Privy Council Appeal No. 43 *of* 1933.

William Francis O'Connor - - - - - - - *Appellant*

v.

Gordon Waldron - - - - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH NOVEMBER 1934.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the Supreme Court of Canada affirming a judgment of the First Appellate Division of the Supreme Court of Ontario affirming a judgment of Mr. Justice Orde. The original judgment was given on a motion by the defendant to dismiss the plaintiff's action for slander on the ground that it was frivolous and vexatious. The question is whether the defendant in uttering the words was protected by the absolute privilege which is given to words spoken by a judge. The statement of claim alleges that the plaintiff is a barrister-at-law of the provinces of Ontario and Nova Scotia, and that the defendant published, concerning the plaintiff in relation to his profession and practice, to seven named persons the words following :—

> " 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."

The defence admits that the words alleged were spoken except " it ought to be reported to the Law Society," and alleges that when speaking the words the defendant spoke them in his office of a commissioner appointed by the Governor-General in Council under the Combines Investigation Act, R.S.C., c. 26, while he was acting judicially and that the speaking the said words was absolutely privileged.

The statement of claim did not allege the defendant's office : and it is obvious that the pleading could not be struck out as disclosing no cause of action. The plaintiff, however, on examination for discovery admitted that the words were spoken by the defendant while purporting to act under his commission. On that admission the motion in question was made and decided.

Their Lordships are of opinion that the words uttered were not protected by absolute privilege, and the order dismissing the action should be set aside. The result will be that the action may come on for trial, and in these circumstances it is desirable that their Lordships should confine their opinion strictly to the matter in issue so as to avoid prejudicing the case of either party on a future occasion.

The law as to judicial privilege has in process of time developed: Originally it was intended for the protection of judges sitting in recognised courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice. In their Lordships' opinion the law on the subject was accurately stated by Lord Esher in *Royal Aquarium* v. *Parkinson* [1892], 1 Q.B. 431 at p. 442, where he says that the privilege " applies wherever there is an authorized inquiry, which though not before a court of justice, is before a tribunal which has similar attributes. . . . The 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."

The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act ? This is of necessity a differentia which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other ; and the final decision must be content with determining on which side of the line the tribunal stands. There must be remembered on the one hand the public

policy which protects the independence of the judge; and on the other the public policy which requires that a citizen's reputation must be protected against false and malicious defamatory statements.

Has then a commissioner appointed under the Combines Investigation Act attributes similar to those of a Court of Justice; or does he act in a manner similar to that in which such courts act? In their Lordships' opinion the answer must be in the negative. Their Lordships had occasion recently to examine the provisions of the Act in question in *Proprietary Articles Trade Association* v. *Attorney General for Canada* [1931], A.C. 310 and find it unnecessary to review in detail its provisions. The constitutional validity of the Act was in that case expressly impugned on the ground that it constituted an interference with the administration of justice. The Judicial Committee negatived that contention, and it seems clear from the judgment that they came to the conclusion that the sections dealing with the investigations by commissioners and others were merely administrative machinery for inquiring whether offences had been committed. It is only necessary to remember that the commissioner by the Act is empowered to enter premises and examine the books, papers and records of suspected persons to see how far his functions differ from those of a judge. His conclusion is expressed in a report; it determines no rights, nor the guilt or innocence of anyone. It does not even initiate any proceedings, which have to be left to the ordinary criminal procedure. While it is true that some tribunals charged with the duty of inquiry whether an offence or breach of duty has been committed have been held entitled to judicial immunity, such as a military court of inquiry (*Dawkins* v. *Rokeby*, 8 Q.B. 255; 7 H.L. 744 (1873)), or an investigation by an ecclesiastical commission (*Barratt* v. *Kearns* [1905], 1 K.B. 504), there were in those cases conditions as to the way in which the tribunal exercised its functions, and as to the effect of its decisions which led to the conclusion that such tribunals had attributes similar to those of a court of justice. On the other hand, the fact that a tribunal may be exercising merely administrative functions though in so doing it must act "judicially" is well established, and appears clearly from the *Royal Aquarium* case above cited. If it is exercising such functions it seems to be immaterial whether it is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders made for the purpose of effectuating its inquiries. See *Shell Co. of Australia* v. *Federal Commissioner of Taxation* [1931], A.C. 275.

Smith J., in the Supreme Court, found his view confirmed by the decision in the Court of Appeal in *Hearts of Oak Assurance Co.* v. *Attorney General* [1931], 2 Ch. 370. That decision was reversed in the House of Lords [1932], A.C. 392, since the decision in the Supreme Court. That was a case of

an inquiry by an inspector under statutory powers given by the Friendly Societies Act. It seems to their Lordships probable that if the learned judges of the Supreme Court had had the advantage of considering that decision and the statement therein of Lord Dunedin that such an inquiry was not a judicial proceeding, and that privilege in it would be qualified not absolute they might have come to a different conclusion. In the result their Lordships find themselves in agreement with the reasoning and decision of the late Mr. Justice Hodgins in the Appellate Division of the Supreme Court of Ontario. The defendant in this case will be protected if he establishes that he spoke the words complained of on a privileged occasion, and the plaintiff fails to prove express malice. This is the measure of protection given to other administrative officers exercising similar duties, and their Lordships know of no legal principle which affords any further or better protection. The appeal should be allowed, and the orders in the court below discharged with costs; and their Lordships will humbly advise His Majesty accordingly. The appellant must have his costs of the appeal.

In the Privy Council.

WILLIAM FRANCIS O'CONNOR

v.

GORDON WALDRON.

DELIVERED BY LORD ATKIN.

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