

[HIGH COURT OF AUSTRALIA.]

IN RE McCawley.

ON APPEAL FROM THE SUPREME COURT OF
QUEENSLAND.

Practice—High Court—Appeal from Supreme Court of State—“Judgment”—Necessity of parties and litigation—Refusal to administer oath to Judge—Formal order drawn up—The Constitution (63 & 64 Vict. c. 12), sec. 73—Judiciary Act 1903-1915 (No. 6 of 1903—No. 4 of 1915), secs. 2, 35.

H. C. OF A.
1918.

MELBOURNE,

Feb. 25.

—
Barton,
Gavan Duffy
and Rich JJ.

The appellant presented to the Full Court of the Supreme Court of Queensland a commission purporting to appoint him a Judge of the Supreme Court, and asked to be sworn in. The validity of the commission was challenged by counsel as *amici curiæ*, and, after argument between those counsel and counsel for the appellant, the Full Court made a formal order declaring that the appellant was not entitled to be sworn in and that he was not eligible to be appointed a Judge of the Supreme Court, and giving leave to appeal to the High Court. On an application for leave, or in the alternative for special leave, to appeal to the High Court,

Held, that neither leave nor special leave should be granted, the determination of the Supreme Court not being a “judgment” within the meaning of sec. 35 of the *Judiciary Act* 1903-1915, and, if it were a judgment, not being interlocutory.

Leave and special leave to appeal from the Supreme Court of Queensland: *In re McCawley*, (1918) S.R. (Qd.), 62, refused.

APPLICATION for leave or special leave to appeal.

On 6th December 1917 Thomas William McCawley, President of the Court of Industrial Arbitration of Queensland, presented to the Full Court of the Supreme Court of Queensland a commission dated 12th October 1917, from His Excellency the Governor in Council of Queensland, appointing him to be a Judge of the Supreme Court, and asked to have the oath of allegiance and of office administered to him, and claimed the right thereafter to take his seat on the Bench as a Judge of the Supreme Court. Thereupon *Feez* K.C.

H. C. OF A.
1918.
~
IN RE
McCawley.

and *Stumm* K.C., as *amici curiæ*, questioned the validity of the commission and *Ryan*, A.-G. for Qd., and *Macrossan* argued in support of the validity of the commission.

On 15th February 1918 the Full Court made an order which was headed: "In the matter of an application of Thomas William McCawley, President of the Industrial Court of Arbitration, to be sworn in as a Judge of the Supreme Court of Queensland and to take his seat as a member of the said Supreme Court." The order was in the following terms:—"The said Thomas William McCawley, President of the Court of Industrial Arbitration in the State of Queensland, having applied on the sixth day of December one thousand nine hundred and seventeen to this Honourable Court to be sworn in as a Judge of the Supreme Court of Queensland and to take his seat as a member of the said Supreme Court And upon hearing the Honourable the Attorney-General and Mr. *Macrossan* of counsel for the said Thomas William McCawley and Mr. *Feez* K.C. and with him Mr. *Stumm* K.C. as *amici curiæ* This Court did order that this application should stand for judgment and the same standing this day Tuesday the twelfth day of February one thousand nine hundred and eighteen in the paper for judgment in the presence of counsel for the said Thomas William McCawley and the said Mr. *Stumm* K.C. *amicus curiæ* This Court is of opinion that the said Thomas William McCawley is not entitled to have the oaths of office administered to him or to take his seat as a member of the Supreme Court And the said Court having ordered that judgment as to the validity of the commission of the said Thomas William McCawley as Judge and President of the Court of Industrial Arbitration should be reserved until Friday the fifteenth day of February one thousand nine hundred and eighteen, and the same standing in the paper this day Friday the fifteenth day of February one thousand nine hundred and eighteen for judgment in the presence of Mr. *Macrossan* of counsel for the said Thomas William McCawley and Mr. *Stumm* K.C. *amicus curiæ* This Court is of opinion that the commission of the twelfth day of January One thousand nine hundred and seventeen purporting to appoint the said Thomas William McCawley a Judge of the Court of Industrial Arbitration was ineffectual for

that purpose, that on the twelfth day of October one thousand nine hundred and seventeen (the date of the commission purporting to appoint the said Thomas William McCawley to be a Judge of the Supreme Court) he was not the President or a Judge of the Court of Industrial Arbitration and was not therefore eligible to be appointed a Judge of the Supreme Court pursuant to the provisions of the *Industrial Arbitration Act of 1916*. And this Court doth declare and adjudge accordingly and that the said Thomas William McCawley do have leave to appeal (if such leave be necessary) to the High Court of Australia."

H. C. OF A.
1918.
~
IN RE
McCawley.

An application was now made on behalf of Thomas William McCawley for leave, or alternatively for special leave, to appeal from that decision to the High Court.

Macrossan, for the appellant. The order made is a "judgment" within the meaning of sec. 35 of the *Judiciary Act*. It stands in the records of the Supreme Court of Queensland as a judgment. There was a *lis* and a contest between counsel who appeared. See *Buckley v. Edwards* (1). The judgment is interlocutory, for it does not finally decide the rights of the appellant, so that only leave to appeal is necessary. If it is not an interlocutory judgment, then special leave to appeal should be granted.

The judgment of the COURT, which was delivered by BARTON J., was as follows :—

None of us think that if this is a judgment it is interlocutory. In the next place we do not think that it is a judgment. The High Court has jurisdiction under the Constitution to entertain appeals from judgments, decrees, orders and sentences, and there must be one of those in order to found an appeal under sec. 35. It seems to me that a judgment must be *inter partes*—that it must be pronounced in some litigation between parties. We cannot make any order in this case.

Solicitor, *W. F. Webb*, Crown Solicitor for Queensland.

B. L.