WILLIAM FRANCIS O'CONNOR (PLAINTIFF) ..... } APPELLANT;

1931
*Nov. 23.
*Dec. 22.

AND

GORDON WALDRON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Defamation—Absolute privilege—Words spoken by person while conducting, as commissioner, proceedings of enquiry under the Combines Investigation Act, R.S.C., 1927, c. 26.

Respondent was sued for damages for alleged defamatory words spoken by him in the course of 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, c. 26, and of the *Enquiries Act*, R.S.C., 1927, c. 99.

Held, that absolute privilege attached to the proceedings conducted by respondent and protected him against the present action.

Judgment of the Appellate Division, Ont., [1931] O.R. 608, affirming judgment of Orde J.A., 65 Ont. L.R. 407, dismissing the action on motion in weekly court, affirmed. (Reasons of Middleton J.A. in the Appellate Division, and of Orde J.A., approved. *Hearts of Oak Assur. Co. Ltd.* v. *Attorney-General*, [1931] 2 Ch. 370, discussed).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (*a*) dismissing his appeal from the judgment of Orde J.A. (*b*) dismissing the action, upon motion made by the defendant in weekly court. The action was for damages for alleged defamatory statements made by defendant. The words spoken were (as found by the court on the pleadings and admissions in plaintiff's particulars and examination for discovery) spoken during the course of certain proceedings which defendant was conducting as 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, c. 26, and of the *Enquiries Act*, R.S.C., 1927, c. 99. Defendant's motion before Orde, J.A., to dismiss the action was made on the ground that the statement of claim disclosed no reasonable cause of action or

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(*a*) [1931] O.R. 608. (*b*) (1930) 65 Ont. L.R. 407.

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that the action was frivolous or vexatious, in that the defendant was absolutely privileged on the occasion in which it was alleged he spoke the words complained of. Orde, J.A., dismissed the action on the ground that the proceedings before the defendant were absolutely privileged, and his judgment was upheld by the Appellate Division.

The appellant in person.

H. H. Davis K.C. and *D. G. Farquharson* for the respondent.

The judgment of the court was delivered by

SMITH J.—This is an appeal by the plaintiff from a judgment of the First Appellate Division of the Supreme Court of Ontario (1), upholding, by a majority of four to one, the judgment of the Honourable Mr. Justice Orde (2), 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

(1) [1931] O.R. 608. (2) (1930) 65 Ont. L.R. 407.

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* (1), decided since the judgment herein of the Appellate Division.

In that case the Industrial Insurance Commissioner, as authorized 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 authorizes 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 subs. 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

(1) [1931] 2 Ch. 370.

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on the principle laid down in *Scott* v. *Scott* (1). Luxmoore J. 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* (1). 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* (2) it was the duty of the commissioners to hear evidence of both sides and then report, and that in *Dawkins* v. *Lord Rokeby* (3) 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* (4) seems to be rather

(1) [1913] A.C. 417.
(2) [1905] 1 K.B. 504.
(3) (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744.
(4) [1931] 2 Ch. 370.

in support of than against the judgment here appealed from.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. Gerald Kelly.*
Solicitors for the respondent: *Kilmer, Irving & Davis.*

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*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1932] 1 W.W.R. 234.