COSTAS KORALLIS, *Appellant*,

AND

CLEANTHIS CHRISTOFOROU AND OTHERS, *Respondents*.

(*Civil Appeal No.* 4224).

Civil Procedure—Mode of trial—Libel action—Substantial damages claimed—Proof of innuendo—Justification—Who is "first party" under Civil Procedure Rules, Order 33, *rule* 7.

Practice—Ruling under Civil Procedure Rules, Order 33, *rule* 7—*Whether appealable—Courts of Justice Law,* 1953, *section* 27.

The appellant brought an action for libel against the respondents claiming substantial damages. The respondents admitted publication of the article complained of but pleaded justification, fair comment and qualified privilege. Proof of some innuendoes rested on the appellant.

Before any evidence was heard, the trial Court ruled that the appellant (plaintiff) should begin as the " first party " on whom the burden of proof lay under Order 33, rule 7, of the Civil Procedure Rules. The plaintiff appealed.

Held : that it was in the discretion of the trial Court to regulate the proceedings within the compass of the Rules of Court, and to make rulings on the mode of trial ; and that the trial Court had exercised its discretion properly in making its ruling.

Quaere : Whether a ruling made by the trial Court could be embodied in an order so as to enable a litigant to appeal against it. A trial Court in conducting the hearing of a case and directing the various phases of trial usually had to make a number of rulings. To hold that each of these rulings constituted a decision within the meaning of section 27 of the Courts of Justice Law, 1953, and was, therefore, subject to appeal to the Supreme Court, would protract litigation unnecessarily and encourage piecemeal appeals in one and the same case, which was highly undesirable.

Appeal dismissed.

Cases referred to :

(1) *Beevis* v. *Dawson* (1956) 3 All E.R., 841.

(2) *Browne* v. *Murray* (1825) Ry. & M. 254 ; 171 E.R. 1012.

Appeal.

The plaintiff appealed against the ruling of the Full District Court of Limassol (Zenon P.D.C. and Kacathimis D.J.), dated 21st May, 1957 (Action No. 944/54), whereby he was called upon to begin as the " first party ".

M. Houry and *A. Anastassiades* for the appellant.

G. Cacoyiannis for the respondent No. 1.

G. Chryssafinis, Q.C., and *M. Triantafyllides* for respondents Nos. 2 & 3.

The facts sufficiently appear in the judgment of the Court which was delivered by :

ZEKIA J. : This is an appeal against the ruling of the Full District Court of Limassol, which was called upon by plaintiff-appellant to make a ruling at the inception of the trial, before any evidence was heard, as to which of the parties the onus of proof lies on so that that party should open his case.

The action relates to a publication which allegedly contained defamatory matter against the appellant and for the publication of which the sum of £10,000 was claimed as general damages. The defence did not deny the publication of the articles complained of but pleaded justification, fair comment and qualified privilege. The appellant contends that the publication in question is libellous in character and once the publication has been admitted the defence of justification, fair comment and qualified privilege has to be established by the defendants and, therefore, in accordance with Order 33, r. 7, the defendants should be the first party in the proceedings and they should open their case and adduce their evidence. The respondents/defendants on the other hand contended that this is not the case because (*a*) the plaintiff in certain paragraphs of his statement of claim, referring to the defamatory character of the publication in question, thought it necessary to add innuendoes to support the allegation that certain parts of the published article bear a defamatory meaning and it is up to the plaintiff to prove his innuendoes, and, (*b*), the plaintiff's claim is for substantial and unliquidated damages and for an injuction and it lies on him to prove his right to such remedies once the right to such damages and injuction has been disputed. The appellant argues that the essence of the action is not the amount of damages and the estimation of general damages is always left to the discretion of the court ; once the quality of the libel is shown damages follow automatically and once the profession and social standing of the plaintiff are not disputed there remains practically nothing on the part of the plaintiff to prove. To sum up appellant's submission is this : that the main or substantial issue in this case being whether the libel complained of is justified, privileged or not the defence should proceed to prove their defence.

Another point which has been raised by the respondents in this case is whether the ruling of the trial court is an appealable one. Plaintiff's counsel in seeking the ruling addressed the trial court in the following terms :

"So, Your Honours, the position is this—it is for you to say on whom the burden of proof lies so that we may apply the proper procedure laid down by our Rules of Court, as to who is the first and who is the second party.

If you will rule that the first party are the defendants, they will have to take the position of the plaintiff and we take the position of the defendants.

In other words, it would be for the defendants to open their case and give their evidence.

Or, if the Court rules otherwise, they are at liberty to say that they are not going to adduce evidence, in which case we shall have to consider if we are to produce any evidence".

Zenon, P.D.C., intervened and said:

"But in this case, Mr. Houry, we feel that all the allegations which are made in para. 7 should be proved before the Court".

"HOURY: I am not suggesting now that all the innuendoes should be proved without the aid of any evidence; a few of them require some evidence, but the vast majority can be shown as inferences, without the necessity of any evidence. On that point I am quite prepared to take the risk as regards the innuendoes. You will see that the article is defamatory, without the aid of any innuendo".

The ruling is made in the following words:

"We feel that in this case the plaintiff should begin his case. If he wants to come to the witness box, or call any witness, it is up to him but in a libel case, and in this particular case, we are of the opinion that the plaintiff should start his own case. He is the first party to come before the Court, he made a complaint and asked for damages, and he should start the case as the First Party in these proceedings. It is not for us to direct either side as to how they should conduct their case".

After the making of the said ruling counsel of the plaintiff applied for a formal order to be drawn up as to the said ruling regarding the onus of proof so as to enable the plaintiff to appeal from sush an order.

In the first place it is very doubtful whether the ruling made could be embodied in an order so as to enable a

litigant to appeal against it. Indeed a trial Court in conducting the hearing of a case and directing the various phases of trial usually has to make a number of rulings. To hold that each of these rulings constitutes a decision within the meaning of section 27 of the Courts of Justice Law, 1953, and, therefore, is subject to appeal to the Supreme Court would unnecessarily protract litigation and encourage piecemeal appeals in one and the same case, which is highly undesirable. However, we prefer to reserve our opinion on this point considering that the view we take on the main point involved in this appeal is sufficient to dispose of the case. The relevant section of the Civil Procedure Rules, namely, O. 33, r. 7, deals in general terms with the party on whom the burden of proof lies as having the right to begin and he is called " the first party " in the proceedings. It does not deal with cases where the onus of proof rests in part on both sides. We have, therefore, by virtue of section 35 of the Courts of Justice Law, 1953, to follow the practice and procedure obtaining in the courts in England.

In Vol. 15 of Halsbury's Laws of England, 3rd Edition, p. 271, dealing with the burden of proof and under the heading " right to begin " the law and practice are stated as follows :

> " In general this question is to be decided more upon what justice to the parties requires than upon any strict rules of practice ; though usually the party on whom the onus of proof lies has the right to begin. An exception occurs where the affirmative of all the issues is upon the defendant but the plaintiff's claim is for substantial and unliquidated damages, in which case the plaintiff begins . . . . . Where both parties allege affirmative issues or where the onus of proof on some issue or issues is on one party and on another issue or issues on the other party, then, if the plaintiff undertakes to adduce evidence upon any issue, the onus of proving which is upon him, the plaintiff is entitled to begin ".

We read also from p. 256 of Odgers on Pleadings and Practice, 13th Edition :

> " Next may arise the question as to which side has the right to begin. This depends entirely on the pleadings. Whenever the plaintiff claims unliquidated damages, he has the right to begin, unless the defendant has expressly admitted that the plaintiff is *prima facie* entitled to recover the full sum which he claims. If the damages claimed be liquidated, still, if the defendant has in his Defence traversed any material allegation which is essetial to the plaintiff's case, the plaintiff has the right to begin. If one issue be on the plaintiff, it

does not matter that there are others which lie on the defendant. But the defendant may have made admissions in his Defence which entitle him to begin".

It has indeed been regarded as an advantage or privilege to have the right to begin in a case. It is unusual for a plaintiff to disclaim such a right and insist on a ruling declaring him " the second party " for the purposes of the trial. Surely, he has to prove innuendoes and he has also to support his claim for substantial damages—even though they are general damages in character—and also his right to an injunction. On the other hand, it is a matter almost entirely in the discretion of the trial court to regulate within the compass of the Rules of Court the hearing of a case and to make rulings touching the mode of trial.

In *Beevis* v. *Dawson* (1956) 3 All E.R. 841, Singleton, L.J., dealing with a similar point states the following :

" I doubt whether there is a hard and fast rule either way. The authorities seem to me to show that the practice is based on general convenience. It must depend of course on the issues which are raised ; obviously it must depend on the pleadings in the case in which the issues are set out. If publication is admitted and justification is set up as a defence, the plaintiff is entitled to say that the onus on the issue of justification is on the defendant. In most cases there are other pleas, and the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of parties, and from the point of view of the court. These interests are really all the same. If, after hearing submissions, the judge decides that one course is preferable to another, his decision should in general be treated as final. He will not deprive the plaintiff of the opportunity of reserving his evidence until he has heard the evidence of the defendant in support of the plea of justification, if he considers that any injustice can be done to the plaintiff by such a ruling ".

Jenkins, L.J., in p. 848 of the same case referred to the judgment of Abbot C.J. in *Browne* v. *Murray* and concludes :

" In actions of this nature, the plaintiff may, if he thinks fit content himself with proof of the libel, and leave it to the defendant to make out his justification ; and then the plaintiff may, in reply, rebut the evidence produced by the defendant ".

The Lord Justice continues :

" Then the learned lord chief justice went on to say that the plaintiff should not sever his evidence on the issue of justification, leading some of that evidence in presenting his own case and some of it in rebuttal of

the defendant's case. I think that the principle there stated may well reflect a practice which in appropriate circumstances it is right to follow, but *is subject to the overriding discretion of the court to give such directions as to the order in which the onus of proof is to be dealt with* and in which witnesses are to be called as the court may find just and convenient in the circumstances of the particular case ".

There was no application on the part of the plaintiff for allowing plaintiff's evidence to be postponed until it became necessary to rebut the case of justification which might be made out by the defence. According to the principle stated in *Browne* v. *Murray the* plaintiff might have chosen to take this course but the plaintiff invited the trial court to rule that the defendants were the first party and that plaintiff was the second. Mr. Houry argued before this Court that the court below might not allow rebutting evidence to be given by the plaintiff if he had delared at the very start of the trial that he has no evidence to adduce. There is nothing to indicate that the trial court would necessarily have taken this course. We do not think that we are entitled to infer that the ruling of the court amounted to a refusal to reserve the right to the plaintiff to rebut evidence of justification which might have been given against him in the hearing.

We do not think that the court below has erred in principle or acted arbitrarily in exercising its discretion to make the ruling complained of.

We think, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.