[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

RHYS JONES MACTAGGART & BURCH LIMITED AND OTHERS . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1915.

BRISBANE, *Aug.* 5.

Griffith C.J., Isaacs, Gavan Duffy and Powers JJ.

Practice—High Court—Appeal from Supreme Court of a State—Industrial matter — Special leave to appeal — Application by Crown — Intervention by Crown by leave of Supreme Court—Interest of the Crown—Judge of Industrial Court—Industrial Peace Act 1912 (*Qd.*) (3 *Geo. V. No.* 19), *sec.* 46.

By sec. 46 of the *Industrial Peace Act of* 1912 (Qd.) it is provided that "the Crown may, where, in the opinion of the Minister, the public interests are or would be likely to be affected by the decision of the Industrial Court or the award of a Board, intervene in any proceedings before the Court or such Board, and make such representations as it thinks necessary in order to safeguard the public interests."

On the hearing of an order *nisi* for prohibition directed to the Industrial Court of Queensland and the Judge thereof in respect of an appeal to that Court from an award of an Industrial Board, the Attorney-General, who had not intervened either before the Board or the Industrial Court, intervened by permission of the Supreme Court. The order *nisi* having been made absolute, the Crown obtained special leave to appeal to the High Court.

Held, by *Griffith* C.J., *Gavan Duffy* and *Powers* JJ. (*Isaacs* J. dissenting), that the Crown did not become a party to the proceedings by virtue of the order of the Supreme Court granting leave to intervene, and had no right to intervene, either by virtue of its position as guardian of public rights, or by virtue of sec. 46 of the *Industrial Peace Act of* 1912, and, therefore, was not entitled to appeal to the High Court.

Held, also, by the whole Court, that special leave to appeal should not be granted to the Judge of the Industrial Court.

Special leave to appeal from the decision of the Supreme Court of Queensland: *The King* v. *Industrial Court*; *Ex parte Rhys Jones Mactaggart & Birch Ltd.*, (1915) S.R. (Qd.), 165, rescinded.

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APPEAL from the Supreme Court of Queensland.

An Order in Council purporting to be made under the *Industrial Peace Act of* 1912 (Qd.) ordered that there should be created an Industrial Board to apply to all labourers engaged in the construction and maintenance of water and sewerage works. The members were elected, and were subsequently appointed by an Order in Council. The Board proceeded to make an award. Rhys Jones Mactaggart & Burch Ltd. and five other parties interested appealed to the Industrial Court of Queensland from the award on the ground that it was invalid, and in the alternative on the ground that it was unfair. That Court decided that the award was not invalid, but, at the instance of the parties appealing, deferred consideration of the question of the fairness of the award on it being suggested that an application for prohibition against proceeding upon the judgment of the Industrial Court was about to be made to the Supreme Court. An order *nisi* for a prohibition was accordingly obtained by those parties, and on the return of the order *nisi* an order was, on the application of the Attorney-General for Queensland, made giving leave to the Crown to intervene. The Supreme Court made the order absolute for a prohibition: *The King* v. *Industrial Court; Ex parte Rhys Jones Mactaggart & Birch Ltd.* (1).

From that decision the Crown now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Stumm K.C. (with him *O'Rourke* and *Wassell*), for the respondents, moved to rescind the special leave to appeal. The intervener is not a person to whom leave to appeal could be granted. The Attorney-General had no *locus standi* before the Supreme Court to intervene in a private dispute. There are only two cases in which intervention has been allowed to the Crown, *i.e.*, where the Crown had a right or interest, and in cases of divorce where the petitioner and respondent might be in collusion: *Safford and Wheeler's Privy Council Practice*, p. 372, *note* (*o*).

(1) (1915) S.R. (Qd.), 165.

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[Counsel referred to the *Industrial Peace Act*, secs. 8 (2) and 46.]

Ryan (A.-G. for Queensland) and *Henchman*, for the appellants, applied for special leave to appeal on behalf of the Judge of the Industrial Court returnable *instanter*, if necessary. This appeal is a matter in which the public interests are involved: *R.* v. *Archbishop of Canterbury* (1). [Counsel referred to *Industrial Peace Act*, secs. 8 (5), 11 and 16.]

Stumm K.C., in reply.

GRIFFITH C.J. This is an appeal by special leave from an order made by the Supreme Court, on the motion of Mr. *Stumm's* clients, granting a prohibition to the Industrial Court. The Attorney-General was allowed by the Supreme Court to intervene on behalf of the Crown on the hearing of the motion. In form, the application was for a prohibition against proceeding upon a judgment of the Industrial Court, but there is some error, I think, in the order as formally drawn up. It reads: "This Court, being of opinion that the prosecutors are not bound nor affected by the award hereinafter mentioned, and that the Industrial Court had no jurisdiction to entertain the prosecutors' appeal against the award"; then follows an order granting a prohibition "from further proceeding" on the judgment. But on reference to the judgment itself it appears that what the learned Judge of the Industrial Court did was to dismiss in part an appeal from an award, and to adjourn the rest of the appeal. His words were "I shall dismiss so much of the appeal as is contained in clause 2 of the notice of motion" (which was to set the award aside on the ground that it was *ultra vires*) "and adjourn the hearing of the rest of the appeal" (which was as to the merits) "until after the decision of the Full Court in the contemplated proceedings by the appellants for prohibition." So that, really, the prohibition is to go to restrain him from going on to entertain the appeal on the merits. Then the Attorney-General obtained from this Court special leave to appeal. His only right to become an appellant

(1) (1902) 2 K.B., 503, at p. 571.

to this Court is that he was a party to the proceedings in the Supreme Court. I am quite unable to see how he was a party, or how the Supreme Court could have made him a party to these proceedings. The Crown is not interested in the matter in the sense in which the term "interest" is used in speaking of legal proceedings. The Attorney-General is interested, as any other member of the community, in seeing that the laws are properly interpreted, but had no interest in the matter in dispute between the parties. The parties themselves do not now desire to litigate the matter. It is true that under the *Industrial Peace Act* the Attorney-General is allowed to appeal against an award on the ground that the public interests are affected by it, but that is a very different thing from intervening to support the jurisdiction of the Judge to entertain an application which is alleged to be outside his jurisdiction and where the parties do not desire to litigate the question. Under these circumstances I do not think that the Attorney-General can be regarded as a party to the proceedings before the Supreme Court, or that the Supreme Court could (if they did, which is very doubtful) add him as a party. And, not being a party there, I do not think that this Court can give him leave to appeal.

With respect to the application now made by counsel for the Crown for special leave to the Judge of the Industrial Court to appeal, that is a matter for the discretion of the Court. Under ordinary circumstances, perhaps, it would be granted, that is to say, if the matter was one of real importance requiring decision. But, under the special circumstances in which this application is now made, I think that, in the exercise of the discretion of the Court, the application should be refused. In my opinion, therefore, the special leave to appeal already granted should be rescinded, and the application by the learned Judge for special leave to appeal should be refused.

ISAACS J. The circumstances of this particular case I only refer to, of course, for the purpose of this particular application to rescind leave to the Crown on the one side, and to grant leave to the Judge of the Industrial Court to appeal on the other. The Governor in Council, by an Order in Council, created a certain

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Industrial Board. The members were elected, and were subsequently, by an Order in Council, appointed. The Board proceeded to make an award. It was said by a party interested that that award was invalid, and, in the alternative, that it was unfair. That was said on an appeal to the Industrial Court. The Industrial Court heard the appeal, and decided that the award was not invalid. If the Court had decided it was invalid, of course there was an end to the whole matter, but, having decided it was not invalid, it was then proceeding to consider the fairness of it at the instance of the party appealing. A suggestion having been made that a prohibition to the Supreme Court was about to be taken, that portion—as to the unfairness—was deferred by the Industrial Court. Before the Industrial Court the Crown did not appear. It could have appeared under sec. 46 of the Act, which says: "The Crown may, where, in the opinion of the Minister, the public interests are or would be likely to be affected by the decision of the Court or the award of a Board, intervene in any proceedings before the Court or such Board, and make such representations as it thinks necessary in order to safeguard the public interests." Not only could the Crown have appeared before the Court, but it could have appeared before the Board in the first instance, and after it had been before the Board it could have appeared before the Court. The section says so. If it appeared before the Industrial Court, I am at a loss to understand how the Crown could be shut out from carrying on its safeguarding of the public interest before the Supreme Court of the State, and beyond the Supreme Court of the State, on the ground that it was not a competent appellant. If the Crown was not a competent appellant there, it must be because the law of Queensland did not contemplate that the Crown, having intervened under sec 46, should continue its intervention in the Courts of the State. If, however, the fact of its intervention in the Industrial Court connoted that it also might competently carry on its safeguarding of the public interests of Queensland in the State Courts and become a party there, then it seems to me that the fact of its intervention being allowed by the Supreme Court of Queensland invests it with competency to carry on the same safeguarding of the same public interests on

this appeal. There is no authority on the point. We have to consider it on general principles, and I find that under this Act the determination of an industrial matter—I do not refer to industrial disputes, which are between parties—is not as between parties. It is quasi-legislation which binds parties who are not in the industry to-day at all, and they are bound if they come into the industry to-morrow. Therefore, it is difficult, to my mind, to confine the settlement of industrial matters under this Act to the same limits as pertain to the parties in a litigation in a Court of Justice. The question of what is fair and right in relation to any industrial matter is, by the Act, to extend not only to the interests of the persons immediately concerned, but also to the interests of the community as a whole—that is to say, that the interests of the persons not in the particular calling are to be considered as well as those who are in the calling. Effect is given to that by sec. 8 of the Act, which allows the Crown, at any time after the making of an award by a Board, power to appeal against the award. They may appeal against the award. Why? Because injustice may be done to the community at large, or some branch of it other than the one immediately involved, and that is carried on, as I have said, by sec. 46. As we are dealing with the law of Queensland, it does seem to me that the Crown, having obtained leave to intervene in the Supreme Court of Queensland to protect the public in various ways—it may be, for instance, in regard to the validity of the Order in Council of the Governor in Council, or even the unfairness of the award towards the rest of the community—and, even if one of the parties should be indisposed to carry the matter further, in case of an adverse decision, or being unable for want of means to carry it any further, should have the right to come in and fulfil its public duty. I think, once the Crown is admitted to be a litigant, an intervener, if it is but to fight the question in the Supreme Court, that gives it a *locus standi* to fight it when it is dissatisfied with the result, and, when it comes to this Court, it seems to me its competency is clear. The question, of course, remains a matter of discretion for this Court whether, in a particular case, leave should be granted. The circumstances of this case seem to me to be circumstances in which that discretion ought to be exercised.

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And, therefore, I am of opinion that the Crown ought to be permitted to test the question.

With regard to the Judge, I am of the same opinion as the learned Chief Justice, because, although the Judge is technically a party in such a case, he is not a real or substantial party, and I should be very sorry to think he was. The fact that the learned Judge did not appear in the Supreme Court shows that he took up that fair and impartial position—of keeping clear of parties. I should be extremely indisposed to lend my aid to drag in a Judge as a litigant for the purpose of having a contest proceeded with. In the circumstances, I agree that the application to have the Judge a party should be refused.

GAVAN DUFFY J. So far as this application of the Crown is concerned, there are two questions to consider: first, is the Crown a competent appellant; and next, if the Crown be a competent appellant, are the circumstances such that special leave ought to be granted to it? Is the Crown a competent appellant? If I thought that the question could be settled on the general views which have been expressed so effectively by my brother *Isaacs*, I should say that the Crown ought to be declared a competent appellant. But, to satisfy myself, I have to look into the authority which is alleged to exist, not to show that the Crown is interested as the custodian of public rights, but to show that it is, in fact, a party to these proceedings. I am not satisfied that the Crown is a party, either by virtue of the order of the Supreme Court allowing it to intervene, or by reason of any interest it may have as the custodian of public rights, or of any interest it is given under the particular Queensland Statute with which we are now dealing. I am, therefore, compelled to come to the conclusion that this Court is not shown at present to have jurisdiction to grant special leave to the Crown. In these circumstances it is unnecessary to consider whether the discretion ought to be exercised, if it existed.

Then I come to the application made to substitute, in effect, the Judge for the Crown. I had hoped at one time that we should be able to do so, but, in view of the opinions on that subject entertained by my brother Judges, I do not think it

possible for us to get rid of the difficulty that has been raised. I therefore come to the conclusion that the application ought not to be granted.

POWERS J. read the following judgment:—I think the public interests are affected by the questions raised by the Crown in this appeal. The Crown had a statutory right, under the Act, to become a party to the proceedings, but did not do so. It thereby lost its statutory right to be a party. The Crown was only allowed to intervene in the Supreme Court in an appeal then before that Court, brought by the employers aggrieved by the award. Personally, if I thought this Court had power to grant the Crown leave to appeal, I would not be a party to rescinding the leave. If there was an appeal before the Court, for the same reasons I would join in giving the Crown leave to intervene. There is no appeal before the Court in which the Crown can be granted leave to intervene. Solely on the ground that this Court has no power to grant leave to the Crown, in this proceeding, to appeal, because it was not, at any stage of the proceedings, a party, I agree that the leave to appeal should be rescinded.

As to the application on behalf of the Judge of the Industrial Court: that application, if confined to the question of the jurisdiction of his Court, should, I think, have been granted, but counsel would not confine the application to that ground, as a decision on that point would not have decided the questions the Crown wished this Court to decide. I therefore agree that that application for leave to appeal should be refused.

Special leave to appeal rescinded. Motion by Judge for special leave to appeal refused. By consent Crown to pay respondents' costs.

Solicitor, for the appellant, *T. W. McCawley*, Crown Solicitor for Queensland.

Solicitors, for the respondents, *Bouchard & Holland.*

R. G.