the public interest if witnesses or counsel appearing before a Commissioner under the Act were to be hampered in what they might say during the course of the proceedings by the fear of a possible action for slander. If counsel and witnesses are entitled to that protection, then this Commissioner must be also.

The Commission of Inquiry in the present case cannot, in my opinion, be distinguished in its character from the Military Court of Inquiry, or the local military tribunal or the bishop's commission of inquiry, which were in question in the cases already referred to. Mr. O'Connor tried to distinguish the case of the bishop's commission, *Barratt* v. *Kearns*, upon the ground that the bishop was himself a Court, but it was not the Court of the bishop that was in question, and it is quite clear from the judgments in that case that they do not rest upon any such ground, but upon the ground that the Commission derived its authority from the statutory power given to the bishop to appoint it, and that it created a judicial tribunal with the statutory power of compelling the attendance of witnesses and the production of books. Both that case and that of the Military Court of Inquiry, *Dawkins* v. *Lord Rokeby*, are singularly like the present case.

Mr. O'Connor referred to several cases where applications for prohibition had been dismissed upon the ground that the bodies sought to be prohibited were not Courts. I cannot see their relevancy. The principles upon which prohibition will lie against an inferior Court have nothing to do with the rule of law applicable here, and there is no analogy which justifies any attempt to make the principles of prohibition apply. In none of the cases upon absolute privilege have I found any suggestion of such an analogy.

I was also referred to an unreported judgment of the learned Chief Justice of the Common Pleas, given on the 13th November, 1929, upon an application for the release of Mr. Singer who was under detention by the order of the defendant under the Commission in question here. During the course of that judgment, certain observations were made as to the defendant's powers under his Commission, one of which was pressed upon me, namely, "the Commissioner is not a Court, he is at most a judicial officer with powers of investigation only," as being a ruling as to the scope of the defendant's powers, and as such binding upon me.

In the first place, as I read the judgment, it was dealing with the Commissioner's power to detain Mr. Singer after he had in effect purged the contempt for which he had been imprisoned, and the statement that the Commission was not a Court was *obiter*. And secondly, if the judgment is to be regarded as a sweeping ruling as to the limit of the defendant's powers, that question had already been dealt with by my brother Jeffrey *in Re Singer* (1929), 37 O.W.N. 3, in a judgment which was binding upon the learned Chief Justice and is binding upon me.

In the Supreme Court of Ontario.

No. 9. Reasons for Judgment of Mr. Justice Orde, 5th May 1930—*continued.*

It was further argued that the Combines Investigation Act was *ultra vires* of the Dominion Parliament. If this question were really before me, I could not properly consider it until the Attorney-General of Canada had been notified. That would be a futile proceeding for the simple reason that the Act has been held by the Supreme Court of Canada to be valid, *re Combines Investigation Act, &c.* (1929), S.C.R. 409. That decision is, of course, binding upon me and I am not called upon to consider the possibility of its reversal by the Privy Council upon the appeal which I am informed is now pending.

I must therefore hold that the proceedings before the defendant were absolutely privileged and there will be judgment dismissing the action with costs, including the costs of this motion.

No. 10. Formal Judgment dismissing action, 6th May 1930.

No. 10.

Formal Judgment dismissing action.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE Mr. JUSTICE ORDE.

Monday, the 5th day of May, 1930.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - *Defendant.*

UPON motion made unto this Court on Monday the 14th day of April, and again on Thursday, the 17th day of April, 1930, by Counsel on behalf of the defendant, in presence of the plaintiff in person, for an order dismissing this action with costs upon the ground that the Statement of Claim discloses no reasonable cause of action or that the said action is frivolous or vexatious in that the defendant was absolutely privileged on the occasion in which it was alleged that he spoke the words complained of, or upon such other grounds as appear from the material, upon hearing read the writ of summons, the pleadings and proceedings in the action, the examination of the plaintiff for discovery and the Commission and the Order-in-Council authorizing the same, therein referred to, and upon hearing Counsel for the defendant and the plaintiff in person, and this Court having been pleased to direct that this motion should stand over for judgment and the same coming on this day for judgment.

1. THIS COURT DOTH ORDER AND ADJUDGE that this action be and the same is hereby dismissed with costs including the costs of this motion, to be paid by the plaintiff to the defendant forthwith after taxation thereof.

Judgment signed this 6th day of May, 1930.

D'ARCY HINDS,
Assistant Registrar.

In the Supreme Court of Ontario.

No. 11.
Notice of appeal to Appellate Division, 7th May 1930.

No. 11.

Notice of appeal to Appellate Division.

IN THE SUPREME COURT OF ONTARIO.

Between

WILLIAM FRANCIS O'CONNOR - - - - - - - - *Plaintiff*

and

GORDON WALDRON - - - - - - - - - - *Defendant.*

TAKE NOTICE that the plaintiff appeals to a Divisional Court from the judgment pronounced by The Honourable Mr. Justice Orde on the 5th day of May, 1930, and asks that the said judgment be set aside, the motion dismissed, and the action allowed to proceed to trial, upon the following grounds :—

That the said judgment is wrong in law for the following reasons :

(1) The Combines Investigation Act whereunder the defendant claims to have been appointed a Commissioner with the immunities claimed by him is legislation which is beyond the legislative competency of the Parliament of the Dominion of Canada, wherefore the defendant had no jurisdiction to act as Commissioner as claimed and no absolute privilege attached to him or to his words of which the plaintiff complains or to the occasion upon which the said words were uttered.

(2) If the said Act is within the legislative competency of the Parliament of the Dominion of Canada, the requirements thereof precedent to jurisdiction in the Governor-General in Council of the Dominion of Canada to appoint the defendant a Commissioner with jurisdiction to act as such under such Act were not complied with, wherefore—

(a) because the defendant had no jurisdiction to act as Commissioner as aforesaid, no absolute privilege attached to him or to his words of which the plaintiff complains or to the occasion upon which the said words were uttered; and

(b) the absence of such requirements precedent to jurisdiction to appoint having been pleaded by the plaintiff as matters of fact in his reply to the defendant's statement of defence the issue thus raised between the plaintiff and the defendant remains undetermined and the plaintiff's action ought not to have been dismissed.

(3) The words complained of by the plaintiff in his statement of claim were not absolutely privileged, nor uttered by an absolutely privileged person, nor upon an absolutely privileged occasion, for the following reasons :

(a) The defendant was not at the relevant time or at all a court, nor acting by way of precognition before or with relation to proceedings in Court or by way of commission emanating from a Court or acting under a Statute or otherwise for a Court; and

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No. 11. Notice of appeal to Appellate Division, 7th May 1930—*continued.*

(b) The defendant was not at the relevant time or at all performing nor authorized to perform judicial functions, nor had he any power to hear and determine so as to bind the plaintiff in his person or property, but, instead, if authorized at all to perform any functions, he was performing merely ministerial functions, to wit hearing evidence to be reported with his conclusions thereon to another merely ministerial officer, to wit to the Minister of Labour of Canada, who was not a Court nor a tribunal recognized by law, nor authorized to hear and determine as aforesaid; and

(c) The law as to absolute privilege does not extend to Royal Commissioners or to Statutory Commissioners or to their words or actions as such.

DATED at Toronto, this seventh day of May, 1930.

J. G. KELLY,
1505 Concourse Building,
Toronto, Ontario.
Solicitor for the Plaintiff.

To Kilmer, Irving & Davis,
10 Adelaide St. E.,
Toronto, Ontario.
Solicitors for Defendant.

In the Supreme Court of Ontario (Appellate Division).

No. 12. Reasons for Judgment, 15th June 1931. (a) Middleton, J.A. (concurred in by Mulock, C.J., Magee and Grant, JJ.A.)

No. 12.

Reasons for Judgment of Appellate Division.

O'CONNOR v. WALDRON — The plaintiff in person. H. H. DAVIS, K.C., for defendant. Argued 20th, 21st April, 1931.

MIDDLETON, J.A.: Appeal by the plaintiff from the judgment of the Honourable Mr. Justice Orde, pronounced on the 5th of May, 1930, upon a summary application made by the defendant for an order dismissing the action, upon the ground that the Statement of Claim discloses no reasonable cause of action, or that the action is frivolous or vexatious in that the action is brought in respect of certain statements alleged to have been made upon an occasion that was absolutely privileged. The application was granted, and the action was dismissed with costs.

The reasons given by the learned Judge are reported at length in 65 O.L.R. p. 407.

The defendant was, on the 19th day of July, 1929, by Commission issued under the Great Seal of Canada, appointed a Commissioner for the purpose of conducting an inquiry under the terms of the Combines Investigation Act, R.S.C. 1927, cap. 26, with the power authorized by the Revised Statutes of Canada respecting inquiries concerning public matters, to

No. 12.
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(*a*) Middleton, J.A. (concurred in by Mulock, C.J., Magee and Grant, JJ.A.)—*continued.*

summon before him witnesses and require to give their evidence under oath, and to produce upon such inquiry all books, papers and documents relative to the inquiry. The Commissioner is required and directed to report to the Minister of Labour the result of his investigations, together with the evidence taken before him, and any opinion he may see fit to express thereon.

The particular subject of the inquiry is defined in a report from the Minister of Labour to the Privy Council, which is attached to and forms part of the Commission. This states that representations have been made to the Minister of Labour to the effect that the Amalgamated Builders' Council, an organization including in its membership plumbing and other contractors and dealers in the building trades in certain named places within the Province of Ontario, are a combine within the meaning of the Combines Investigation Act. The Commissioner is to investigate the existence of the alleged combine, and if he finds that a combine exists, to report those who are believed to be parties or privies to the combine.

During the course of the inquiry it was suggested that the plaintiff, who is a practising barrister and solicitor, had suggested or advised the things that were shown to have been done, and which, in the opinion of the Commissioner, constituted a combine. The Commissioner expressed his disapproval of the plaintiff's conduct in strong and emphatic language. Hence this action.

Upon the argument of the appeal, the plaintiff confined himself to the presentation of three contentions only, although the notice of motion took a wider range.

During the course of the argument it became plain that there was only one contention really relied upon, to wit, that the appointment of the plaintiff under the Statute in question, did not confer upon him a status entitling him to rely upon that immunity which is commonly described as the judicial privilege, or the privilege of courts and other tribunals exercising true judicial functions.

Many of the cases are reviewed and discussed in the judgment appealed from, and I do not think any good purpose would be served by reiterating what is there said.

I accept, as a starting point for the little that I find it necessary to state, the often quoted words of Lord Esher, M.R., in *Royal Aquarium* v. *Parkinson*, L.R. (1892), 1 Q.B. 431. " It is true that in respect of statements made in the course of proceedings before a Court of Justice, whether by Judge or counsel or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of Justice, but the doctrine has been carried further, and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of Justice, is before a tribunal which has similar attributes.

In the case of *Dawkins* v. *Lord Rokeby*, L.R. 8 Q.B. 255, 7 H.L. 744—the doctrine was extended to a Military Court of Inquiry. It was so extended

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on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of Justice acts, in respect of an inquiry before it. This doctrine has never been extended further than to Courts of Justice and tribunals acting in a manner similar to that in which such Courts act."

In the case from which I have quoted, an unsuccessful attempt was made to extend the immunity in question to the proceedings before a licensing Board of the London County Council. Such a Board in the opinion of the Court was a mere administrative body, not falling within the definition quoted.

The case of *Barratt* v. *Kearns*, L.R. (1905), 1 K.B. 504, appears to me to conclusively establish that the defendant acting under this Commission, is entitled to the protection claimed. Under a certain English Statute not widely differing in its terms, and so far as I can see in no way substantially distinguishable from the Act here in question, a Commission was issued by the Bishop of a diocese to inquire into the alleged inadequate performance by an incumbent of the ecclesiastical duties of his benefice.

This, it was held, created a judicial tribunal and conferred absolute privilege, even though the Commissioner could do no more than take evidence and report thereon to the Bishop.

In the New Zealand case of *Jellicoe* v. *Haselden* (1902), 22 N.Z.L.R. 343, the New Zealand Supreme Court held that a Commissioner acting under a Commission issued by the Governor for the purpose of inquiring into certain charges made by a prisoner against a chief warden of the gaol, was not entitled to immunity. The decision was a majority decision of three judges out of a court of five. The law which I have quoted was accepted by all. The case turned upon a careful and exhaustive analysis of the powers exercisable under the particular Commission, the majority taking the view that the Commissioner's powers were purely administrative, and in no sense judicial.

In *Georgeson* v. *Moodie* (1918), 38 D.L.R. 105, the Supreme Court of Alberta held that the proceedings before a Commissioner appointed by the Lieutenant-Governor-in-Council under the Public Inquiries Act of that Province, were absolutely privileged.

I do not desire to review or refer in any detail to the earlier cases. *Dawkins* v. *Lord Rokeby* (supra) appears to me of the greatest possible value because it shows that while the immunity in question is not to be in any way extended, the Court has no hesitation in holding that it exists where the tribunal in question is a public tribunal duly appointed by the Crown, and authorized and required to inquire into and deal with a matter of public concern.

It was argued rather strenuously before us that the same test ought to be applied as where an application is made for prohibition. I cannot at all follow this argument. Prohibition will only lie to an inferior court

or a judicial officer or tribunal of limited jurisdiction, including in this any person who is empowered by Statute to pronounce a decree or judgment, or to impose a legal duty or obligation on another. *Godson* v. *Toronto*, 18 S.C.R. 86, a test widely different from that indicated in any of the cases to which I have referred, or any others which I have been able to find.

It was also argued that the recent decision of *Shell Co. of Australia* v. *The Federal Commissioner of Taxation*, 1931 A.C. 275, was in the favour of this appeal. The inquiry there was whether a Board of Review created by the Australia Income Tax Assessment Act was an administrative body or a Court. If a Court, then its appointment was said to be unconstitutional, because under the Constitution Act of Australia, members of a court were required to be appointed for life. The members of this Board are appointed for a term of years only. The inquiry there was whether this Board was a " Court " in the strict meaning of that term or an administrative body. The holding was that it was an administrative body only.

In the course of the discussion, certain negative propositions were laid down. " A tribunal is not necessarily a Court in the strict sense, because it gives a final decision, nor because it hears witnesses under oath, nor because two or more contending parties appeared before it, between whom it has to decide, nor because it gives decisions which affect the rights of subjects, nor because there is an appeal to a court, nor because it is a body to which a matter is referred by another body."

All these are indicia pointing to the body being a Court, but individually and collectively they are not conclusive.

The matter is much discussed by text writers. I find nowhere a more careful and satisfactory analysis of the situation than that in Spencer Bower on Actionable Defamation, 2nd Ed. p. 85. His conclusion is " that there is absolute protection where the matter complained of is published by any judicial officer, litigant or witness in the courts of and for the purpose of any judicial proceeding." By " judicial proceeding " he means " Any trial, hearing, inquiry or investigation by or before any judicial tribunal, whether in open court or in private, whether a final or interlocutory or preliminary character, and whether *ex parte* or *inter parte*."

" Judicial Tribunal " in his views, includes not only the well known courts, but " any other tribunal whatsoever exercising in virtue of royal, statutory or other lawful commission, warrant, grant, charter or authority, and with apparent regularity the judicial functions as a court, but not any tribunal discharging merely administrative or consultive functions, though acting according to judicial principles."

In a note he collects many instances of such judicial tribunals.

I would add a reference to *Burr* v. *Smith* (1909), 2 K.B. 306, where the Court of Appeal held that an action for libel cannot lie against an official receiver in respect of observations on the affairs of the company in liquidation, published by him to the creditors, and contributories of a company.

This case emphasizes the impossibility of an individual discharging a duty cast upon him by the law of the land, if at all times he should be

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constantly in fear of actions against him by reason of that which he might do in the discharge of his duty.

The appeal should be dismissed with costs.

MULOCK, C. J. O.
MAGEE, J. A.
GRANT, J. A.
} I agree.

No. 12. Reasons for Judgment, 15th June 1931. (b) Hodgins, J.A.

HODGINS, J. A.: The Order-in-Council under which the defendant was appointed a Commissioner, was made pursuant to the Combines Investigation Act, R.S.C. 1927, cap. 26. In it, the Minister recommended the appointment of the defendant as Commissioner under the said Act, to investigate the position of the Amalgamated Builders Council, the Canadian Plumbing and Heating Guild and the business of the Dominion Chamber of Credits and of certain other persons. Pursuant thereto a commission under the Great Seal was issued to the defendant to conduct the inquiry mentioned in the Order-in-Council. That commission conferred upon the Commissioner among other things:—

> " the power of summoning before him any witnesses and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as our said Commissioner shall deem requisite to the full investigation of the matters into which he is hereby appointed to examine."

And required and directed the Commissioner

> " to report to our Minister of Labour the results of his investigation together with the evidence taken before him and any opinion he may see fit to express thereon."

Lord Atkin, speaking for the Judicial Committee in the case of the *Proprietary Articles Trade Association* v. *The Attorney General for Canada*, 1931 A.C. 310, in which the constitutionality of the Combines Investigation Act was challenged, judgment being delivered on the 31st January, 1931, thus summarizes the provisions of the Act which describe the duties of a Commissioner thereunder:

> " By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a registrar of the Combines Investigation Act. The registrar is charged with the duty to inquire whether a combine exists, wherever an application is made for that purpose of six persons supported by evidence, or whenever he has reason to believe that a combine exists or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the registrar and a commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The

registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the registrar, who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity."

In regard to the constitutionality of the Act, the Privy Council decided that the section of the Criminal Code which was attacked, namely, 498, " and the greater part of the Combines Investigation Act," fell within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects " criminal law including the procedure in criminal matters."

In dealing with the provisions of the Act, and having contrasted it with the earlier Acts, Lord Atkin makes this observation :

> " There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt follow the breach of orders made for the discovery of evidence; but if the main object be *intra vires*, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack."

He then makes a remark dealing with the question as to whether the fact that property and civil rights in the Province were affected, which I think is relevant to the question to be decided in this appeal :

> " Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14 : ' the administration of justice in the Province,' even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice."

The duty cast upon the Commissioner according to the judgment of the Judicial Committee is to make preliminary inquiries as to whether an offence under the Act has been committed and to report to the Minister. No penal consequences follow directly from the report of a Commissioner, and it is not even made evidence. To the Minister is confided under sec. 31 the duty of deciding whether an offence has been committed and whether

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(*b*) Hodgins, J.A.—*continued.*

a prosecution should follow. Then and not till then does any proceeding in the Courts take place.

The above preliminaries are entered upon and proceeded with, under sections of the Statute, to ascertain whether a criminal offence has, or has not, been committed. Preliminary inquiries by Justices of the Peace, Magistrates and the Grand Jury are familiar instances of such a procedure, and as the Dominion Parliament has jurisdiction over criminal procedure, it has authority to define what steps shall be taken in reference to any particular crime as is done by this Statute. But none of these familiar instances referred to, provide for any report to a Minister of the Crown before action is decided upon. The procedure under the Act in question is not uncommon where the matters to be investigated are complicated, as under the Loan & Trust Corporations Act, R.S.O. c. 223, s. 144. and The Security Frauds Prevention Act, 20 Geo. V., c. 39, Part II., but no one suggests that those who make such preliminary inquiries are, in any sense, a Court although to the Provincial authorities is entrusted the constitution of the Courts. In the Proprietary Articles case the procedure is justified by the Judicial Committee as part of the administration of the Act effected by inquiries to ascertain whether the statutory crime of assisting in the formation or operation of a combine has been committed. " The criminal quality of an act cannot be discerned by intuition " (p. 324).

It is true that the Commissioner in making his inquiry is adorned with some of what have been referred to as the " trappings " of a real court.

In a recent judgment given in the Privy Council, *The Shell Co. of Australia* v. *The Federal Commissioner of Taxation*, 1931, A.C. 275, when dealing with the question as to whether a Board of Appeal was in fact a court or merely an administrative board, the distinction is pointed out in these words :

> " Instead of the Board being given the powers and functions of the Court, it is given ' the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act.' "

And the Judicial Committee define " judicial power " by adopting the definition of Griffith, C.J., in *Huddart, Parker & Co.* v. *Moorehead*, 8 C.L.R. 330, 357 :

> " I am of opinion that the words ' judicial power ' as used in s. 71 of the Constitution, mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Lord Sankey, L.C., adds :

> " This definition of ' judicial power ' suggests to their Lordships a further material difference in the status of the two Boards not alluded to by Isaacs, J."

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(*b*) Hodgins, J.A.—*continued.*

The material difference is that :

> " It is only the decision of the Court which, in respect of an assessment, is now made final and conclusive on all parties; a convincing distinction, as it seems to their Lordships, between a ' decision ' of the Board and a ' decision ' of the Court."

They sum up their view in a few words :

> " An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an *ad hoc* tribunal an exercise by a Court of judicial power."

This statement stands beside the assertion that a tribunal is not necessarily a Court in the strict sense because it gives a final decision or one which affects the rights of subjects.

Lord Atkin, in The Proprietary Articles Case, distinctly rejects the idea that the inquiry made by the Commissioner interferes with the administration of justice in the Province. Now to interfere with the administration of justice in the Province is to interfere with the Courts in their administration of justice. It cannot, therefore, have been intended to constitute a Court as that would be to interfere with the administration of justice in the Provinces and the constitution of its Courts. If it is a tribunal recognized by law it would seem to be one which is essentially not a Court but a tribunal conducting a statutory inquiry.

To my mind, therefore, the Act does not erect or intend to erect a Court and that the question to be settled is whether the Commissioner is an administrative officer merely or a tribunal recognized by law in the sense in which that expression is used in reference to those compelled to give evidence before it.

The best definition that I have found is contained in the last edition of Odgers on Libel and Slander (6th Ed. 1929), where it is said that :

> " An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though not expressly a Court, exercises judicial functions—that is to say, has power to determine the legal rights and to effect (*sic*) the status of the parties who appear before it. All preliminary steps which are in accordance with the recognized and reasonable procedure of such a tribunal are also absolutely privileged. It is not necessary that the tribunal should have all the powers of an ordinary Court."

In *Royal Aquarium* v. *Parkinson* (1892), 1 Q.B. at p. 442, Lord Esher said that absolute immunity " applies wherever there is an authorized inquiry which, though not before a Court of Justice, is before a tribunal which has similar attributes." But he adds that " the privilege has never been extended further than to Courts of Justice and tribunals acting in a manner similar to that in which such Courts act."

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(*b*) Hodgins, J.A.—*continued.*

This accords with the remarks of Fry, L.J., in the same case, where he says:

> " It seems to me that the sense in which the word ' judicial ' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially."

This decision dealt with the language used by a member of the London County Council when considering the applications for music hall licenses, and it was held that the duties which the Council was thus performing were administrative and not judicial and that there was not absolute immunity but that privilege attached where:

> " a body of persons are engaged in the performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public . . . or a member thereof; provided the person who utters it is acting bona fide, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting bona fide and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he know to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that effect, I should be very loath to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion."

Another aspect of the question is suggested by the case of *Burr* v. *Smith*, (1909) 2 K.B. 306, where privilege was held to be absolute in the sense that absolute privilege attaches to the performance of the duty of an official receiver in a liquidation to prepare and submit a report to the Board of Trade. In that case Fletcher Moulton, L.J., said:

> " The ground upon which I base my judgment is that the defendant was acting as an officer of the Board of Trade, who had to prepare this report in order to enable that Board to perform their statutory

duty under s. 29. In collecting the materials for and preparing this report he may be said to have acted as the hand of the Board of Trade; and in communicating this report to that Board I do not think he was communicating it to any other body than that of which he was for this purpose, so to speak, a component part. I hold that the coming of this report into the hands of the superior officials of the Board cannot be looked upon as a publication of it for the purpose of the law of libel."

Farwell, L.J., at page 315-6, said:

"I do not see any difference, in point of principle, between the position of the official receivers and the Inspector-General in Companies' Liquidation in making these reports and that of a chief clerk of a judge in the Chancery Division in reporting on a case to the judge. No one has ever dreamed of suggesting that in such a case the chief would be liable to an action for libel."

It will be noted that in most of the leading cases on this subject, it is the protection of the witness that is dealt with. The reason is that where a tribunal is properly constituted pursuant to statute or recognized by law which can compel persons to attend and give evidence the witness is protected because he is compelled to give evidence.

Chief Baron Kelly in *Dawkins* v. *Lord Rokeby*, on appeal to the House of Lords (L.R. 7 H.L. 744), giving the opinion of the Judges, said, at p. 752:

"A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the prima facie presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary Courts of Justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man, bound to appear and give testimony before a Court of Inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such witness as against one giving evidence in an ordinary Court of Justice."

But even in the case of a witness there is an exception mentioned by Cockburn, C.J., in *Seaman* v. *Netherclift*, 1876, 2 C.P.D. 53, 56, in these words:

"But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not

In the Supreme Court of Ontario (Appellate Division).

No. 12. Reasons for Judgment, 15th June 1931.

(*b*) Hodgins, J.A.—*continued.*

while he was giving evidence in the case, the result might have been different."

. . . . . .

" Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked : ' Were you at York on a certain day ' ? and he were to answer : Yes, and A.B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege". 10

The defendant in that case escaped only because what he said in the witness box was in reference to or relevant to the inquiry.

In the statement of the Chief Baron in advising the House of Lords in the *Dawkins* case (ante) it will be observed that he says :

" All that he said and wrote had reference to that inquiry ",

and Lord Cairns, L.C., in the same case at p. 754, deals with the importance of relevancy in these words :

" The defendant in the action was called upon that inquiry as a witness, as a person who was required to make statements relevant to the inquiry which was then being conducted, and it was in the 20 course of that inquiry that those statements were made.

. . . . . .

" It is not denied that the statements which he made, both those which were made *viva voce* and those which were made in writing, were relative to that inquiry."

It is the relevancy of the observations made by the defendant to the duty which he had to perform that is here objected to and forms the basis of this action, and it is urged that even if this is such a tribunal as that a witness compelled to appear before it would be protected no matter what his answers in the box were, the defendant here was under no compulsion 30 and had only to perform the duty imposed on him which did not include that which he did and said.

It is, I think, quite clear that, unless absolute privilege exists, such an action as this will lie. *Adam* v. *Ward* (1917), A.C. 309. The facts in that case were that after statements had been made by the plaintiff in the House of Commons which ascribed to a certain officer wilful and deliberate mis-statements of fact, and the Army Council had held an enquiry at the request of the accused officer and made a report, they afterwards published a letter, which letter reflected severely on the plaintiff. The ground of privilege indicated was that while the statement of the plaintiff in the House of 40 Commons was absolutely privileged, it was provocative and that the observations in the letter reflecting on him were reasonable and relevant in vindication of the officer who was the subject of the inquiry. The House of Lords considered the whole subject of Defamation arising out of the act of a public body.

In examining the pleadings it will be seen that the defamatory matter complained of is contained in a question by the defendant to a witness. The question was directed to one whose actions were the subject of enquiry and was unnecessary, intemperate and approbrious in its reference to the plaintiff, a member of the legal profession, whose actions were then also to be, or being, investigated. If the defendant's duty was merely to enquire and report and even if it included the duty to form and to express in his report, his opinion (though this is nowhere provided for in the Act), then he was travelling out of the path of his duty in scarifying in public any one compelled to come before him. It is true the sense of the defamatory matter in question may be a little obscure or even incoherent in parts, but it is not denied that the words, with one exception, were spoken of the plaintiff or that they were defamatory.

The plaintiff asserts and pleads, in par. 3 (b), that the appointment of the defendant as commissioner was not legally made in that the provisions of the Combines Investigations Act contained in secs 11 to 13 inclusive, were not complied with. I think he has a right to have this issue tried as the Commission itself only affords a presumption of regularity and that presumption is rebuttable.

In *Barratt* v. *Kearns* (1905), 1 K.B. 504, Collins, M.R., said, on p. 510 :

> " We find a commission conforming on the face of it with the statutory provisions applicable to such a commission and it is for the person who raises an objection to the constitution of the commission to support his objection by evidence and that has not been done."

and by Cozens-Hardy, L.J., thus : (p. 511) :

> " We are bound to treat the tribunal constituted by the Commission as a statutory body, and the presumption, in the absence of evidence to the contrary, is that everything was done in the constitution of the tribunal which ought to have been done."

I have not overlooked the case of *Georgeson* v. *Moodie* (1917), 12 Alberta Reports 358. In that case the authorities I have considered are all discussed, but the decision throws no new light on the position of the defendant here.

The case at bar raises some interesting and important questions, namely, the exact status of a commissioner appointed under the Combines Investigation Act and similar statutes. Is he constituted a tribunal recognized by law and as such absolutely privileged in his conduct and language during the enquiry or only when, in the words of Lord Justice Fry, he is acting with the fairness and impartiality which characterizes proceedings in Courts of Justice and are proper to the functions of a Judge. Is his privilege limited to what he states in his report or does it extend to all he says during the enquiry ? Does the qualification of a witness' privilege apply to him and has relevancy spoken of by Kelly, C.B., and Cairns, L.C., any bearing upon his conduct and language ?

In the Supreme Court of Ontario (Appellate Division).

No. 12. Reasons for Judgment, 15th June 1931.

(*b*) Hodgins, J.A.—*continued.*

There is a great preponderance of authority in favour of absolute privilege for those who act or profess to act judicially in performing some statutory duty but none to my mind which settle definitely that there is no limit to what can be said to and of those who are during an enquiry being examined in public and in face of the press and who are not then on their trial. The law of qualified privilege as expounded in *Adam* v. *Ward* (*ante*) seems to me an adequate protection for any one acting under a Commission such as this. As Commissions such as the one in question are frequently issued in Canada to Judges and others to inquire into social, economic and professional matters and in some cases into questions which in working out may touch some political issue or party, it is to my mind advantageous that an authoritative pronouncement should be arrived at and that that can only be done by sending the case for trial. The case of *Electrical Development Co.* v. *Attorney-General* 1919, A.C. 687, gives an indication of the view of the Privy Council in that direction on a somewhat similar point arising in a much less contentious case.

Apart from that view, I think that the plaintiff is entitled to set up and prove, if he can, the words which the defendant does not admit using, as they seem rather irrelevant to the inquiry. The plaintiff has also the right to dispute the regularity of the issue of the Commission itself.

On the whole, therefore, I am inclined to the view that the appeal should be allowed and the action sent to trial. Costs of appeal in the cause.

No. 13. Formal Judgment, 15th June 1931.

No. 13.

Formal Judgment.

IN THE SUPREME COURT OF ONTARIO.

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF ONTARIO
THE HONOURABLE MR. JUSTICE MAGEE
THE HONOURABLE MR. JUSTICE HODGINS
THE HONOURABLE MR. JUSTICE MIDDLETON
THE HONOURABLE MR. JUSTICE GRANT

Monday, the 15th day of June, 1931.

Between

WILLIAM FRANCIS O'CONNOR - - - - *Plaintiff*

Seal

and

H.W.S. GORDON WALDRON - - - - - - *Defendant.*

UPON motion made unto this Court on the 20th and 21st days of April, 1931, by the plaintiff in person, in presence of Counsel for the defendant, by way of appeal from the judgment pronounced in this action by the Honourable Mr. Justice Orde on the 5th day of May, 1930, and upon hearing read the

writ of summons, the pleadings and proceedings in the action, the examination of the plaintiff for discovery and the Commission and the Order-in-Council authorizing the same therein referred to, and the said judgment and upon hearing the plaintiff in person and Counsel for the defendant, this Court was pleased to direct that the matter of the said motion should stand over for judgment, and the same coming on this day for judgment,

In the Supreme Court of Ontario (Appellate Division).

No. 13. Formal Judgment, 15th June 1931—*continued.*

1. THIS COURT DOTH ORDER that this appeal be and the same is hereby dismissed with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof.

E. HARLEY,
Senior Registrar, S.C.O.

Entered O.B. 119 pages 297-8
June 14th, 1931.
E. B.

No. 14.

Notice of appeal to Supreme Court of Canada.

No. 14. Notice of appeal to Supreme Court of Canada, 18th June 1931.

IN THE SUPREME COURT OF ONTARIO.
APPELLATE DIVISION.

Between

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

and

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

TAKE NOTICE that William Francis O'Connor, the above named plaintiff, hereby appeals to the Supreme Court of Canada from the decision and order pronounced in this cause by the Appellate Division of this Court on the 15th day of June, 1931, whereby the said plaintiff's appeal was dismissed with costs, and whereby the decision and order of The Honourable Mr. Justice Orde, a Judge of this Court, pronounced in this cause on the 5th day of May, 1930, whereby this cause was dismissed, with costs, stands confirmed.

DATED at Toronto, this 18th day of June, 1931.

J. GERALD KELLY,
1505 Concourse Building,
Toronto, Ontario.
Solicitor for the abovenamed
William Francis O'Connor.

To Messrs. KILMER, IRVING & DAVIS,
10 Adelaide Street East,
Toronto, Ontario.
Solicitors for the abovenamed
Gordon Waldron.

In the Supreme Court of Ontario (Appellate Division).

No. 15. Bond on appeal to Supreme Court of Canada, 7th August 1931.

No. 15.

Bond on appeal to the Supreme Court of Canada.

KNOW ALL MEN BY THESE PRESENTS that we, William Francis O'Connor, of the City of Toronto, in the County of York and Province of Ontario, Barrister, and The General Accident Assurance Company of Canada, are jointly and severally held and firmly bound unto Gordon Waldron of the said City of Toronto, Barrister, in the penal sum of five hundred dollars, for which payment well and truly to be made, I, the said William Francis O'Connor, bind myself, my heirs, executors and administrators and the said The General Accident Assurance Company of Canada binds itself, its successors and assigns, jointly and severally firmly by these presents.

DATED this 7th day of August, 1931.

WHEREAS a certain action was brought in the Supreme Court of Ontario by the said William Francis O'Connor, plaintiff, against the said Gordon Waldron, defendant.

AND WHEREAS judgment was given in the said Court against the said William Francis O'Connor, who appealed from the said judgment to the Appellate Division of the Supreme Court of Ontario;

AND WHEREAS judgment was given in the said action in the said last mentioned Court on the fifteenth day of June, A.D. 1931;

AND WHEREAS the said William Francis O'Connor complains that in the giving of the last mentioned judgment in the said action upon the said appeal manifest error hath intervened wherefore the said William Francis O'Connor desires to appeal from the said judgment of the said Appellate Division of the Supreme Court of Ontario to the Supreme Court of Canada.

Now the condition of this obligation is such that if the said William Francis O'Connor shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said William Francis O'Connor has hereunto set his hand and seal, and The General Accident Assurance Company of Canada has caused these presents to be sealed and signed by its duly authorized officers in that behalf this 10th day of August, 1931.

SIGNED, SEALED AND DELIVERED by William Francis O'Connor, in the presence of FERN E. WALLACE.

WILLIAM FRANCIS O'CONNOR. (Seal)

THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA.
W. C. Barrington,
Manager.
(Seal)

In the Supreme Court of Ontario (Appellate Division).

No. 16.

Affidavit of due execution of Bond.

No. 16. Affidavit of due execution of Bond, 7th August 1931.

PROVINCE OF ONTARIO,
COUNTY OF YORK,
To Wit:

I, Fern E. Wallace, of the City of Toronto, the County of York and Province of Ontario, make oath and say:

1. THAT I was personally present and did see the annexed instrument duly signed, sealed and executed by William Francis O'Connor, one of the parties thereto.

2. THAT the said instrument was executed at Toronto aforesaid.

3. THAT I know the said William Francis O'Connor.

4. THAT I am a subscribing witness to the said instrument.

SWORN before me at the City of Toronto, in the County of York, and Province of Ontario, this 7th day of August, A.D. 1931.
SAMUEL CIGLEN,

FERN E. WALLACE.

A Commissioner for taking affidavits in and for the said County of York.

No. 17.

No. 17. Order approving Bond, 28th August 1931.

Order approving Bond.

IN THE SUPREME COURT OF ONTARIO.

The Honourable Mr. Justice Orde, J.A., in chambers.

Friday the 28th day of August, 1931.

Between:

WILLIAM FRANCIS O'CONNOR,

Plaintiff

—and—

GORDON WALDRON,

Defendant.

ORDER APPROVING BOND ON APPEAL.

1. UPON the application of the above named plaintiff, in presence of counsel for the defendant, and upon hearing what was alleged by the plaintiff and counsel for the defendant;

2. IT IS ORDERED that the bond entered into the 7th day of August, 1931, in which William Francis O'Connor, the above named plaintiff, and The General Accident Assurance Company, of Canada, are obligors,

In the Supreme Court of Ontario (Appellate Division).

No. 17. Order approving Bond, 28th August 1931—*continued.*

and Gordon Waldron, the above named defendant, is obligee, duly filed as security that the above named plaintiff will effectually prosecute his appeal from the order of the Court dated the 15th day of June, 1931, and will pay such costs and damages as may be awarded against him by the Supreme Court of Canada, be and the same is hereby allowed as good and sufficient security.

3. IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

E. HARLEY,
Senior Registrar, S.C.O.

In the Supreme Court of Canada.

No. 18. Factum of William F. O'Connor.

No. 18.

Factum of William F. O'Connor.

PART I.

STATEMENT OF FACTS.

This is an appeal by a plaintiff in an action of slander whose action was dismissed summarily, with costs, by Orde, J.A., in Weekly Court at Toronto, under Rule 124 of the Rules of the Supreme Court of Ontario and the inherent jurisdiction of the Court.

Rule 124 reads as follows—

> " A Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly."

An appeal of the Appellant to the First Divisional Court of the Appellate Division of the Supreme Court of Ontario was dismissed with costs and this appeal is from the last mentioned Court.

The Appellant is a barrister. So is the Respondent.

The slander, as the Appellant pleads, was uttered at Toronto, on September 27th, 1929. The Respondent, as he pleads, was acting at the time as a commissioner appointed under the Combines Investigation Act (chapter 26, R.S.C. 1927).

The slander consisted in part of words spoken to a witness by the Respondent while he was purporting to act as Commissioner as aforesaid, and, as to the whole of the words used, they were spoken at large and in public, to all within hearing. Such words, which relate to a written legal opinion, claimed to have been given by the Appellant to such witness, are as follows :—

> " A very odious counsel. A lawyer cannot advise a wrong or a crime any more than anybody else. He has no privilege to do that. Well, then, you had full knowledge of the scheme. Was it you who

gave to O'Connor the contrivance of effecting a crime without effecting a crime, of making a false pretence to the public and to the law? Was it you who gave that to O'Connor or did he give it to you? I will describe it more clearly. Did you give to O'Connor the idea that you might beat the law by false pretence? I say it is a thing any lawyer ought to be ashamed of. I do not care who he is. It is an outrageous, scandalous exhibition. It ought to be reported to the Law Society. Anybody who had an evil mind or disposition to commit crime would be completely carried away by the eloquence of Mr. O'Connor." (Statement of Claim, p. 4 of Record.)

The Respondent, by his Statement of Defence (page 7 of the Record), admits speaking the words set forth, excepting the words " it ought to be reported to the Law Society."

He does not plead truth, nor qualified privilege, nor withdraw the words, but he sets up his office as commissioner and pleads that when he spoke the words he was acting judicially upon an absolutely privileged occasion. He denies an innuendo pleaded.

The Respondent having pleaded absolute privilege, the issues which were discussed below and which will arise again on this appeal, are as follows:

1. Whether, in fact, the necessary steps were taken under the Act mentioned to give jurisdiction (under Sections 11 to 16, inclusive, of the Act) to the Governor-General in Council of Canada lawfully to appoint the Respondent or any other person a commissioner under that Act. The Appellant set up this issue of fact by his Statement of Claim. It has never been determined.

2. Whether the Appellant's action falls within that class of actions so clearly frivolous or vexatious or abusive of the process of the Court as to justify their summary dismissal without trial.

3. Whether, assuming a valid appointment of the Respondent, the utterances complained of were made upon an absolutely privileged occasion. Incidentally, whether there may not have been such an abuse of the occasion as to cause a loss of the privilege of such occasion.

The Respondent caused the Appellant to be examined for discovery. His evidence appears at pp. 10 and 11 of Record. The Respondent's commission and the order in Council authorizing it appear at pp. 84 and 85 of the Record.

Following upon such examination for discovery, the Respondent moved before Orde, J.A., for an order dismissing the Appellant's action with costs. The motion was granted.

The reasons of Orde, J.A., which appear at pp. 12 to 18 of the Record, do not deal at all with the point raised before him that outstanding questions of fact as to the status and jurisdiction of the Respondent made it improper to dismiss the action. They relate entirely to the question of law whether words uttered by a commissioner under the Combines Investigation Act

during the performance of his duties as Commissioner are uttered upon an absolutely privileged occasion.

The Appellant appealed and his appeal was heard by the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, consisting of Mulock, C.J.O., Magee, Hodgins, Middleton and Grant, JJ.A. The appeal was dismissed with costs. Hodgins, J.A., dissented.

The opinion of the majority, written by Middleton, J.A., like that of Orde, J.A., does not discuss the Appellant's attack upon the status in fact of the Respondent, resultant upon claimed lack of jurisdiction in the Governor-General of Canada to appoint any commissioner under the particular circumstances, which circumstances the Appellant has been deprived of an opportunity to prove. In the result the majority decision confirms that of Orde, J.A.

The opinion of Hodgins, J.A., dissenting, was, as to the matter of absolute privilege, that the Respondent was neither a court nor a tribunal authorized to perform judicial functions, wherefore the occasion was not absolutely privileged. He held further that the Appellant was entitled to an opportunity to establish by evidence his pleas of excess of jurisdiction and abuse of occasion by the Respondent and of illegal appointment of the Respondent, going to absence of jurisdiction, by reason of non-compliance with conditions precedent required by the Combines Investigation Act.

PART II.

In what Respects the Judgments Appealed from are Erroneous.

The Appellant contends that the judgments of Orde, J.A., and of the Appellate Division are erroneous and should be wholly reversed and set aside with costs, and that the courts appealed from should have dismissed with costs the Respondent's motion to dismiss the action of the Appellant and permitted such action to go to trial, because—

1. There were relevant and material issues of fact outstanding and undetermined, and

2. The plaintiff's action was neither frivolous nor vexatious nor abusive of the process of the Court, and

3. The words complained of were not uttered upon an absolutely privileged occasion, for the reasons that commissioners appointed and acting upon the Combines Investigation Act are neither Courts of Justice nor courts which, although not Courts of Justice, are courts or tribunals recognized by law and authorized to perform functions like to those which are performed by Courts of Justice, nor do such commissioners act in precognition for Courts of Justice or for any other courts or tribunals to the acts and affairs whereof absolute privilege attaches, nor are the functions performable by such commissioners judicial, or otherwise than administrative functions. Incidentally, because the Appellant had pleaded, and was entitled to prove, facts shewing that the Respondent had abused the occasion of privilege, if any.

PART III.

BRIEF OF ARGUMENT.

POINT No 1.

There are relevant and material issues of fact outstanding and undetermined.

It is submitted that even if the decision of Orde, J.A., as to the application of the law of absolute privilege to commissioners under the Combines Investigation Act be right, so far as it goes (and likewise as to the confirmatory decisions on appeal below) the utmost proper result in this action would be the striking out of paragraph 3 (d) of the Appellant's Reply (which pleads that the Respondent " was not a court or a judge, nor acting as or for a court or a judge nor as a judicial officer or official, nor in manner like to that in which courts or judges act, nor was he then performing any judicial function or duty, but he was then authorized to perform and performing merely ministerial functions ").

There was not before the Court any such case of admitted, or undenied, or undeniable status, power and jurisdiction, in the Respondent, from which absolute privilege clearly resulted (as it would result in the case of a judge of a Court of Justice) which would authorize the summary dismissal of the action. The status of the Respondent, upon which his claim to absolute privilege was based, was put in issue by the pleadings as matter of fact.

Also, apart from the fact that paragraph 3 (d) of the Reply pleads as fact that the Respondent " when he spoke the said words " (Record p. 8, l. 24) was not " then performing any judicial function or duty but he was then authorized to perform and performing merely ministerial functions " (Record p. 9, l. 24) paragraph 3 (b), (c) and (e) of the Reply pleads as fact that the Respondent was not a commissioner under the Act at all, by reason of non-compliance with the applicable statute pleaded, which non-compliance resulted in lack of jurisdiction in the Governor-General in Council in Canada to appoint the Respondent as commissioner. Such non-compliance depended upon facts to be proved. The Appellant possibly might fail on the trial to prove them, but he was entitled to an opportunity to prove them.

The Appellant has pleaded (and, notwithstanding certain words of Section 12 of the Combines Investigation Act, to be cited, which prima facie bear against his contention, he submits) that the terms of Sections 10, 11, 12, 13 and 16 of that Act, read together, so require that no investigation can be begun or be carried on under that Act, whether at the instance of the Registrar of the Act or of the Minister who administers the Act, and whether by a commissioner or otherwise, unless and until the Registrar receives from six British subjects a complaint in writing with proofs, verified as mentioned in Section 11 of the Act. No such complaint or proofs were ever made or received by the Registrar, wherefore the Appellant has pleaded, and he submits that there was no jurisdiction in the Governor in Council to appoint the Respondent a commissioner under the Act. The Respondent,

In the Supreme Court of Canada.

No. 18. Factum of William F. O'Connor—*continued.*

accordingly, cannot claim to have spoken on an absolutely privileged occasion. The sections referred to are as follows:—

"DUTIES OF THE REGISTRAR."

"10. It shall be the duty of the Registrar

(a) to receive and register, and subject to the provisions of this Act to deal with applications for investigation of alleged combines;

(b) to bring at once to the Minister's attention every such application;

(c) to conduct such correspondence with the applicants and other persons as may be necessary;

(d) to call for such returns and to make such inquiries as the Registrar may consider to be necessary in order that he may thoroughly examine into the matter brought to his attention by any application for an investigation;

(e) to make reports from time to time to the Minister;

(f) to conduct such correspondence with commissioners as may be necessary and file all reports and recommendations of commissioners;

(g) to keep a register in which shall be entered the particulars of all applications, inquiries, reports and recommendations, and safely to keep all applications, records of inquiries, correspondence, returns, reports, recommendations, evidence and documents relating to applications and proceedings conducted by the Registrar or any commissioner, and when so required to transmit all or any of such to the Minister;

(h) to supply to any parties on request information as to this Act or any regulations thereunder;

(i) generally to do all such things and take such proceedings as may be required in the performance of his duties under this Act or under any regulations made hereunder."

"COMPLAINT AND INVESTIGATION."

"11. Any six persons, British subjects, resident in Canada, of the full age of twenty-one years, who are of the opinion that a combine exists or is being formed, may apply in writing to the Registrar for an investigation of such alleged combine, and shall place before the Registrar the evidence on which such opinion is based.

2. The application shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(a) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act have authorized to represent them;

(b) the nature of the alleged combine and the names of the persons believed to be concerned therein and privy thereto;

(c) the manner in which and where possible the extent to which, the alleged combine is believed to operate or to be about to operate to the detriment or against the interest of the public whether consumers, producers or others."

" 12. Whenever such application shall be made to the Registrar, or whenever the Registrar shall have reason to believe that a combine exists or is being formed, or whenever so directed by the Minister, the Registrar shall cause an inquiry to be made into all such matters, whether of fact or of law with respect to the said alleged combine as he shall consider necessary to inquire into with the view of determining whether a combine exists or is being formed."

" 13. If after such inquiry as he deemed the circumstances warrant the Registrar is of the opinion that the application is frivolous or vexatious, or does not justify further inquiry, he shall make a report in writing to the Minister setting out the application, the statement or statements, the inquiry made and the information obtained, and his conclusions; and the Minister shall thereupon decide whether further inquiry shall or shall not be made, and shall give instructions accordingly.

2. In case the Minister decides that further inquiry shall not be made, he shall notify the applicant of his decision, giving the grounds thereof.

3. The decision of the Minister shall be final and conclusive and shall not be subject to appeal or review."

" 16. Every commissioner shall have authority to investigate the business or any part thereof, of any person who is or is believed to be a member of any combine or a party or privy thereto, and who is named in the Order in Council appointing the Commissioner, and to enter and examine the premises, books, papers and records of such person.

2. The exercise of any of the powers herein conferred on commissioners shall not be held to limit or qualify the powers by this Act conferred upon the Registrar."

The Appellant contends that, although no such application or proofs as are required by Section 11 of the Act had been received by the said Registrar, the Minister of Labour, misunderstanding the true effect of Section 12 of the Act, which (and this only under circumstances to be mentioned) authorises the Minister to direct the Registrar to further continue an investigation being conducted by him, conceived that he (the Minister) had authority to originate an inquiry by a commissioner under the Act as and when he pleased, without such complaint, etc., and to cause a commissioner to be appointed to conduct it. The circumstances under which the Minister acted are recited in his Report to Council set out in Order in Council P.C. 1311 (page 84 of the Record) recommending the appointment of the Respondent. The Appellant contends that, apart from his having been denied opportunity to prove his pleas as to fact, P. C. 1311 discloses on its face lack of authority for the Respondent's appointment. If invalidly appointed the

Respondent cannot in proceedings against himself set up absolute privilege. He cannot himself plead de facto status.

The Order in Council P.C. 1311 (page 84 of the Record), besides being in excess of jurisdiction because it rests according to its terms, upon " representations " to the Minister, instead of upon complaint by way of statutory declaration, with evidence in support, to the Registrar (see Sec. 11 of the Act), is in excess of jurisdiction in another vital respect.

Section 16 of the Act is the only section thereof which defines what commissioners may do under the Act. All other sections applicable to commissioners have reference to the manner in which what may be done shall be done. While Section 16 of the Act limits the powers of commissioners to the investigation of the business, premises, books, papers and records of persons specifically named in the Order in Council appointing such commissioners, the Order in Council appointing the Respondent purports to authorize him to investigate " the business of the Amalgamated Builders' Council and the business of the Canadian Plumbing and Heating Guild and the businesses of the persons named in the schedule attached, and the business of any and all other members of the Amalgamated Builders' Council or of the Canadian Plumbing and Heating Guild, and the business of any other person who is or is believed to be a member of the alleged combine or a party or privy thereto."

The contention that receipt of the application and proofs mentioned in Section 11 of the Act is a condition precedent to the institution of any investigation under the Act is reinforced by a survey of the Act as a whole, but, because the effect of Section 18 of the Act is to incorporate by reference several provisions of the Inquiries Act (chapter 99, R.S.C. 1927) it will be necessary to identify the extent of the application of that Act.

The Appellant submits that it will appear that no excess of jurisdiction claimed by him is cured or avoided by anything appearing in the Inquiries Act.

CONSTRUCTION OF THE COMBINES INVESTIGATION ACT.

Section 1. The title of the Act.

Section 2 is a definition section. Inter alia, it describes what shall be deemed to be a combine for the purposes of the Act. (See Section 32). Section 2 provides also that—" Commissioner " means " a commissioner appointed by the Governor in Council as hereinafter provided." (Sec. 2(2)). See in this connection Sec. 6 (3), to be cited.

Sections 3 and 4 are presently immaterial.

Section 5 provides for administration of the Act by a Minister of government. In fact, the Act is administered by the Minister of Labour. In the P.A.T.A. case the Judicial Committee of the Privy Council seems to have upheld most of the sections of the Act as administrative action ancillary to Section 32 of the Act, which is the penalty section. After pronouncing that section to be within the competence of Parliament the Judicial Committee proceeds to say that the Act (as a whole) " does not in any way interfere with the administration of justice nor is there any ground for

suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority and it does regularly in the case of revenue officials and other matters which need not be enumerated."

Section 6 provides for the appointment of a Registrar by the Governor in Council. (Sec. 6 (1)). It also provides that—" The Governor in Council may, from time to time, appoint one or more persons who are British subjects to be commissioners under this Act." (Sec. 6 (3)).

Sections 7, 8 and 9 are presently immaterial.

Section 10, already set out in full, imposes certain duties upon the Registrar. He receives, registers, and, subject to the Act, deals with, applications for investigation of alleged combines, puts such applications before the Minister, conducts correspondence with the applicants and others, calls for such returns and makes such inquiries as he considers to be necessary " in order that he may thoroughly examine into the matter brought to his attention by any application for an investigation, reports from time to time to the Minister, conducts correspondence with commissioners, receives and files reports and recommendations of commissioners, keeps a register of applications, inquiries, reports and recommendations, safely keeps the applications, records of inquiries, correspondence, returns, reports, recommendations, evidence and documents relating to applications and proceedings conducted by the Registrar or any commissioner, and, when so required, transmits all or any of them to the Minister, and, generally, does all such things and takes all such proceedings as may be required in the performance of his duties under the Act or regulations made thereunder.

Section 11, already set forth in full, provides what the Appellant contends are conditions precedent to the institution of any investigation under the Act, viz., an application in writing for it, by six British subjects, who are of opinion that a combine exists or is being formed. They must supply evidence in support. The application must be accompanied by a statutory declaration, which identifies the applicants, shows the nature of the " alleged combine," the names of the persons believed to be concerned or privy, and the manner, and, where possible, the extent to which, the " alleged combine " is believed " to operate or to be about to operate " detrimentally to the public. This section, in lines 5, 15 and 19 thereof, refers to the combine which is complained of in the application for an investigation as " such alleged combine " (line 5) and " the alleged combine " (lines 15 and 19). The reason for giving stress to these expressions will appear on reading the following exposition of sections 12 and 13.

Section 12 seems at first to authorise an investigation by the Registrar:—

1. Whenever an application has been made by six British subjects in conformity with Section 11, or

2. Whenever (although no application has been made under Section 11) the Registrar has reason to believe that a combine exists or is being formed, or

3. Whenever (although no application has been made under Section 11) the Minister directs the Registrar to investigate.

But the Section proceeds to disclose a different intent. In all three cases " the Registrar shall cause an inquiry to be made into all such matters, whether of fact or of law, with respect to the said alleged combine as he shall consider necessary to inquire into with the view of determining whether a combine exists or is being formed." The said " alleged combine," surely, is that mentioned three times in Section 11.

Section 12 seeming thus to contemplate that, always, proceedings under the Act shall be instituted by a " complaint." (See the heading of Section 11 *et seq.*—" Complaint and Investigation "). Section 13 resolves any contrary inference suggested by the opening words of Section 12.

It appears from Section 13 that the Registrar, upon receipt of an application made under Section 11, may adopt any one of several courses :—

1. He may, pursuant to Section 12, proceed upon the application and the accompanying evidence as sufficient grounds to justify an investigation under the Act.

2. He may not be satisfied that the evidence submitted with the application is sufficient, in which case he may supplement, preliminarily, pursuant to Section 12, by " such inquiry as he deems the circumstances warrant " the information conveyed by the application, and thus acquire " reason to believe " (although not sufficient to enable him to determine) that a combine exists or is being formed." (Sec. 12) in which case he may proceed until ready to report, finally, to the Minister, his, the Registrar's determination (Sec. 12) " whether a combine exists or is being formed."

3. He may, pursuant to Section 13, after " such inquiry as he deems the circumstances warrant," made as the result of the receipt of an application under Section 11 has led him to " the opinion that the applicaton is frivolous or vexatious, or does not justify further inquiry (than his own; already made) to report in writing to the Minister. The Registrar's report to the Minister under Section 13 (which is designed to cover the first two alternatives of Section 12) must be one " setting out the application (mentioned in Sec. 11) the inquiry made and the information obtained, and his conclusions " (which will be either that the application is frivolous or vexatious or that the application does not justify further inquiry, with grounds). The Registrar's report may be either that in his opinion the application does not justify any enquiry, or it may be that the evidence secured by him sufficiently discloses that a combine does not exist, or that a combine does exist (and when he finds that a combine does exist he may report his view that he has sufficient evidence for purposes of prosecution) and that consequently there is no necessity for further inquiry. But the Minister may disagree with him, overrule him, and direct that either he, the Registrar, or a commissioner shall further inquire. When the Minister directs the Registrar himself to enquire (as e.g., when the Registrar reports that there should be no enquiry because of the character of the application) the third alternative of Section 12 of the Act is fulfilled.

Where, under Section 13, the Registrar, " after such inquiry as he deems the circumstances warrant," has so reported to the Minister, he, the Minister " shall thereupon decide whether further inquiry shall or shall not be made, and shall give instructions accordingly." That is to say the Minister decides whether the investigation shall be dropped or shall proceed further. If he decides that it shall be carried on further by the Registrar, then the Registrar is " directed by the Minister " as mentioned in Sec. 12, and he proceeds. If the Minister decides that further inquiry should be by a Commissioner under Sec. 16, he so directs and provides. But always, as the language of Section 13 relating to the application shows, the investigation, whether by inquiry or by further inquiry, and whether by the Registrar or by a Commissioner, must be one instituted under Section 11. The Minister, of course, is free at this stage, without further inquiry, to act upon the Registrar's report and remit the materials placed in his hands to the Attorney General. See Sec. 31 set out fully hereunder.

Sections 14 and 15 enable the Registrar to investigate by way of questionnaire. The Registrar, who, under the Act, causes all inquiries (Sec. 12) and to whom all reports of commissioners must be made (Sec. 27, set out fully hereunder) is a departmental officer of government, who, while he may conduct in person any investigation (Sec. 16 (2) and 27) and may, under Sec. 14, by questionnaire, when that mode of proceeding is sufficient, conduct a number of investigations at one time, is physicially unable, (and, perhaps, as well, unequipped technically) to conduct many investigations in many places at or about the same time, to examine witnesses viva voce and make rulings upon the construction of the Act.

Accordingly, Section 6 (3) provides for the appointment of commissioners and Section 16 defines the scope of their authority to investigate under the Act. It is by no means commensurate with that of the Registrar, under Section 12. He, upon application made under Section 11 causes an inquiry to be made " into all such matters, whether of fact or law, with respect to the said alleged combine as he shall consider necessary to inquire into with the view of determining whether a combine exists or is being formed." He reports under Sec. 13 or under Sec. 27 (1) direct to the Minister. Commissioners report under Sec. 28 (2) to the Registrar.

Whenever, in the course of an investigation caused (as the result, always, of an application under Sec. 11) by the Registrar, it appears to or is believed by the Registrar or the Minister, as the case may be, that a combine exists, Section 16 of the Act enables the appointment of a commissioner to further inquire to the limited extent authorized by that section, an authority which has been much exceeded by the Order in Council appointing the Respondent. Commissioners, for instance, have nothing to do with the question of combine or no combine. That is the Registrar's business to determine under Section 12, or the Minister's under Section 31. The availability of commissioners' services under Section 16 is premised upon the Registrar's or Minister's previously reached determination that a combine exists. Hence Section 16 of the Act provides merely for " mopping up " processes in these terms—" Every commissioner shall have authority to

investigate the business, or any part thereof, of any person who is or is believed to be a member of any combine or a party or privy thereto, and who is named in the order in council appointing the commissioner, and to enter and examine the premises, books, papers and records of such person." This is what the commissioner may do. No other section of the Act does more than define the way in which he shall do it or provide sanctions for enforcing. No provisions of the Inquiries Act repugnant to or inconsistent with Section 16 can be effective to confer upon any commissioner further authority. (Sec. 18 of the Combines Investigation Act, set out fully below.) He is therefore merely an officer to hear, get, record and report evidence of named persons. Sec. 16 and 27 (2). He is an assistant of the Registrar in the conduct of an investigation caused by the Registrar under Sec. 12 as the result of an application under Sec. 11, and if in the absence of such application there is no lawful investigation, then in the absence of such application there is no lawful commissioner.

Sections 17 to 26 inclusive (excepting Sec. 18, which is set out at page 13 of this factum, pp. 48 and 49 of Record) relate to access, inspection, taking evidence, etc., and apply, mutatis mutandis, to the Registrar and to Commissioners.

Section 27 of the Act is as follows :

> " 27. The Registrar at the conclusion of every investigation which he conducts shall make a report in writing which he shall sign and without delay transmit to the Minister.
>
> 2. Every Commissioner who conducts an investigation shall at the conclusion thereof make a report in writing which he shall sign and transmit to the Registrar together with the evidence taken at the investigation, certified by the Commissioner, and any documents and papers remaining in the custody of the Commissioner; and the Registrar shall without delay transmit the report to the Minister.
>
> 3. The Minister may call for an interim report at any time, and it shall be the duty of the Registrar or commissioner as the case may be, whenever thereunto required by the Minister, to render an interim report setting out fully the action taken, evidence obtained and conclusions reached at the date thereof."

Note that the statute does not authorize the Commissioner to report in his final report any " conclusions ", as the Respondent's commission of appointment purports to authorize. The Minister may at any time call for an interim report, with conclusions, from either Registrar or Commissioner.

Sections 28, 29 and 30 are presently immaterial.

Section 31 of the Act (first sub-section) is as follows :

> " 31. Whenever in the opinion of the Minister an offence has been committed against any of the provisions of this Act, the Minister may remit to the Attorney General of any province within which such alleged offence shall have been committed, for such action as such

Attorney General may be pleased to institute because of the conditions appearing,

(a) any return or returns which may have been made or rendered pursuant to this Act and are in the possession of the Minister and relevant to such alleged offence; and

(b) the evidence taken on any investigation by the Registrar or a Commissioner, and the report of the Registrar or Commissioner."

The return or returns which may have been made or rendered are those to the Registrar under Sec. 14.

The Minister, of course, may remit to the Attorney-General whenever the Registrar convinces him that a combine exists, and without appointing any commissioner at all. (Sec. 31.)

Sections 32 to 41 (the last sections of the Act) are presently immaterial.

The Appellant submits that discovery of what is the relevant effect of the Combines Investigation Act will be assisted by the following considerations :—

When a Commissioner with powers as in Section 16 is appointed under authority of Section 6 (3) he is necessarily acting in an investigation already instituted and caused under Section 11, and which has been proceeding under Section 12 or has been directed to be further proceeded with under Section 13 of the Act. He is appointed 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, and who is named in the order in council appointing the commissioner." (Sec. 16.) Now note Section 11 (b). The statutory declaration of the six British subjects must shew " the nature of the alleged combine and the names of the persons believed to be concerned therein or privy thereto."

Section 12 contemplates that the Registrar shall cause all such inquiries as are held under the Act to be made. Unless the Commissioner, when he proceeds under Section 16, is acting in an inquiry caused by the Registrar and referable to Sections 11, 12 and 13 of the Act there is no machinery for starting the Commissioner outside of Section 16 itself, so how is it to be decided, unless by reference to an application under Section 11 or to a Registrar's inquiry instituted under Section 11, what persons are, or on what grounds any persons are believed to be, members of a combine, etc., and where does whoever does the deciding or believing get the names of such persons so as to include these in the order in council, and how does it become so well known that there is a combine that Section 16 contemplates knowledge of it and even of the names of those who are parties to it or believed to be such?

It is submitted that it was the intent of Parliament that the drastic provisions of Section 16, authorizing, as they do, invasion of the private affairs and businesses of particular named persons, should be resorted to only after a prima facie case of the existence of a combine had been made out under Sections 11, 12 and 13 of the Act.

If it had been the intent of Parliament that the Minister administering the Act might, under Section 16, institute independent inquiries by commissioners, free of the operation of Sections 11, 12 and 13, would Parliament have left that intent to be inferred, would it have provided at all the " solemn mummery " which Sections 11, 12 and 13 would in such case exhibit? Under Section 12 the Registrar, under all circumstances, causes inquiries to be made " into all such matters, whether of fact or of law, as he shall consider necessary to enquire into with the view of determining whether a combine exists or is being formed." That determination he himself makes, either upon the application itself or by supplementary inquiry, but under Section 13, if he determines against inquiry the Minister may overrule him. Any " further inquiry," however, is not a different inquiry to that caused by the Registrar under Section 12, but the same inquiry further prosecuted by the Registrar or by a commissioner under the Registrar. In other circumstances the Registrar, under his general powers derived from Sections 10 and 12 and preserved by Section 16 (2), possibly might, in an inquiry caused by him under Section 12, recommend the appointment of a commissioner to supplement any inquiry already made by the Registrar, by way of Section 14 or otherwise.

It has been mentioned that when the Registrar reports under Section 12 against further inquiry the Minister may overrule him. It is at this stage that the Minister's jurisdiction to secure the appointment of a commissioner arises. Note that by Section 13 the Registrar, when reporting his determination to the Minister for or against further inquiry must set out " the application, the statement or statements, the inquiry made and the information obtained, and his conclusions," and that the Minister shall " thereupon " (that is upon such materials so reported to him) " decide whether further inquiry shall or shall not be made." What better indication than this could there be that unless there is an application or complaint pursuant to Section 11, there can be no inquiry, no further inquiry, and no appointment of a Commissioner. When the Minister decides that further inquiry shall be made, the investigation or inquiry, of course, whether or not conducted by a commissioner, is the same as that originally instituted by the Registrar. But, in any event, any inquiry, under any of the alternatives of Section 12 must be one " with respect to the said alleged combine " which is mentioned in Section 11 as a combine alleged and prima facie proved by six British subjects.

The only Section of the Combines Investigation Act which authorizes an investigation at all is Section 11. That Section was not complied with. In any event the Appellant has pleaded as fact that none of the Sections 11 to 13 were complied with and it is submitted that he was entitled to go to trial upon such plea as to fact.

INQUIRIES ACT (CAP. 99 R.S.C. 1927)

Section 18 of the Combines Investigation Act provides that—

> " All provisions of the Inquiries Act not repugnant to the provisions of this Act shall apply to any inquiry or investigation

under this Act, and the Registrar and every commissioner shall have all the powers of a commissioner appointed under the Inquiries Act, including the powers which are thereby authorized to be conferred by the commission issued in the case, except in so far as any such powers may be inconsistent with the provisions of this Act."

Interpreting the Section, all non-repugnant provisions of the Inquiries Act are to be read as if repeated in the Combines Investigation Act, and the Registrar and Commissioners may exercise the powers which Sections 4 and 5 of the Inquiries Act confer upon commissioners appointed under that Act, and also (without express conferring by the commission issued in the case) the powers which under Sections 11 and 12 of the Inquiries Act may be authorized by commissions issued in cases under that Act, except (as respects all powers conferred by or conferrable under that Act) such powers as are inconsistent with the provisions of the Combines Investigation Act.

Sections 4 and 5 of the Inquiries Act deal with witnesses, evidence and oaths. They are repugnant (see Section 22 of the Combines Investigation Act) and, in any event, immaterial.

Section 11 of the Inquiries Act deals with engagement by the commissioners of counsel and expert and other assistance. They seem to conflict with Sections 6 (4), 9 (1), 9 (2), 21 and 26 of the Combines Investigation Act. In any event they are immaterial.

Section 12 of the Inquiries Act provides that the 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.

Section 13 of the Inquiries Act provides 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.

Possibly these presently immaterial Sections 12 and 13 (the last two sections of the Act) must be read into the Combines Investigation Act. It is submitted that nothing else in the Act can apply.

Sections 1 (short title) and 2 and 3 (inquiries and appointments under the Act) are obviously repugnant.

The inquiry was not one made under the Act nor was the Respondent's appointment made under the Act.

Sections 4 and 5 have been shown to be repugnant.

Sections 6 to 10 inclusive (Departmental Investigations) are obviously inapplicable.

Section 11 (employment of counsel experts and assistants by Commissioners) has been shown to be inconsistent with the Combines Investigation Act.

Sections 12 and 13 (the last sections) possibly can apply, but they are immaterial.

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No. 18. Factum of William F. O'Connor— *continued.*

Thus, it is submitted, nothing in the Inquiries Act enlarges either the power to appoint Commissioners under the Combines Investigation Act or the jurisdiction of such commissioners after appointment, or otherwise relevantly affects for the purposes of this appeal the last mentioned Act.

POINT No. 2.

The plaintiff's action was neither frivolous nor vexatious nor abusive of the process of the Court.

Actions should be disposed of summarily only " in plain and obvious cases." The case must be one beyond doubt.

Mayor, etc., of London v. *Horner* (1914), 111 L.T. 512 (C.A.).

Hubbuck v. *Wilkinson* (1899), 1 Q.B. 86 at 91.

The power to dismiss summarily " ought not to be applied to an action involving serious investigations of ancient law and questions of general importance."

Dyson v. *Attorney General* (1911), 1 K.B. 414.

If there is a point of law which requires serious discussion an objection should be taken on the pleadings and the point set down for argument.

Hubbuck v. *Wilkinson*, supra.

Admittedly, where a statement of claim in an action of libel or slander shows that the occasion of publication was absolutely privileged, the statement of claim may be struck out, but in this case the statement of claim does not so disclose. The Respondent set up his status as fact. The Appellant denied that status. The Court has, in effect, disposed of an issue of fact as if it were an issue of law.

The Appellant does not deny the Court's inherent power to dismiss an action in a proper case, as in a case which must fail, (e.g., for words admittedly uttered in a Superior Court by a Superior Court Judge) but he submits that such power " will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed." The Appellant relies in this respect upon the reasons of Hodgins, J.A., below, and upon—

Lawrance v. *Norreys*, 15 A.C. 210.

Goodson v. *Grierson* (1908), 1 K.B. 766.

Electric Development Co. v. *A.G. for Ontario*, 1919, A.C. 687.

POINT No. 3.

The words complained of were not uttered upon an absolutely privileged occasion. They were uttered by an administrative officer while he was performing administrative duties. Incidentally, the occasion of privilege, if any, was abused and lost, the words complained of having been uttered out of office and out of character.

The Appellant, before applying the law to the point above stated, finds it necessary to correct a number of possibly prejudicial errors of fact appearing in the majority decision below.

That decision not only errs as to fact but travels beyond the case book when it states that—

> " During the course of the inquiry it was suggested that the Plaintiff, who is a practising barrister and solicitor, had suggested or advised the things that were shown to have been done, and which, in the opinion of the Commissioner, constituted a combine." (See p. 21, lines 17 to 20 of the Record.)

There was nothing before the Court, either by plea or in proof, to indicate, or from which the Court could judicially or otherwise know unless by inference from or by addition to the words complained of as defamatory,—

(a) What had been the course of the inquiry

(b) That anyone had suggested that the Appellant advised anything that was done.

(c) That anything had been shown to have been done which, in the opinion of the Respondent, constituted a combine.

(d) That the legal opinion concerning which the Respondent spoke, (slanderously as the Appellant claimed and as the Respondent has not denied) had in fact any relation to the proceedings before the Respondent or to any combine.

In the circumstances the Appellant begs permission to correct the erroneous statement and to say that the defamatory words complained of in his action had reference to a legal opinion given in writing by the Appellant, but which had no relation whatever to the enquiry being conducted by the Respondent, or to any of the trade organisations being investigated by him.

The Appellant submits that the circumstances complained of afford a cogent example of the undesirability of disposing summarily of such actions as this.

The Appellant is able to accept almost without qualification the principles of the law as to absolute privilege as they have been stated by the Courts below, especially in the decision of Orde, J.A.

The contest, as usual, is rather as to the propriety of the application of such principles to the case in hand.

The outstanding questions arising out of point No. 3 on this appeal are, it is submitted,—

1. Was the Respondent a court or judicial tribunal recognised by law?

2. Assuming that the Respondent was such a court or tribunal, were the duties which he was performing when he uttered the defamatory words of a judicial, or of a merely ministerial, character ?

3. Assuming as aforesaid and that his duties were of a judicial character, could and did he step out of office and speak out of character when he uttered the defamatory words, and thus by abuse of the occasion deprive it of its absolutely privileged character ?

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No. 18. Factum of William F. O'Connor—*continued.*

Some of these questions, possibly, need not be decided on this appeal, and possibly cannot be answered without a better fact basis than is available in the absence of sworn testimony as to the circumstances.

But, it is submitted, there is one other question, apart from, although suggested by, the mentioned three questions, answer to which cannot be avoided. It is this—

Is not the Appellant, in view not merely of his own rights and interest but in view also of the importance to others of right decision of the serious questions of law which this case presents, entitled to litigate the mentioned questions sufficiently to enable him to supply to the courts the data which the courts must have before such questions can be properly disposed of? Hodgins, J.A., below, considered that the Appellant was so entitled. (See p. 32, lines 7 to 20 of the Record.)

It seems to be a fact, as intimated by Hodgins, J.A., (p. 32, lines 1 to 8 of the Record) that no authoritative decision exists as to whether words spoken " out of character " by judge, counsel or witness are absolutely privileged. The Respondent having pleaded (Defence, par. 6, page 7, line 39 and page 8, line 1 of the Record) that he spoke the words " in his said office while he was acting judicially," the Appellant (Reply, par. 1, page 8, line 15 of the Record) joined issue. He also (Reply, Par. 3 (c), page 4, lines 12 to 21) specially in pleaded detail that the speaking was out of office.

The Appellant submits that for the reasons given and upon the authorities cited by Hodgins, J.A., below, this case, if only to enable the Appellant to prove his case of abuse of a possibly, otherwise, privileged occasion, ought to have been allowed to go to trial.

There can be no doubt as to what is the general law as to absolute privilege as affecting " Public Authorities and Public Officers." It is as stated in 23 Halsbury's Laws of England, paragraphs 668 to 673. The Appellant adopts the language of the text for the purposes of this factum, as his own.

> " Persons exercising judicial functions in a court are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity."
>
> 23 Halsbury, Par. 668.
>
> " The object of this privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to the administration of justice if the persons concerned therein were subject to inquiry as to malice, or to litigation with every man whom their decisions might offend. It is necessary that such persons should be permitted to administer the law not only independently and freely and without favour, but also without fear."
>
> 23 Halsbury, Par. 669.
>
> " To entitle any person to this protection the proceedings out of which the action arises must be the judicial proceedings of a tribunal

which is, in the eyes of the law a court. The protection applies to all courts of justice and to certain other courts having similar attributes. Thus, among courts of justice it has been applied not only to the superior courts, but also to inferior courts of record and to inferior courts of justice not of record. The protection is also applied to analogous tribunals other than courts of justice if the case is one of an authorised inquiry before a tribunal acting judicially. It is not, however, sufficient that the tribunal should be acting judicially, it must also be a court or authorised tribunal."

23 Halsbury, Par. 670.

"This protection applies only to judicial proceedings as contrasted with administrative or ministerial proceedings, and where a judge acts both judicially and ministerially or administratively the protection is not afforded to acts done in the latter capacity."

23 Halsbury, Par. 671.

"Wherever protection of the exercise of judicial powers applies it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause, suffices to found an action. The protection does not, however, extend to acts purely extra judicial or alien to the judicial duty of the defendant, and therefore if words complained of are not uttered in relation to judicial proceedings the defendant is not protected. It is doubtful whether even the most complete irrelevancy of words spoken in court during or in relation to judicial proceedings would destroy the protection; no such irrelevance as would exempt a witness from prosecution for perjury would have that effect. Probably the correct rule is that words are protected unless so clearly irrelevant that no man of ordinary intelligence and judgment could honestly dispute that they had no connection with the case in hand."

23 Halsbury, Par. 672.

"If protection is claimed by a member of the court it can only be obtained if the court was acting within its jurisdiction. . . Where the court has acted without jurisdiction the matter is said to have been corum non judice the record can be traversed and the judge has no protection."

23 Halsbury, Par. 673.

When a court has the protection of absolute privilege all persons are protected who are constituent members of the Court or concerned with its judicial processes. It applies, therefore, to all steps in judicial proceedings.

Tinsley v. *Nassau* (1827) Moo. & M. 52 (Sheriff)).
Tunno v. *Morris* (1835) 2 Cr. M. & R. 298 (Sheriff).
Bradley v. *Carr* (1841) 3 Man & Gr. (Steward of Court).
Bushell's Case (1674) Vaugh. 135 (Members of Jury).

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Munster v. *Lamb* (1883) 11 Q.B.D. (Counsel).
Law v. *Llewellyn* (1906) 1 K.B. 487 (C.A.) (Magistrates).
Seaman v. *Netherclift* (1876) 2 C.P.D. 53 (C.A.) (Witnesses).
Watson v. *McEwan* (1905) A.C. (Preliminary statement of witness to solicitor or counsel).
Burr v. *Smith* (1909) 2 K.B. 306 (C.A.) (Report of Official Receiver in winding-up Proceedings).
Barratt v. *Kearns* (1905) 1 K.B. (Inquiry by Commission of Ecclesiastical Court).
Dawkins v. *Rokeby* (1873) L.R. 7 H.L. 744 (Military Court of Inquiry).

See generally, 18 Halsbury's Laws Par. 655 and note (h) and Par. 1254 note (l).

Respectfully, the courts below have erred in failing to note that in every case where absolute privilege has been held to have existed the body involved was either a court of justice or other actual court lawfully created to perform judicial functions and acting as such, or a body acting for and performing in whole or in part, for such a court, the functions of such a court.

The error, it is submitted, has ensued from a misconstruction of the meaning of the words " tribunal recognised by law " in the expression " court or tribunal recognised by law " (which, appearing originally in the judgment of the Exchequer Chamber in *Dawkins* v. *Rokeby* (1873) L.R. 8 Q.B., 255, at 263, have been often since quoted) and to a mistaken conception that there can be a " tribunal recognised by law " which is something that falls short of being what is really a court recognized by law. With deference, such is a mistaken conception. The principle of *Dawkins* v. *Rokeby* (supra) was approved by the Court of Appeal in *Royal Aquarium &c.* v. *Parkinson* (1892) 1 Q.B. 431 (C.A.),—

> " with the qualification that the tribunal referred to must be a court in law or a court recognized by law. See the judgments of Fry and Lopes L.JJ."

Attwood v. *Chapman* (1914) 3 K.B. 275, per Avory J.
23 Halsbury's Laws Pars. 670 and 671.

The protection has not been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act.
18 Halsbury's Laws, Par. 1253.

The most recent cases in which the protection of absolute privilege has been allowed are—

Slack v. *Barr* (1918) 82 J.P. 91.
Co-partnership Farms Ltd. v. *Harvey Smith* (1918) 2 K.B. 405.

The first mentioned of these cases involved the status as a court of a statutory arbitration tribunal. It had power to hear and determine as to rights of parties. It, therefore, was a " tribunal recognized by law " and " acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it."

18 Halsbury's Laws, Par. 1253.

The second mentioned of these cases involved the status as a court of a statutory military service tribunal. It, too, had the power to hear and determine upon the important matter of a subject's liability to impressment into the King's service. The power to adjudicate, that is, determine, as to life, liberty or property is a judicial function and in both cases last cited the exercise of such a function was the purpose of the tribunal, which, clearly, therefore, was a court.

In sharp distinction are two other recent cases—

Attwood v. *Chapman* (1914) 3 K.B. 275.

Collins v. *Whiteway* (1927) 2 K.B. 378.

In the first mentioned case, justices, clearly a court when performing judicial functions, had, by statute, the obligation to hear applications for public house licenses and to issue, in a proper case, such licenses. It was held that the protection of absolute privilege did not apply because the justices, qua the matter of licensing, did not constitute a court acting judicially. The duties of the justices, qua licensing, were held to be administrative and not judicial, hence, per curiam, they were not a " court in law or a court recognized by law " performing judicial functions within the meaning of the rule as to the application of absolute privilege. The court, it was held, must, under the rule, be acting at the time of the defamation, as a court with similar attributes to those of a court of law.

The second mentioned case involved the application of the protection of absolute privilege to the proceedings of a body which, by statute, was described as a " Court of Referees," under an unemployment insurance Act. The " court," although called a court, was held to be a body authorized to exercise merely administrative duties and not " judicial functions similar to those of a court of justice." Consequently defamatory statements made in the course of proceedings before it were decided to be not absolutely privileged.

A case similar in principle to that mentioned is—

Veal v. *Heard* (1930) 46 T.L.R. 448.

It is submitted, upon the authorities already cited, that for the protection of absolute privilege to apply the defamatory words must have been uttered—

(a) by, or actually or constructively before, a body which, in the eyes of the law is a court.

(b) which court, if not a court of justice, must be a court having similar attributes to those of a court of justice,

(c) and in the course of judicial, as distinguished from merely administrative or ministerial, proceedings before the court.

As to what may or may not be a court, the most recent discussion is afforded by—

Shell Co. of Australia v. *The Federal Commissioner of Taxation* (1931) A.C. 275 (P.C.).

The decision just mentioned makes it quite plain that a body with merely administrative powers although called a court, cannot really be a court. "An administrative tribunal," says the Judicial Committee, "may act judicially but still remain an administrative tribunal as distinguished from a court, strictly so called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a court of judical power."

The same decision interprets the expression "judicial power" as meaning "the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

It is obvious that the tribunal thus referred to may be either a court of justice or a court which, although not a court of justice, is clothed with similar attributes to those of a court of justice, the chief whereof are the power to hear and the power to determine by a "binding and authoritative decision (whether subject to appeal or not) some controversy, between subjects or between Crown and subject, which controversy affects life, liberty or property."

It would be curious if any purported court required by law to be one that functions "in a manner as nearly as possible similar to that in which a court of justice acts" should be held to be a court, although it had no power to exercise the chief attribute of a court, which is the power to give a "binding and authoritative decision." Commissioners under the Combines Investigation Act are empowered merely to hear evidence and report it to the Registrar of the Act, who reports it to a Minister of the Crown, who may remit it to the Attorney General of a Province, whose power is merely to cause to be commenced, de novo, if he sees fit, ordinary criminal proceedings wherein the testimony taken before the Commissioner may not lawfully be used. The result, judicially, of the commissioner's efforts is nil. He has acted as a detective of crime, using methods, by the way, which are by statute made lawful but which, if used by an ordinary police officer without statutory authority, would be rightfully reprehended.

Combines Investigation Act, Secs. 27, 31 and 24.

A valuable discussion as to the distinction between judicial and ministerial or administrative action is afforded by

Munster v. *Lamb* (1883) 11 Q.B.D. 588.

There is in Canada a constitutional objection to the erection, by the Dominion, of bodies which can be construed to be courts to administer the Criminal law, (See Section 91 (27) B.N.A. Act, "except the constitution of courts of Criminal Jurisdiction") and since the Combines Investigation Act has been held to be intra vires under the Criminal law power of the Dominion, it is submitted that the proceedings by way of investigation under the Registrar or by Commissioners must be held to be merely police

or detective proceedings, viz., investigation as to the possible commission of crime, and not judicial functions. Such proceedings have never been considered to be entitled to the protection of absolute privilege.

It was said of such proceedings in a United States decision that—

" neither common convenience nor the interests of society require that the opinions, suspicions and deductions of police and detective officers, whether reported in writing to their superior officers or through the telephone to the newspapers should be published to the world. Such reports are in no sense judicial proceedings and their publication is entitled to no greater privilege than that of reports emanating from private individuals."

Billet v. *Times Democrat Publishing Co.* 58 L.R.A. 62.

In the *P.A.T.A. case* (1931) A.C.310, the Judicial Committee of the Privy Council said that—

> " The greater part of the statute is occupied in setting up and directing machinery for making preliminary enquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either Commissioner or Registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished must be tried on indictment and the offence proved in due course of law."

These observations are followed by a pronouncement that the Act " does not in any way interfere with the administration of justice."

It is submitted that authorities which disclose the circumstances under which prohibition will be granted to restrain proceedings of inferior courts are applicable to the questions whether the respondent, as commissioner, was a court, and whether his duties as such commissioner were judicial or merely administrative or ministerial.

Prohibition issues only to inferior courts of justice and to other inferior tribunals which (because they have the power to impose obligations upon persons who are parties to proceedings before such tribunals) exercise judicial functions.

10 Halsbury's Laws Par. 303;

Godson v. *The City of Toronto*, 18 S.C.R. 36.

In the case just cited it was held that the functions of a County Court judge acting under statutory authority as a commissioner, with the powers of a commissioner appointed under the Ontario Inquiries Act, (which enables commissioners to compel attendance of witnesses, administer oaths to witnesses, punish them for contempt &c.) to investigate and report upon a matter of civic administration involving a charge that the City of Toronto had been defrauded of public moneys, were not those of a court, nor judicial, but that they were those of a statutory ministerial officer. He was, it was held, " in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person." He was not, therefore, subject to control by writ of prohibition from a superior court.

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The *Godson* case has been followed in

Re Gartshore, 27 B.C.R. 121 (C.A.).

which holds that because commissioners acting under Public Inquiries Acts are neither courts nor judicial bodies, and have not the power to impose obligations or duties, they are not subject to the Crown remedy of prohibition.

Note that in—

Re Clement, 33 Can. Cr. Cas. 119 (B.C.).

which case arose out of the same circumstances as *Re Gartshore* supra, the Appeal Court of British Columbia held specifically that such statutory or " Royal " commissioners are not courts and that under its power to administer justice a province may appoint Royal Commissioners to investigate the possible commission of crime in breach of Dominion laws.

There have been like decisions as to the ministerial character of such commissioners in—

Menard v. *The King*, 59 D.L.R. 144 (Que.).
Re Milton A. Thomas, 26 O.R. 449 (Ont.).

The reason for adding the " trappings of a court " to Royal and statutory commissioners is that unless this is done their proceedings are practically certain to fail. But this is not a reason for holding, afterwards, that because of such addition such commissioners have been constituted what they have not been intended to be, or possibly, what they may not be (as, it is submitted, is the case in Canada) by constitutional law.

A royal commissioner has not by the common law the right to compel answers from witnesses.

Attorney-General for Australia v. *Colonial Sugar Refining Co. Ltd.*, 1914 A.C. 237 (P.C.) at p. 257.

Nobody, unless summoned, has any right to appear before a Royal or Parliamentary commission. Therefore, counsel or solicitors may not appear for parties involved in the proceedings unless by leave.

Re Belfast Riots Commission (1886) 21 L.J., M.C. 556.

2 Halsbury's Laws, Pars. 633 and 634.

26 Halsbury's Laws, Par. 1184.

A court martial is, of course, a court for the purposes of absolute privilege.

Some military committees or commissions, erected under Military law (which while part of the ordinary law of the realm has as distinct a character of its own as, for instance, ecclesiastical law, which also is part of the ordinary law) are, either directly or vicariously, courts. Certain of them are by statute termed courts. But only such committees or commissions as are authorized by law to exercise judicial functions are courts, and prohibition will issue only to such of them as in the eyes of the law are, or act for, courts.

Re Clifford &c. (1921) 2 A.C. 570 (H.L.).

R. v. *Maguire &c.* (1923) 2 Ir. R. 58.

Under the English Companies Act the Board of Trade (a government department which administers the Acts as the Minister of Labour of Canada administers the Combines Investigation Act) may, upon application, " appoint one or more competent inspectors to investigate the affairs of the company and to report thereon in such manner as the Board directs." The application must be supported by evidence inter alia, of " good reason " for the application. The inspector may require production of books and documents, administer oaths and examine witnesses under oath. On the conclusion of the investigation the inspector is to report his opinion to the Board. There is provision for costs of the inquiry. The applicants may be compelled to give security for costs. For references to the terms of the applicable legislation see—

5 Halsbury's Laws, Par. 440.

and for an illustration of the application of these provisions see—

Re Grosvenor &c. (1897) 76 L.T. 337 (C.A.).

In the case just cited prohibition against such an inspector under the Companies Acts, with the above mentioned powers, and against the Board of Trade, was refused on the ground that such inquiries by inspectors involved nothing in the nature of a judicial determination and so was an administrative and not a judicial enquiry.

10 Halsbury's Laws Par. 303 note (n).

In certain cases, under the law of evidence, a report made by a public officer on an inquiry of a judicial or quasi-judicial nature is admissible as evidence of the facts stated therein (e.g., where it is virtually a judgment as in *R.* v. *London County Council &c.* (1895) 11 T.L.R. 337). The report of such an inspector under the Companies Acts is not so admissible, because his duties are held to be merely administrative.

Re Grosvenor &c. (1897) 13 T.L.R. 309 (C.A.).

13 Halsbury's Laws, Par. 750.

There is a very close similarity between the matters preliminary to appointment of such inspectors, their powers to examine, their duty to report and the class of person to whom they report, as provided by the Companies Acts, and the same matters, powers, duty and class of person as provided respecting commissioners by the Combines Investigation Act.

There has been a decision in Alberta which is adverse to the contentions of the appellant.

The Court of Appeal of that Province has decided, in the case of a claim of the protection of absolute privilege for defamatory words uttered by a witness before a royal or statutory commissioner, that the privilege applies. The court on that ground, raised and argued as a point of law, dismissed a plaintiff's action.

Georgeson v. *Moodie* 12 Alb. L.R. 358 (C.A.).

For a case decided the opposite way see—

Jellicoe v. *Hasselden* (1902) 22 N.Z.L.R. 343.

The Appellant respectfully submits that the Alberta case was erroneously decided. The action was for slander uttered by a witness while

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giving evidence in proceedings before a commissioner acting under Chapter 2 of the Alberta Statutes of 1908, the Inquiries Act. The Act contained the usual clauses. The defence was absolute privilege. The commissioner was a District Court Judge.

The appeal in *Georgeson* v. *Moodie*, supra, as in the present case, was decided principally upon two authorities (*Dawkins* v. *Rokeby* and *Barratt* v. *Kearns*). The rationale of both these cases is liable to be misunderstood upon a cursory reading of the reports. They are discussed specially in this factum at pages 25 to 29 (Record pp. 61 to 65). Said Harvey, C.J., without citation of authority, " any enquiry to be made under the Act can involve no administrative duty, the work being purely judicial."

It is submitted that in *Godson* v. *The City of Toronto*, 18 S.C.R. 36 (which was not cited on the argument of *Georgeson* v. *Moodie*) the Supreme Court had held that the work of such commissioners upon such inquiries was not judicial, but merely ministerial.

Harvey, C.J., in *Georgeson* v. *Moodie*, relied also on the opinion of Lord Esher in *Royal Aquarium &c.* v. *Parkinson* (1892) 1 Q.B. 431 (C.A.). Lord Esher is the one judge of three who decided that case who does not specifically state that the expression " tribunal recognized by law " means a tribunal that is recognized as a court by law. See the opinions of Fry and Lopes, L.JJ. pages 442 and 447, and see *Attwood* v. *Chapman* (1814) 3 K.B. 275, wherein Avory J. at page 283 says that the principle of *Dawkins* v. *Rokeby* was approved by the Court of Appeal in *Royal Aquarium* v. *Parkinson*, supra, " with the qualification that the tribunal referred to must be a court in law or a court recognized by law." He refers to the opinions in that case of Fry and Lopes, L.JJ., in justification of his contention that the " tribunal " mentioned must be a court, recognized as such by law.

Further, it was held again upon the authority of the just cited cases, in *Collins* v. *Whiteway*, (1927) 2 K.B. 378 that the protection of absolute privilege does not extend to proceedings of bodies other than courts of justice and other courts recognized as such by law and, as to courts themselves, only while performing judicial functions. Horridge, J., who decided the case, followed *Royal Aquarium* v. *Parkinson* (1892) 1 Q.B. 431 (C.A.) and *Attwood* v. *Chapman* (1914) 3 K.B. 275.

It is submitted that the Court in *Georgeson* v. *Moodie*, supra, erred in two respects: (1) in holding that the Royal or statutory commissioner was a court, and (2) that the functions of such commissioners are judicial.

For the protection of absolute privilege to apply such commissioners must be held (1) to be courts and (2) to be authorized to perform and be performing judicial functions.

It is not contended by the Appellant that a commissioner or commissioners cannot constitute a court. Indeed the species of tribunal other than a court of justice which may be " a court recognized by law," so that the protection of absolute privilege can apply, is and has been well exemplified in Canada by our Dominion Board of Railway Commissioners, the now defunct Board of Commerce of Canada and the newly erected Dominion

Tariff Board. In all three cases the Acts erecting these Boards of Commissioners provide that the commissioners " shall be a court of record." The question, if it ever arises, whether the protection of absolute privilege applies while such Boards are engaged in disposing of merely administrative business, will be easily answered. Their privilege will not be superior to that of courts of justice.

In the same sense the proceedings before the Military tribunal the status whereof was considered in *Dawkins* v. *Rokeby*, already cited, (which tribunal was termed a " Court of Inquiry " by the applicable legislation and was part of the machinery whereby military law was being administered under the Commander-in-Chief, to whom, by law, the " court " reported and by whom a binding judicial decision could be given) were proceedings which although not before a court of law, court of record or court of justice, were yet before a " court recognized by law," organized under the Army Act to administer, or to assist in the administration of, a system of law which while part of, is operated collaterally to, the ordinary law of the realm.

25 Halsbury's Laws, Par. 79.

The proceedings, for several reasons, must have been held to have been proceedings before a court. (1) The court of inquiry had been by statute termed a court. (2) Courts of inquiry, under that name, are recognized as courts under the military law system. (3) The business of the court was to find and report matters of fact to a tribunal (the commander-in-chief) for the purposes of a judgment to be given by him. The " court of inquiry," so called, was therefore a constituent part of a court which, in combination, fact finders and judge, had power to hear and determine, just as in a court of justice the jurymen are constituent members of the court, fact finders, and in combination with the judge, constitute the court. (4) The court of inquiry might even be regarded as taking evidence by precognition for the commander-in-chief, to found his judgment in the matter involved, and thus to fall within the principle of *Watson* v. *McEwan* (1905) A.C. 480, in which event the judicial cloak of the court of which they were delegates would envelop them and they would be constructively, the commander-in-chief plus themselves, for the purposes of the law of absolute privilege. (5) The court of inquiry may be regarded as analagous to a commission to take evidence sent out in an ordinary action brought in a court of justice. Proceedings before such commission, of course, qua the protection of absolute privilege, are as fully protected as if the proceedings were in court.

Likewise, because the Ecclesiastical tribunal the status whereof was considered in *Barratt* v. *Kearns*, already cited, although not termed a court by the applicable legislation, (and possibly for that reason the true principle of the decision is more easily identified) was part of the machinery whereby ecclesiastical law was being administered under the Bishop, to whom, by law, the commissioners reported, and by whom a binding judicial decision could be given, the proceedings before the commissioners, though not before a court of law, court of record or court of justice were yet before a " court recognized by law," organized to administer or to assist in the administration of a system of law which, while part of, is operated collaterally to the

ordinary law of the realm. Back of the commissioners, admittedly only fact finders, was the Bishop, who was a court, and who, upon the facts found by the commissioners, was recognized by law as authorized to pronounce, and who would pronounce, a binding judicial decision. So, in *Barratt* v. *Kearns*, too, there were several good reasons for holding the proceedings of the commissioners to be have been proceedings of a court recognized by law to have authority to perform judicial functions. (1) The Bishop was, by virtue of his office, an Ecclesiastical Court. (2) Enquiry by commissioners is an ordinary, indeed practically necessary, means adopted by ecclesiastical courts (Bishops) to secure evidence. The Bishop, having other duties to perform, delegates practically all of his judicial duties. He even delegates the power of decision in most cases to various ecclesiastical courts, sometimes reserving the right to sit therein. In some cases he reserves the right to decide. In others, as in *Barratt* v. *Kearns*, while he delegates to commissioners the power to hear, he is not authorized to delegate the power to determine. (These references to the practice of ecclesiastical courts are supported by citations at pages 26 to 29 of this factum, Record pp. 62 to 65). (3) The business of the commissioners was to find and report matters of fact to the Bishop, who, as a recognized court, would thereon pronounce a binding judicial decision. The commission was thus a constituent part of an ecclesiastical court, which court's functions were judicial functions. The commissioners were the fact finders. The Bishop was the judge. Again the parallel of the jury as a constitutent part of the court applies. (4) The commissioners whose findings of fact were designed to be the basis of decision in the ecclesiastical cause could hardly have been regarded as not part of the court when a commissioner who merely hears evidence in courts of justice is qua his function regarded as part of the court. (5) The commissioners might also be regarded as being within the "precognition" principle of *Watson* v. *McEwan* (1905) A.C. 480.

The case being discussed (*Barratt* v. *Kearns* (1905) 1 K.B.) involves the status, as a court, of commissioners appointed by a Bishop in proceedings under the Pluralities Acts of 1838 and 1885. These Acts concern the holding by clergymen of two or more benefices together, and the proper administration of the benefices and of the assets thereof. (See 11 Halsbury's Laws Pars. 1188-1195). It was held that the protection of absolute privilege extended to defamatory words uttered before commissioners appointed by the Bishop under the Acts in proceedings pending before him.

The rationale of *Barratt* v. *Kearns* may be most conveniently disclosed, possibly, by a number of references to Halsbury's Laws, wherein the applicable legislation and ecclesiastical law procedure are sufficiently set out.

The case involved Sec. 77 of the Pluralities Act, 1838, and the Pluralities Act Amendment Act of 1885. "Where the duties of a benefice are duly reported to the bishop to be inadequately performed" (viz. reported by the commissioners mentioned in Par. 1205 of 11 Halsbury, page 613 and 614, these being the commissioners concerned in *Barratt* v. *Kearns*) "he" (the bishop) may require the incumbent, although resident and engaged in performing the duties, to nominate one or more curates with sufficient

stipends to be licensed to perform or assist in performing the duties." If this is not done the Bishop may himself do it, (and, as will appear, the Bishop may sequester the profits of the benefices if the stipends to the Bishop's nominees as curates are not paid by the incumbent).

11 Halsbury's Laws Pars 1272, 1205, 1230 and notes, 1265.

Differences between a curate and an incumbent, as to his stipend or payment thereof, must be summarily decided by the bishop without appeal. In case of wilful neglect to pay the stipend or arrears the bishop may under the Pluralities Acts, enforce payment by monition and sequestration of profits of the benefice.

11 Halsbury's Laws Par. 1265 and 1203 notes.

The Pluralities Acts, it is submitted, confer upon an existing Ecclesiastical Court, the Bishop, new judicial powers, exercisable in a manner usual in that court, viz., after previous inquiry by commissioners, or by delegation.

For the jurisdiction of a Bishop, in part judicial, in part administrative, see—

Statute 10 and 11 Vict. C. 98.
Phelps v. *St. John* 10 Exch. 895.

For another example of the operation by the Court of the Bishop through inquiry by commissioners see—

Sheppard v. *Bennett, L.R.* 4 P.C. 350.

The case just cited discloses that the commission appointed and sent out by a Bishop (under an Act of 3 & 4 Vict. C. 86, which parallels the Pluralities Act) is a preliminary step for the purpose of advising the Bishop, as a court, whether there is a prima facie case. When the commission reports the Bishop either himself tries and decides the case or elects to send it to the higher, provincial, court. This he does by a letter of request which founds jurisdiction in the higher court. See also—

11 Halsbury's Laws Pars. 1008 to 1011.

A mandamus to compel the bishop to issue a commission under the Act 3 & 4 Vict. c. 86 was refused on the ground that its issuing was in the discretion of " the court " (meaning the Bishop).

R. v. *Chichester* (Bishop) 2 Ellis & Ellis 209.

Sentence, under the Clergy Discipline Act of 1892, and in some other cases, must be pronounced by the Bishop. Inquiry is by delegation.

The trial, in whole or in part, of Ecclesiastical causes, by delegation or by commission, is the ordinary method of trial in these courts. Judicial power resided in the bishop but chancellors, ordinaries, commissaries and others act for him as required by statute or by the bishop himself, as the case may be. In some cases, by statute, the Bishop may require a civil court to hear and decide for him an ecclesiastical cause. In that event the court is the Bishop's alter ego. Its power is his power and it is limited as he sees fit to limit it, having no jurisdiction of its own, or any except through the Bishop. An instance is afforded by

Hudson v. *Tooth* 3 Q.B.D. 46.

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The Bishop acts in such cases as a court and judicially.

Serjeant v. *Dale* 2 Q.B.D. 558.

Allcroft v. *London* (Bishop) (1891) A.C. 666.

The Bishop may himself try, instead of delegating the trial of, a cause originating before him.

11 Halsbury's Laws Pars. 1016-1017.

The ecclesiastical jurisdiction, as a court, of the bishop of an English diocese is very ancient.

11 Halsbury's Laws Pars. 951-954.

As the duties of the bishops increased they began to delegate their judicial and administrative powers.

11 Halsbury's Laws Par. 957.

At the present day every bishop has his consistory court in which formerly he presided. The court is held by the bishop's chancellor. There are also commissary courts in remote parts of the diocese. When the Bishop or his official visitor is present the jurisdiction of the commissary court is superseded.

The Bishop may, and sometimes does, reserve to himself, when issuing the patent to his chancellor, the right to sit in his consistory court to hear certain kinds of causes. The process of the court runs in the name of the Bishop.

R. v. *Tristram* (1902) 1 K.B. 816 (C.A.).

11 Halsbury's Law Par. 961.

It is submitted that when Parliament, by the Pluralities Act of 1838 and amendments, conferred upon the Bishop the power to appoint commissioners for defined purposes it conferred new powers upon an already existing court—the Bishop, instead of, as seems to have been assumed, created a new court—the commissioners. These were unquestionably for the purposes of the law as to absolute privilege, and of *Barratt* v. *Kearns*, (supra), a court, but they were vicariously a court, as a jury or a commissioner to take evidence would be when acting in or for a civil court.

It is submitted that the status of such commissioners appointed by the Bishop has been settled by authority, and that they exercise judicial functions as part of the court of which they are commissioners. They report to the Bishop who decides the cause.

Maughan Ettrick v. *Chelmsford* (Bishop) 90 L.J.K.B. 766.

Judgments of the bishop and his process thereon are entered in and enforced through his commissary court. The bishop's process following upon judgment is oftenest monition and sequestration.

"In proceedings by monition and sequestration for non-residence and for non-payment of curates the monition issues under the hand and seal of the bishop and is served personally on the incumbent and immediately after service is returned into the consistorial court of the Bishop and is there filed with an affidavit of the time and manner of the service.....The sequestration issues under the seal of the consistorial court of the Bishop and is served and returned into the registry of the court in the same manner as is required with respect to the monition."

The preceding extract is with reference to proceedings under the Pluralities Acts.

11 Halsbury's Laws Par. 1230 & notes.

The duties imposed upon the bishop by the Pluralities Acts are of a distinctly judicial character. They involve not merely the power to dispose of, and to decide as to, rights and property, but also the enforcement of such dispositions and decisions by punitive process, such as monition, inhibition, sequestration of property and suspension from office.

11 Halsbury's Laws Pars. 1205, 1206, 1225-1230, 1258.

May it not be reasonably asked, in view of the difference in character of the Pluralities Act and the Combines Investigation Act, what similarity at all exists between the case of *Barratt* v. *Kearns* and this case except that both are cases wherein there had been commissioners appointed?

Barratt v. *Kearns* was a case where commissioners of a court were acting for a court, hence as a court, and performing judicial functions in a cause at law. In this case the respondent was not acting for a court or as a court or performing judicial functions and there was no cause at law.

The preceding extensive review of *Barratt* v. *Kearns* was undertaken only because the majority decision below pronounces that case to be " conclusive " against the Appellant, who respectfully submits, notwithstanding, that, properly understood, that case has no application at all to this.

The following circumstances indicate that commissioners appointed under the Combines Investigation Act were not intended to constitute courts nor to perform judicial functions :—

1. The Board of Commerce Act of 1919, which the present Act replaces, provided (Cap. 37, sec. 3 (2) Acts of 1919) that the Board " shall be a court of record." The existing Act contains no like provision as to Registrar or commissioners.

2. The court so constituted must be, since the decision of the P.A.T.A. case, if intended to be constituted as a court at all, a criminal court. The Dominion Parliament is not constitutionally capable of constituting such a court.

B.N.A. Act, Sec. 91 (27).

3. As a general principle courts are open to the public except as otherwise provided under temporary conditions. Normally a court has not power, even with consent of parties, to hear a case in private. (9 Halsbury's Laws Par. 1; *Nagle-Gilman* v. *Christopher* 4 Ch. Div. 173; *Scott* v. *Scott* (1913) A.C. 417. The Combines Investigation Act provides (Sec. 25) for proceedings in private except that portions thereof may be held, by order of the Minister, in public.

4. The statute itself must provide for and constitute the Court, if any. It cannot result from an act of the Crown, which cannot create a court that does not proceed according to the common law. (9 Halsbury's Laws Par. 24)

5. Commissioners under the Act are mere assistants of the registrar of the Act, to whom they report. It is he who causes and either

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conducts or superintends all investigations. He is an administrative officer of the Minister of Labour, who is the administrator of the Act. The Judicial Committee of the Privy Council supported the constitutionality of the Act (that is, excepting section 29 and 30) as being made up of provisions ancillary to sections 32 looking to administration of the Act, and " not in any way interfering with the administration of justice." They liken the character of the duties of the Registrar and commissioners under the Act to those of revenue officers of the Dominion. These are administrative. If a court were intended to be created it could only be a criminal court, and that would be an interference with the administration of justice. (Sections 5 and 10 to 16 of the Act, particularly sections 10 and 12.)

6. None of the proceedings of commissioners under the Act are for any court, or result in any judgment or in any consequence except one less than that possibly ensuing from an indiscreet voluntary admission to a police officer. The Minister may remit the evidence collected by the Commissioner to an Attorney General (Sec. 31). He, or the Solicitor General of Canada, may authorize a prosecution in the ordinary way in the ordinary courts, beginning de novo. (Sec. 31). That authorization would have been necessary even if no inquiry had been held (Sec. 32 (2)). On such prosecution the oral evidence taken before the commissioner must not be used. (Sec. 24.)

7. The Act does not (although without statutory authority the Commission appointing the Respondent does) require or authorize a commissioner to report his conclusions. The act does (sec. 27 (3)) call for his conclusions in the case of an interim report required by the Minister. Commissioners report finally to the registrar, who under the statute, prosecutes all investigations, and who possibly ought, under sections 10 and 12, to report to the Minister, his, the Registrar's, conclusions, derived from the materials reported to him by the commissioner. The Commissioner, therefore, merely collects and reports evidence, as does an investigating accountant, or a detective or policeman, or, sometimes, an Immigration, or Revenue, or Income Tax, officer. That is administrative work and not judicial.

8. There is not attached to the exercise of the functions of such commissioners that necesssary " apparent regularity " of performance of " the judicial functions of a court," which is required by the citation (from Spencer Bower on Actions for Defamation) appearing in the majority decision below. Such commissioners are of an intermittent existence. They are here to-day and gone to-morrow. They need not be lawyers, nor need they be capable of understanding or construing the Combines Investigation Act. Indeed, they fall exactly within the excluding terms of the citation mentioned, in that, if any commissioner appointed under the Act can be a " tribunal " at all, he is a " tribunal discharging merely administrative or consultive functions, though acting " (supposititiously) " according to judicial

principles." That citation, seemingly, would exclude from the protection of absolute privilege not merely the Respondent, but many others who approximate much more closely than he does to the legal requirement of action " as nearly as possible similar to that in which courts of justices act."

The Appellant submits that while there is abundant reason for the upholding (in the public interest as well as in that of court, counsel and witness) of the law of absolute privilege, as it has been applied to the proceedings of the permanently erected courts of justice and other courts erected and recognized by law as having authority to exercise and administer justice, there is no reason at all for the extension of that protection to such different persons as may intermittently and (as distinct from witnesses called before them) of their own volition, fill such minor offices, as, for a short time and for a single occasion was filled by the Respondent. That kind of law, it is submitted, has never before been extended to that kind of a " court." It is submitted that officers such as the Respondent are sufficiently protected by the law of qualified privilege, which extends freely to all officers exercising quasi-judicial powers, such as justices, local councils and other public officials exercising administrative powers, acting on arbitrations, &c.

> " Besides judicial persons and bodies, strictly so called, there are many other persons and bodies who have authority or discretion to decide upon matters affecting other persons. All persons exercising such quasi-judicial powers, and all parties, advocates and witnesses before them are entitled to a lesser degree of protection if the full judicial protection is not available. That is to say, in the absence of fraud, collusion, or malicious motive, they are not liable to any civil action at the suit of any person aggrieved by their decisions or by words used in the course of the proceedings.
>
> 23 Halsbury's Laws Par. 685.

It was the opinion of Hodgins, J.A., below, that the law of qualified privilege affords adequate protection to such temporary and minor officials as the Respondent.

It seems to have been the opinion of Orde, J.A., and of the majority below, that there is the same and as much reason for extending the protection of absolute privilege to witnesses called before a temporary tribunal or examiner as there is for applying it to a witness in a court of justice.

Suppose this contention to be granted. Perhaps it is the law that a witness, subject to compulsion, may have absolute privilege when his " judge " or examiner has only qualified privilege. The Respondent was not a witness. He was not compellable to speak. Possibly, when he reported to a Minister of Government, if he then spoke defamingly his relevant observations would have been absolutely privileged, say, as acts of state. But why should he utter words " unnecessary, intemperate and opprobrious " (per Hodgins, J.A., below) before the time came for him to

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speak at all? He was not trying anybody. His opinion, if ever desired, was being uttered too soon, and he knew it, yet he spoke, as may be assumed for present purposes, falsely and maliciously, deeming the occasion to be absolutely privileged. May not the Appellant contend that there was an abuse of the occasion and claim the right to trial of his plea? The Respondent openly advised the world that the Appellant should be reported to the Law Society. Did not the Respondent step out of character when he interrupted his proper business long enough to say that?

The Respondent has not justified by his pleading nor, as he might, pleaded an offer to withdraw the words used. The issue is therefore whether the policy of the law requires that the Respondent, with the defence of qualified privilege open to him, whereupon he may escape all results of defamation unless the Appellant can establish malice, should have the same advantage qua the law of privilege as the judges of the permanently established and acting courts of justice and of other courts which administer justice in like manner to the ordinary courts of justice.

It is submitted that to accord to the Respondent the protection of absolute privilege would be to abolish the distinction between absolute and qualified privilege. The latter is designed to apply to such as the Respondent. It is a very valuable protection. Perhaps, in the past, (although this is not conceded) those learned judges who distinguished between the two classes of privilege and measured and defined their application were more practically sensible than logical in doing so. Perhaps it is a fact that witnesses, counsel and "judges" in proceedings under the Combines Investigation Act need to be protected from either their own actual malice or the possible allegation of it, but this Appellant submits that it is now the law, the change whereof is in the care of the Ontario legislature, that such as the Respondent do not come within the protection of absolute privilege, and that neither reason nor public policy recognizes any similarity in the position of the permanent judiciary of this country and the intermittent occupants of minor commissions of inquiry sent out in assistance of the administrative work of government departments.

As to the interesting, important and, as yet, in this case, untried and unconsidered matter of breach or excess of privilege by the Respondent, the Appellant relies upon the reasoning of and the authorities cited by Hodgins, J.A., in the court below. The leading case upon breach of privilege concerns witnesses.

Seaman v. *Netherclift*, 1 C.P.D. 540; 2 C.P.D. 53. That case is referred to in—

Goffin v. *Donnelly*, 6 Q.B.D. 308.

Munster v. *Lamb*, 11 Q.B.D. 594.

Law v. *Llewellyn* (1906), 1 K.B. 487.

The privilege of a witness seems to be confined to the period of his presence in the witness box. His remarks in the court room before or after giving evidence are not privileged.

Trotman v. *Dunn*, 4 Camp. 211.

Lyman v. *Gowing*, 6 L.R. Ir. 259.

Odgers (Libel and Slander) seems to regard it as settled that remarks of witnesses, even while in the box, which are wholly irrevelant to the matter of inquiry, uncalled for by any question of counsel and maliciously introduced by the witness for his own purposes are not privileged. There is an untried issue of fact as between the Appellant and the Respondent on the pleadings, as to whether or not the Respondent used the words " it ought to be reported to the Law Society." It is submitted that what ought to happen in the future to counsel whose legal opinions found in the hands of witnesses being examined displease commissioners acting under the Combines Investigation Act is matter entirely dehors that Act and the duties of Commissioners under it.

The law of privilege has dealt tenderly with witnesses. It protects their relevant or merely irrelevant volunteer observations, yet it recognizes that they may step out of character and when they do so for their own indirect purposes, deliberately, it withdraws their protection. It seems never to have been expressly decided whether the law is the same as to " judge " and counsel. It is submitted that in reason it ought to be, and that in any event an action designed to try out this undecided question ought not to have been dismissed summarily as an abuse of the process of the court.

Since the foregoing was put in type the case of *Hearts of Oak* v. *Attorney-General* (1931), 47 T.L.R. 579 (C.A.) has been reported. The case involved, primarily, the question whether an inspector appointed under the Companies Acts to investigate and report upon the affairs of a particular company could be restrained from carrying on the proceedings in public. Among the grounds of resistance to the application to restrain was one setting up that the inspector was a court because he had the power to hear and determine and that no court could sit otherwise than in public unless expressly authorized so to do.

Of the three judges who heard the appeal, one, Lord Hanworth, after discussing the rationale and effect of the cases (such as *Dawkins* v. *Rokeby* and *Barratt* v. *Kearns*) upon absolute privilege and referring to cases of prohibition, held that the inspector could be restrained from proceeding in public. The other two judges in appeal held, upon grounds not in every respect the same, that the inspector had a discretion whether to proceed in public or privately. A majority of the court (Lord Hanworth and Romer, L.J.) reviewing the cases upon absolute privilege for the purpose of discovery of what is a court, restates and clarifies the previous pronouncement of the Court of Appeal that absolute privilege applies only in courts of law and courts in law, and approves the decision of Horridge, J., in *Collins* v. *Whiteway*, cited on pages 19 and 24 of this factum, that absolute privilege does not attach even to a court, so called, when the business of the so-called court is ministerial and administrative, as distinguished from judicial. The third member of the Court of Appeal found it unnecessary to pronounce whether or not the inspector could be considered to be a court, because, for reasons which he indicated, the

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inspector would be entitled to sit in public whether he was or was not a court.

The case discloses that in *Dawkins* v. *Rokeby* and *Barratt* v. *Kearns* there was power to hear and determine as between parties to a judical proceeding, wherefore the tribunal hearing and determining was a court.

J. G. KELLY,
Counsel for the Appellant.

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PART I.

STATEMENT OF FACTS.

This is an appeal by the Appellant from the Judgment dated the 15th day of June, 1931, of the Appellate Division of the Supreme Court of Ontario which dismissed with costs the Appellant's appeal from the Judgment of Mr. Justice Orde, dated the 5th day of May, 1930, dismissing the Appellant's action with costs. The delay in the hearing of the appeal to the Appellate Division was due to a direction of the Court that the appeal stand off the list for hearing until after the Judicial Committee of the Privy Council had given judgment in the *Proprietary Articles Trade Association Case* 1931, A.C. 310, then pending before the Privy Council, on the question of the validity of The Combines Investigation Act, R.S.C. 1927, Ch. 26, the validity of the said Act having been raised by the Plaintiff in this action in his reply to the Defendant's plea.

The Plaintiff's claim is for damages for slander. The words complained of are set forth in the Statement of Claim (see Record page 4, line 32 to page 5, line 6) and Particulars of the Statement of Claim (see Record page 6) were delivered by the Plaintiff to the Defendant upon demand therefor. The Defendant sent up " absolute privilege " as his defence upon the ground that he was acting at the time complained of as a Commissioner appointed by an Order of the Governor-General-in-Council of Canada, bearing date the 19th day of July, 1929, with all the powers of a Commissioner under The Combines Investigation Act, R.S.C. 1927 Ch. 26, and of The Inquiries Act, R.S.C. 1927, Ch. 99, and that the words charged against him (other than the words " it ought to be reported to the Law Society ") were spoken in the ordinary course of the investigation committed to him and at intervals during the course of the examination under oath of a witness, named Louis M. Singer, upon a written opinion of the Plaintiff to the said Singer. (See Record pages 7 and 8.) The Plaintiff in his Reply (see Record pages 8 and 9) joined issue with the Defendant and replied that The

Combines Investigation Act was beyond the legislative competency of the Parliament of Canada, that the Governor-General-in-Council of Canada had in law no right to appoint or commission the Defendant, that the Defendant was not acting in performance of any jurisdiction under the said Combines Investigation Act but in excess of and apart from such jurisdiction, that the Defendant was not a court or a judge or acting as or for a court or a judge or as a judicial officer or official, or in a manner like to that in which courts or judges act, or then performing any judicial function or duty but only ministerial functions, and that the Defendant was trespassing ab initio in or upon the office which he purported to fill exercising its powers and duties.

The Plaintiff was examined for discovery and in his examination (see Record pages 10 and 11) admitted that the words alleged to have been spoken by the Defendant were spoken by the Defendant while acting as a Commissioner as aforesaid.

The Defendant then moved the Court under Rule 124 of the Rules of Practice and Procedure (see Appendix hereto page 75) for an order dismissing the action upon the ground that the Statement of Claim disclosed no reasonable cause of action or that the said action was frivolous or vexatious in that the Defendant was absolutely privileged on the occasion on which it is alleged he spoke the words complained of, or upon such other grounds as appeared from the material, or for such other order as to the Court might seem just (see Record page 11, line 22 to page 12, line 10). The Defendant notified the Plaintiff in his said Notice of Motion that he would read the Writ of Summons, the pleadings and proceedings in the action, the examination of the Plaintiff for discovery, and the Commission and the Order-in-Council authorizing the same therein referred to. The Plaintiff appeared in person on the motion but filed no affidavits in answer thereto. The motion was heard in Weekly Court at Osgoode Hall, Toronto, on April 17th, 1930, by the presiding Judge, Mr. Justice Orde and judgment was reserved. On May 5th, 1930, His Lordship delivered judgment dismissing the action with costs (for reasons for judgment see Record pages 12–18 and for the formal judgment see Record page 18). An appeal was taken by the Plaintiff from this judgment to the Appellate Division. The Appellate Division heard the said appeal on the 20th and 21st days of April, 1931, and delivered judgment June 15th, 1931, dismissing the appeal with costs. The members of the Court were The Right Honourable the Chief Justice of Ontario, Mr. Justice Magee, Mr. Justice Hodgins, Mr. Justice Middleton and Mr. Justice Grant. Mr. Justice Hodgins dissented from the judgment of the majority of the Court. The reasons for judgment of the majority of the Court were delivered by Mr. Justice Middleton (see Record pages 20–24). The reasons for the dissenting judgment of Mr. Justice Hodgins appear in the Record page 24, line 7 to page 32, line 23.

The Plaintiff thereupon launched this appeal to the Supreme Court of Canada.

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PART II.

The Respondent submits that the Appellant's appeal should be quashed for want of jurisdiction upon the ground that no leave to appeal has been given to the Appellant and that without such leave the appeal does not lie as of right, because " the amount or value of the matter in controversy in the appeal " cannot be said to exceed $2,000. It is not the declaration of claim but the amount or value of the matter in controversy in the appeal that determines the right of appeal. Sec. 39 of The Supreme Court Act, R.S.C. (1927) Ch. 35.

Subject to and reserving the foregoing objection to jurisdiction, the Respondent submits that the judgment appealed from should be affirmed and that this appeal should be dismissed with costs, upon the grounds stated in the reasons for judgment of the majority of the Court appealed from, written by Mr. Justice Middleton, and for the reasons given by Mr. Justice Orde in his judgment in the first Court.

PART III.

ARGUMENT.

The appeal raises the simple question of law as to whether or not the defendant is entitled to his plea of absolute privilege. The material facts are not in controversy. The Plaintiff's reply to the Defendant's plea is that the Defendant was not a Court. It is submitted that it is not necessary to be " a Court " in any strict or technical use of the word, as used in cases involving the determination of legislative competency tc create courts. Absolute immunity attaches by English Law to any person who is clothed with authority from the Crown to inquire judicially into and deal with a matter of public concern in manner like unto an ordinary court. It is not a privilege designed for the personal protection of the individual. The immunity is founded upon a rule of law declared by the Courts. The ground of the rule of immunity is public policy. As said by Scrutton, L.J. in *More* vs. *Weaver* (1928) 2 K.B. 520 at the foot of page 521,—" There are a few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason is that there are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously, as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them, it says : ' We will treat as absolutely privileged any statement made in the performance of those duties.' "

A Commissioner vested by Patent under the Great Seal of Canada issued by Order-in-Council of the Government of Canada with all the powers and privileges of a commissioner not only under The Combines Investigation Act but also under The Public Inquiries Act is entitled to freedom from

civil action for words spoken by him during and in the course of his public investigation. *Barratt* vs. *Kearns* (1905) 1 K.B. 504 is clear English authority in support of this contention. The provisions of the statutes there in question (1 & 2 Vict. c. 106 sec. 77 and 48 & 49 Vict. c. 54, sec. 3) respecting the duties and powers of the Commission are strikingly similar to the provisions in the statutes here in question respecting the duties and powers of the Commissioner in this case.

The Appellate Division of Alberta on a statement of facts, similar to those in this action, took the same view. *Georgeson* vs. *Moodie*, (1917) 12 Alberta Reports 358.

It is unnecessary to add to the very careful review of the cases by Mr. Justice Middleton in the Appellate Division and by Mr. Justice Orde in the High Court Division except perhaps to direct special attention to the extension of the doctrine of immunity in the case of *Dawkins* vs. *Lord Rokeby* L.R. 8 Q.B. 255 : L.R. 7 H.L. 744.

Mr. Justice Hodgins acknowledges that " there is a great preponderance of authority in favour of absolute privilege for those who act or profess to act judicially in performing some statutory duty " but thinks there is none " which settles definitely that there is no limit to what can be said to and of those who are during an inquiry being examined in public and in face of the press and who are not then on their trial." (Record page 32, lines 1–6.) He thinks it would be " advantageous that an authoritative pronouncement should be arrived at " (Record page 32, lines 11–12). In his view " that can only be done by sending the case to trial " and he cites *Electrical Development Company* vs. *Attorney-General* (1919) A.C. 687 as giving an indication of the view of the Privy Council in that direction, on what he regards as a somewhat similar point. But in the Electrical Development Company case, the plaintiff had obtained in the office of a local registrar of the Court the issue of a writ of summons against The Attorney-General of Ontario without his leave or fiat. The writ, however, was actually issued and the problem was to get rid of it. A motion was at once made to set aside the writ and the motion was carried in appeal to the Privy Council. The Judicial Committee said that it would be better to let the case go down to trial to ascertain what the real issue was and whether or not a fiat was necessary. There were no pleadings, no examinations for discovery, and no evidence. Here we have the pleadings, particulars and examination for discovery and if the Defendant is entitled, as a matter of law, to his plea of absolute privilege, all the necessary facts are now before the Court. In England under Order 25, r. 4 (similar to our Rule 124) and by virtue of the inherent power of the Court, an action of defamation will be dismissed on summary application where the occasion of publication was absolutely privileged. *Hodson* vs. *Pare* (1899) 1 Q.B. 455; *Law* vs. *Llewellyn* (1906) 1 K.B. 487; *Bottomley* vs. *Brougham* (1908) 1 K.B. 584; *Barratt* vs. *Kearns* (1905) 1 K.B. 504; *Burr* vs. *Smith* (1909) 2 K.B. 306. Mr. Justice Orde fully discussed the practice and procedure in his reasons for judgment (Record page 13, lines 22–29). Mr. Justice Hodgins says—" The case at bar raises some interesting and important questions " but these are obviously questions of law and the procedure

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in England as well as in Ontario is to deal with such questions on summary applications before trial.

It is submitted that the right of absolute privilege is not affected by the words used by the person who claims immunity. It was said in *More* vs. *Weaver* (1928) 2 K.B. 520 at page 522 that no Judge or witness or counsel is entitled to be malicious or careless but the law has prohibited, in the public interest, any inquiry to ascertain whether or not the person was in fact malicious. What the defendant may or may not have said in this particular instance cannot, it is submitted, have anything to do with the broad question of law whether or not a Commissioner of the Government of Canada, acting under a Patent with the Great Seal of Canada and vested with all the powers and authorities of The Combines Investigation Act and of The Inquiries Act is to be free from any fear of being harassed by civil actions on allegations, whether true or false, that words spoken by him during and in the course of his public investigation were spoken with malice.

The objection raised by the Plaintiff to the regularity of the issue of the Patent by the Governor-General in Council is not available to the Plaintiff in this action on the question of privilege. The Patent itself is the protection to the Commissioner. He is entitled to assume that the Patent is regularly and properly issued; otherwise, every Commissioner, before feeling free to proceed with his public investigation under the Patent would be constrained to await an attack upon its validity. Even if objections taken to the issue of a Patent are sound, public policy demands that the Commissioner acting thereunder be protected.

The prohibition cases relied upon by the Appellant, it is submitted, have no application here. It is difficult to see upon what theory prohibition and privilege cases are bracketed.

Mr. Justice Hodgins observes that no penal consequences follow directly from the report of a Commissioner that a combine exists and the report is not even made evidence. But it is equally plain that penal consequences follow the breach of orders made by the Commissioner for the discovery of evidence. By Sec. 27 (2) of The Combines Investigation Act, the Commissioner makes and transmits to the Registrar a report in writing, together with the evidence taken at the investigation and the Registrar shall without delay transmit the Report to the Minister. Then by Sec. 31, the Minister may remit the evidence taken by and the report of the Commissioner to the Attorney-General of the Province in which an alleged offence shall have been committed for such action as the Attorney-General may be pleased to institute. If no such action shall have been taken by or at the instance of the Attorney-General of the Province " as to the Governor in Council the case seems in the public interest to require," then the Solicitor-General may on the relation of any person resident in Canada permit an information to be laid. And by Sec. 41 of the Act, the Minister shall lay before Parliament, within the first fifteen days of the then next session, an annual report of the proceedings under the Act. In *Burr* vs. *Smith* (1909) 2 K.B. 306 privilege was held to be absolute in a defamation action against an officer appointed by the Board of Trade under the Companies (Winding Up) Act,

1890, s. 27, who in the performance of his duty, had prepared for and delivered to that Board a report on matters within Sec. 29 ss. 2 of the Act for the purpose of its being laid by them before Parliament as part of their general annual report as directed by that subsection.

By Sec. 13 of The Inquiries Act, it is to be observed, no report shall be made by the Commissioner against any person until such 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.

In *Hall* vs. *Mitchell* (1928) S.C.R. 125 at the foot of page 145 and the top of page 146, Mr. Justice Duff said that there was absolute privilege in respect of statements made before the Ontario Workmen's Compensation Board.

The relevant provisions of The Combines Investigation Act and of The Inquiries Act are printed in an Appendix hereto.

By Sec. 22 of The Combines Investigation Act, the Commissioner may order any person resident or present in Canada to be examined upon oath before him, or make production of books, papers or records and may make such orders as seem proper for securing the attendance of such witness and his examination, and the production by him of his books, papers and records and the Commissioner may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpœnas to witnesses or punishment of disobedience thereof.

And by Sec. 4 of The Public Inquiries Act the Commissioner has the power of summoning before him any witnesses and of requiring them to give evidence on oath, and to produce such documents and things as the Commissioner deems requisite to the full investigation of the matter into which he is appointed to examine. By Sec. 5 of the same Act the Commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases, and by Sec. 12 the Commissioner shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel.

It is submitted that the judgment appealed from is right and that this appeal therefrom should be dismissed with costs.

H. H. DAVIS,
of Counsel for the Respondent.

Toronto, August 21st, 1931.

APPENDIX OF STATUTES.

THE RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT OF ONTARIO (IN CIVIL MATTERS) 1928.

124. A Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such

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case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

THE INQUIRIES ACT R.S.C. (1927) CH. 99.

2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof. R.S., c. 104, s. 2.

3. In case such inquiry is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted. R.S., c. 104, s. 3.

4. The commissioners shall have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. R.S., c. 104, s. 4.

5. The commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. R.S., c. 104, s. 5.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel. 1912, c. 28, s. 1.

13. 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. 1912, c. 28, s. 1.

THE COMBINES INVESTIGATION ACT R.S.C. (1927) CH. 26.

2. In this Act, unless the context otherwise requires,

(2) " commissioner " means a commissioner appointed by the Governor in Council as hereinafter provided;

3. No proceedings under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity. 1923, c. 9, s. 32.

6. The Governor in Council shall appoint a Registrar who is a British subject, to be known as the Registrar of The Combines Investigation Act.

3. The Governor in Council may, from time to time, appoint one or more persons who are British subjects to be commissioners under this Act.

16. Every commissioner shall have authority to investigate the business, or any part thereof, of any person who is or is believed to be a member of any combine or a party or privy thereto, and who is named in

the Order in Council appointing the commissioner, and to enter and examine the premises, books, papers and records of such person.

2. The exercise of any of the powers herein conferred on commissioners shall not be held to limit or qualify the powers by this Act conferred upon the Registrar. 1923, c. 9, s. 10.

18. All provisions of The Inquiries Act, not repugnant to the provisions of this Act shall apply to any inquiry or investigation under this Act, and the Registrar and every commissioner shall have all the powers of a commissioner appointed under the Inquiries Act, including the powers which are thereby authorized to be conferred by the commission issued in the case, except in so far as any such powers may be inconsistent with the provisions of this Act. 1923, c. 9, s. 12.

22. The Registrar and every commissioner may order that any person resident or present in Canada be examined upon oath before, or make production of books, papers, records or articles to, the Registrar or commissioner as the case may be, or before or to any other person named for the purpose by the order of the Registrar or commissioner, and may make such orders as seem to the Registrar or commissioner to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or articles, and the use of the evidence so obtained, and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpœnas to witnesses or punishment of disobedience thereof.

2. Any person summoned before the Registrar or a commissioner shall be competent and may be compelled to give evidence as a witness.

27. The Registrar at the conclusion of every investigation which he conducts shall make a report in writing which he shall sign and without delay transmit to the Minister.

2. Every commissioner who conducts an investigation shall at the conclusion thereof make a report in writing which he shall sign and transmit to the Registrar, together with the evidence taken at the investigation, certified by the commissioner, and any documents and papers remaining in the custody of the commissioner; and the Registrar shall without delay transmit the report to the Minister.

31. Whenever in the opinion of the Minister an offence has been committed against any of the provisions of this Act, the Minister may remit to the Attorney General of any Province within which such alleged offence shall have been committed, for such action as such Attorney General may be pleased to institute because of the conditions appearing;

(a) any return or returns which may have been made or rendered pursuant to this Act and are in the possession of the Minister and relevant to such alleged offence; and

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No. 19. Factum of Gordon Waldron—*continued.*

(b) the evidence taken on any investigation by the Registrar or a Commissioner, and the report of the Registrar or Commissioner.

2. If within three months after remission aforesaid, or within such shorter period as the Governor in Council shall decide, no such action shall have been taken by or at the instance of the Attorney General of the Province as to the Governor in Council the case seems in the public interest to require, the Solicitor General may on the relation of any person who is resident in Canada and of the full age of twenty-one years permit an information to be laid against such person or persons as in the opinon of the Solicitor General shall have been guilty of an offence against any of the provisions of this Act.

41. The Minister shall lay before Parliament, within the first fifteen days of the then next session, an annual report of the proceedings under this Act. 1923, c. 9, s. 35.

No. 20. Reasons for Judgment. (*a*) Smith, J. (concurred in by Rinfret, Lamont and Cannon, JJ., 21st December 1931).

No. 20.

Reasons for Judgment of Supreme Court of Canada.

(a) SMITH, J. (Concurred in by RINFRET, LAMONT and CANNON, JJ).

This is an appeal by the plaintiff from a judgment of the First Appellate Division of the Supreme Court of Ontario upholding, by a majority of four to one, the judgment of the Honourable Mr. Justice Orde, dismissing the plaintiff's action upon motion in Weekly Court, on the ground that the defence of absolute privilege was clearly sound.

The first ground of appeal is that there were relevant and material issues of fact outstanding and undetermined, making it improper to dispose of the case in Weekly Court on motion.

I agree with Mr. Justice Orde that the pleadings and the admissions made by the plaintiff in the particulars furnished by him and on his examination for discovery, made it quite clear that the words were spoken by the defendant during the course of certain proceedings which he was conducting as a commissioner appointed by letters patent under the Great Seal of Canada, by the Governor General, under the authority of the Combines Investigation Act, R.S.C. 1927, ch. 26, and of the Enquiries Act, R.S.C. 1927, ch. 99.

The only question to be determined therefore was one of law as to whether or not the commissioner so acting was entitled to absolute privilege. For this reason the motion was properly entertained by the learned judge.

A very full discussion of the law on the question at issue, with a review of the cases applicable, appears in the reasons for judgment of Mr. Justice Orde on the motion and in the reasons of Mr. Justice Middleton in the Appellate Division. I agree with their reasons and conclusions and would

only add to what they have said a reference to the case of *Hearts of Oak Assurance Company, Limited* v. *Attorney General*, 1931, 2 Chy. 307, decided since the judgment herein of the Appellate Division.

In that case the Industrial Insurance Commissioner, as authorised by s. 17 of the Industrial Insurance Act, 1923, appointed Mr. John Fox inspector to examine into and report on the affairs of the plaintiff company. This section authorises the commissioner to make such appointment, if, in his opinion, there is reasonable cause to believe that an offence against this Act or certain other Acts has been, or is likely to be committed. The inspector is given power to examine into and report on the affairs of the society or company, and for that purpose to exercise in respect of the society or company all or any of the powers given by s.s. 5 of sec. 76 of the Friendly Societies Act, 1896, to an inspector under that section, which reads as follows :—

> " An inspector appointed under this section may require the production of all or any of the books or documents of the society, and may examine on oath its officers, members, agents and servants in relation to its business, and may administer such oath accordingly."

On receiving the report of the inspector, the commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed, and may, in case of a society, award that the society be dissolved and its affairs wound up, and in case of a company, may present a petition to the court for the winding up of the company. The question at issue was as to whether or not the inspector was entitled to conduct his examination in public, as he proposed to do.

Luxmoore, J., decided that on the true construction of the Act, the inspection may be held at the discretion of the commissioner, either in public or in private, or partly in public and partly in private, and was upheld by the Court of Appeal, Lord Hanworth, M.R., dissenting.

It was argued that the inspection was a judicial or quasi-judicial proceeding, and therefore must be held in public on the principle laid down in *Scott* v. *Scott*, (1913) A.C. 417. Luxmoore and the majority of the judges in the Court of Appeal, (Lawrence and Romer, L.JJ.) held that it was unnecessary to determine this question, but Lawrence, L.J., states that in his opinion there is a good deal to be said for the contention of the Attorney General that an inspection under s. 17 is in the nature of a judicial enquiry because of the powers given the commissioner as a result of it.

Lord Hanworth in his dissenting judgment says that if the hearing was a judicial proceeding he would follow the principle laid down in *Scott* v. *Scott*. He refers to a number of proceedings that have been held to be of a judicial nature carrying immunity in respect of reports of the proceedings, and cites a number of cases, including some of those cited in the reasons of Mr. Justice Orde and Mr. Justice Middleton. He points out that in *Barratt* v. *Kearns* (1905), 1. K.B., 504, it was the duty of the commissioners to hear evidence of both sides and then report, and that in *Dawkins* v. *Lord*

In the Supreme Court of Canada.

No. 20. Reasons for Judgment. (a) Smith, J. (concurred in by Rinfret, Lamont and Cannon, JJ., 21st December 1931) —*continued.*

Rokeby full opportunity was to be afforded to the officer or soldier of being present at the enquiry, of making any statement, of cross-examining witnesses and of offering evidence. After stating that in both those cases there was provided opportunity for both sides to be heard and for their evidence to be considered, he goes on to say that there is no difficulty in attaching a judicial character to such tribunals. He then alludes to the fact that the inspector was not given power to compel witnesses to answer and concludes that the proceedings of the inspector were not of a judicial character.

In the Acts under which the commissioner was appointed in the present case, he is given the most ample powers for compelling witnesses to attend and to answer questions on oath and to compel the production of documents; and there is provision that parties whose conduct is being investigated, or against whom charges are made, are to be given opportunity to be present and to be heard and to be represented by counsel.

What is said therefore in *Hearts of Oak Assurance Company, Limited* v. *Attorney General* seems to be rather in support of than against the judgment here appealed from.

The appeal must be dismissed with costs.

(b) Anglin, C.J.

(b) ANGLIN, C.J.

I would dismiss this appeal with costs.

Speaking generally, I concur in the reasons therefor given by Mr. Justice Smith.

(Sgd.) FRANK A. ANGLIN.

December 21st, 1931.

In the Supreme Court of Canada.

No. 21.
Formal Judgment, 22nd December 1931.

No. 21.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Tuesday the 22nd day of December, A.D. 1931.

Present: HONOURABLE MR. JUSTICE RINFRET.
HONOURABLE MR. JUSTICE LAMONT.
HONOURABLE MR. JUSTICE SMITH.
HONOURABLE MR. JUSTICE CANNON.

The RIGHT HONOURABLE FRANCIS A. ANGLIN, Chief Justice, being absent, his judgment was announced by The HONOURABLE MR. JUSTICE RINFRET pursuant to the Statute on that behalf.

Between

W. F. O'CONNOR - - - - - - *(Plaintiff) Appellant*

and

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

The Appeal of the above named Appellant from the Judgment of the Appellate Division of the Supreme Court of Ontario pronounced in the above cause on the 15th day of June, A.D. 1931, affirming the Judgment of The Honourable Mr. Justice Orde rendered in the said cause on the 5th day of May, A.D. 1930, having come on to be heard before this Court on the 23rd day of November, A.D. 1931, in the presence of the Appellant in person and Counsel for the Respondent whereupon and upon hearing what was alleged by the Appellant and by Counsel aforesaid this Court was pleased to direct that the said Appeal should stand over for Judgment and the same coming on this day for Judgment.

This Court did Order and adjudge that the said Judgment of the Appellate Division of the Supreme Court of Ontario should be and the same was affirmed and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellant to the said Respondent.

(Sd.) J. F. SMELLIE,
Registrar.

In the Privy Council.

No. 22. Order in Council granting special leave to appeal to His Majesty in Council, 25th May 1933.

No. 22.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of May, 1933.

Present,

THE KING'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT — SECRETARY SIR PHILIP CUNLIFFE-LISTER
EARL OF ONSLOW — MAJOR ORMSBY-GORE.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 18th day of May 1933 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of William Francis O'Connor in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and Gordon Waldron Respondent setting forth (among other matters) that the Petitioner is a barrister and one of Your Majesty's Counsel : that in Toronto on the 27th September 1929 while a witness to whom the Petitioner had given a legal opinion in writing relating to the effect and proper construction of the Combines Investigation Act (C. 26 of the R.S.C. 1927) was being orally examined under oath before the Respondent who was acting as a Commissioner to take and report evidence under the Act the Respondent uttered to that witness and in the hearing of many persons present of and concerning the Petitioner and with reference to his legal opinion certain defamatory words : that the only question arising on this Petition is one of law as to whether the occasion whereon the words uttered by the Respondent were published was one of qualified or of absolute privilege : that this question turns on the point whether the Respondent as such Commissioner was a tribunal exercising judicial functions within the meaning of the decided cases : that the Petitioner on the 2nd October 1929 issued a Writ of Summons in an Action of slander in the Supreme Court of Ontario against the Respondent and delivered a statement of claim setting out the words complained of and claiming damages : that the Respondent pleaded a defence to the claim whereby without justifying or denying (except for an immaterial denial of utterance of certain of such words) he pleaded that the remaining words complained of had been uttered with absolute privilege : that the Respondent on the 17th April 1930 moved the Court to dismiss the Petitioner's Action summarily as an abuse of process because the words complained of were uttered with absolute privilege : that the Supreme Court on the 6th May 1930 gave judgment dismissing the Action : that the Petitioner

No. 22. Order in Council granting special leave to appeal to His Majesty in Council, 25th May 1933—*continued.*

appealed to a Divisional Court of the Supreme Court and that Court composed of Mulock C.J. Magee Hodgins Middleton and Grant JJ. gave judgment on the 15th June 1931 dismissing the Appeal by a majority (Hodgins J. dissenting) : that the Petitioner appealed to the Supreme Court of Canada and that Court composed of Anglin C.J. Rinfret Lamont Smith and Cannon JJ. gave judgment on the 22nd December 1931 dismissing the Appeal: that in the reasons for judgment the Supreme Court relied largely on the Judgment of the Court of Appeal in England in *Hearts of Oak Assurance Co.* v. *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 : that the Petitioner humbly submits that in the light of the decision of the House of Lords there is little doubt that the decision of the Supreme Court is erroneous and that it would be a serious and undesirable extension of the authorities to hold that persons in the position of the Respondent herein were " Courts " entitled to absolute privilege : And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court of Canada of the 22nd December 1931 or that Your Majesty may be pleased to make such further or other Order as to Your Majesty in Council may appear fit :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 22nd day of December 1931 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs.

" And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

DOCUMENTS.

Order in Council, P.C. 1311, appointing Gordon Waldron a Commissioner under the Combines Investigation Act, 19th July 1929.

Order in Council P.C. 1311 appointing Gordon Waldron a Commissioner under the Combines Investigation Act.

Seal Privy Council Canada.

Certified to be a true copy of a minute of a meeting of the Privy Council, approved by His Excellency the Governor-General, on the 19th July, 1929.

The Committee of the Privy Council have had before them a report, dated 16th July, 1929, from the Minister of Labour, submitting as follows:

That representations have been made to the Minister of Labour to the effect that the Amalgamated Builders' Council, an organization which includes in its membership plumbing and other contractors and dealers in the building trades in Toronto, London, Windsor, Fort William and Port Arthur, co-operating with the Canadian Plumbing and Heating Guild, the Dominion Chamber of Credits, and the persons hereinafter named or referred to, is a combine within the meaning of the Combines Investigation Act;

That the Registrar of the Combines Investigation Act has made inquiries into the said alleged combine, and reports that he has reason to believe and does believe that the Amalgamated Builders' Council, co-operating with the Canadian Plumbing and Heating Guild and the persons hereinafter named or referred to, is a combine within the meaning of the said Act;

That the Minister deems it expedient in the public interest that a Commissioner be appointed under the powers conferred by the said Act to investigate the said alleged combine and the business of the persons who are or who are believed to be parties or privy to the said alleged combine.

The Minister, therefore, recommends that, under and by virtue of the powers conferred by the said Act, GORDON WALDRON, one of His Majesty's counsel learned in the law, of the City of Toronto, in the Province of Ontario, be appointed a Commissioner under the said Act, with all the powers and authority thereby conferred, to investigate the business of the Amalgamated Builders' Council, and the business of the Canadian Plumbing and Heating Guild, and the business of the Dominion Chamber of Credits, and the business of the persons named in the schedule attached, and the business of any and all other members of the Amalgamated Builders' Council or of the Canadian Plumbing and Heating Guild, and the business of any other person who is or is believed to be a member of the alleged combine or a party or privy thereto.

The Committee concur in the foregoing recommendation and submit the same for approval.

G. G. KEZAR,
Asst. Clerk of the Privy Council.

(Annexed to the Order in Council is a schedule of names. The appellant's name is not one of them.)

Commission from Governor-General of Canada to Gordon Waldron 19th July, 1929. Documents.

Commission from Governor-General of Canada to Gordon Waldron, 19th July 1929.

(GREAT SEAL OF CANADA) "Willingdon"

CANADA.

GEORGE THE FIFTH, by the grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India,

TO ALL to whom these presents shall come or whom the same may in anywise concern

GREETING:

WHEREAS in and by an Order of our Governor in Council bearing date the nineteenth day of July in the year of our Lord one thousand nine hundred and twenty-nine (copy of which is hereto annexed) provision has been made for an investigation with respect to certain matters therein mentioned by our Commissioner therein and hereinafter named as upon reference to the said Order in Council will more fully and at large appear.

NOW KNOW YE, that by and with the advice of our Privy Council of Canada, we do by these presents, nominate, constitute and appoint GORDON WALDRON, of the City of Toronto, in the Province of Ontario, Esquire, one of our counsel learned in law, to be our Commissioner to conduct such inquiry.

John Chisholm, Acting Deputy Minister of Justice, Canada.

TO HAVE, hold, exercise and enjoy the said office, place and trust unto the said GORDON WALDRON, together with the rights, powers, privileges and emoluments unto the said office, place and trust, of right and by law appertaining, during pleasure.

AND WE DO HEREBY, under the authority of the revised statute respecting inquiries concerning public matters, confer upon our said Commissioner, the power of summoning before him any witnesses and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as our said Commissioner shall deem requisite to the full investigation of the matters into which he is hereby appointed to examine.

AND our said Commissioner is hereby authorized to engage the services of our accountants, engineers, technical advisers or other experts, clerks, reporters and assistants as he may deem necessary or advisable to aid and assist in such inquiry.

AND WE DO HEREBY REQUIRE and direct our said Commissioner to report to our Minister of Labour the results of his investigation together with the evidence taken before him and any opinion he may see fit to express thereon.

Documents.

Commission from Governor-General of Canada to Gordon Waldron, 19th July 1929—*continued.*

IN TESTIMONY WHEREOF, we have caused these our Letters to be made patent and the Great Seal of Canada to be hereunto affixed.

Witness. Our right trusty and well beloved cousin FREEMAN VISCOUNT WILLINGDON, Knight Grand Commander of our Most Exalted Order of the Star of India, Knight Grand Cross of our Most Distinguished Order of St. Michael and St. George, Knight Grand Commander of Our Most Eminent Order of the Indian Empire, Knight Grand Cross of Our Most Excellent Order of the British Empire, Governor-General and Commander-in-Chief of Our Dominion of Canada.

At Our Government House in Our City of Ottawa, this nineteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine, and in the twentieth year of Our reign.

BY COMMAND,

THOMAS MULVEY,
Under Secretary of State.

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.

RECORD OF PROCEEDINGS.

BISCHOFF, COXE, BISCHOFF & THOMPSON,
4, Great Winchester Street, E.C.2.
Solicitors for William Francis O'Connor.

BLAKE & REDDEN,
17, Victoria Street, S.W.
Solicitors for Gordon Waldron.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4.