The Political Appointment of T.W. McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland.[1]

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During the period 1915-1922 in Queensland a Labour Government, first under the leadership of T.J. Ryan and subsequently E.G. Theodore, conceived of the role of the state as one of taking active action to aid and alleviate the conditions of the working people of the state. This was made apparent when the Government introduced measures directed towards the introduction of social justice, and the regulation of industrial conditions and relations. This article is concerned with those reforms directed towards social justice and in particular through the establishment of a new Court of Industrial Arbitration together with the selection and appointment of T.W. McCawley to act as President of the Court. It is therefore concerned with a political appointment and the characteristic political nature of that appointment, culminating in his elevation to Chief Justice of the Supreme Court of Queensland in 1922.

The Industrial Arbitration Bill

When the Ryan Government took office, industrial relations were regulated by the provisions of the Industrial Peace Act of 1912. The most regrettable feature of the Act so far as Labour was concerned was the non-recognition of unions and the prohibition of strikes. It was one of the main objects of the Labour Party to abolish the Act. E.G. Theodore, the Secretary for Public Works and the crown solicitor T.W. McCawley drew up a Comprehensive Industrial Arbitration Bill in 1915. Two features of the Bill stand out. Firstly, Courts of Law were to be utilized to the fullest to provide a comprehensive means of regulating industrial conditions. This was secured by increasing the status of the Court of Industrial Arbitration by making it an integral part of the Judiciary. The President of the Court was to be a member of the Supreme Court. In order to stop the decisions of the Court being upset by endless appeals by employers, appeal was to be only to the Full Court of the Court of Industrial Arbitration.[2] The Court was given an extremely wide jurisdiction ranging from such matters as working conditions, hours, leave and apprenticeship. Secondly, in conjunction with these provisions, the Labour Party rejected the notion that industrial relations could be regulated by the rejection of unions. Unions were recognized fully in the eyes of the law. This did not mean that strikes were to be encouraged. Rather, Theodore maintained that Law and Courts of Law were to be utilized to secure more effective industrial relations.[3]

These ideas were rejected by *The Courier* and the Opposition. W.J. Vowles,[4]

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1. The article is based on a thesis submitted to the University of Queensland in 1972 for the degree B.A. (History Honours). The thesis is entitled *A Study of Labour Government and The Law in Queensland 1915-1922.*
2. *Q.P.D.*, CXX (1915), 376.
3. *Q.P.D.*, CXXX (1915), 57.
4. W.J. Vowles, was born at Enoggera in 1876. He began his career as a solicitor at Dalby. In July 1910 he entered the Legislative Assembly and succeeded James Tolmie as Leader of the Opposition. In 1920 he was instrumental in forming the Country Party and became leader of that party.

leader of the Opposition attacked the idea of increasing the status of industrial court Judges because it was an "interference with the existing rights of the Supreme Court Bench"[5]. In the Legislative Council, E.W. Fowles, a barrister, reiterated the Conservative belief in the three democratic principles of equality of opportunity, the right to work, and the right to live. Values which he regarded as consistent with the pursuit of free enterprise. It was the belief of Vowles and the other lawyer member of the Council, Thynne, that the Government's sole task was to provide the conditions necessary for work and free enterprise.[6] There was no necessity for a Government to be animated by any other end. Labour on the other hand believed that free enterprise aided the rejection of unionism, and did not provide the requisite justice for the workers. This the Council would not accept; so the Industrial Arbitration Bill was rejected.

It was not until late in 1916 that Theodore was again able to press on with the re-introduction of the Bill, following the Dickson Sugar Award. This award by an Acting Industrial Court Judge gave substantial increases to the workers in the sugar industry. Its effect was to bring the whole sugar industry to a halt because growers and millers refused to pay the wages.[7] The crisis brought into view the need for some form of an appeal from an industrial tribunal. Ryan and Theodore throughout the crisis insisted that the difficulties could be solved by the passage of the Government's proposed Industrial Arbitration Bill. Theodore, in order to make the Bill more acceptable to the Council, emphasized that the clause relating to preference to unionists was merely an option left to the Court and not to the Union delegates.[8] The Government was however forced to drop the preference clause to secure the passage of the Bill. Nevertheless, the major part of its proposed reform of industrial relations could be implemented. The Government was now faced with the problem of establishing in an effective way the new Court and with choosing suitable Judges to make the new Court an effective one.

The Appointment of T.W. McCawley as President of The Court of Industrial Arbitration

The Government appointed Judge MacNaughton and T.W. McCawley, the Crown Solicitor and Under Secretary for Justice. MacNaughton had been a Judge of the old Industrial Court set up in 1912. His services were retained under the new Act but he was not made President of the new Court.[9] This responsibility was given to McCawley.[10] McCawley had early established

5. *Q.P.D.*, CXX (1915), 854.
6. *Q.P.D.*, CXXI (1915), 2620.
7. Full details of the crisis can be found in correspondence found in the archives at PRE/A557, QSA. All sections attempted to utilize the crisis for political gain. Ryan attempted to utilize it to secure the passage of the Commonwealth War Power's Bill.
8. *Q.P.D.*, CXXIII (1916), 2447.
9. Judge Macnaughton was born at Edinburgh in 1859 where he attended school and the University of Edinburgh. He read for the Bar in Sydney when he came to Australia and was admitted as a barrister to the New South Wales Bar in 1822. While practising there he also worked as a Law Reporter in the Equity Courts. In 1886 he came to Queensland and was admitted to the local Bar, but moved to Townsville and acquired a large practice in Civil and Criminal jurisdictions and also acted as a Crown Prosecutor on Circuit Courts. At times he acted as a Supreme Court and District Court Judge, until his permanent appointment to the District Court in 1909. He had no political career.
10. T.W. McCawley was born at Toowoomba on 24 July 1881, and attended St. Patricks Boys School and State school there. At fourteen he began teaching, but after a short period, entered the office of Messrs. Wonderly and Hall, Solicitors of Toowoomba. His mastery of shorthand

himself as a competent and young public servant. In 1910 at the age of twenty-eight, McCawley was appointed Crown Solicitor by the Attorney-General, T. O'Sullivan K.C. During his period of office the business of litigation was heavy and in appeals to the Privy Council, the Government was successful in all cases. In 1916 he travelled with Ryan to aid him in two appeals. Success in what is known as the *Eastern Case*[11] saved the State some £70,000.[12] McCawley also successfully predicted the outcome of the *Stock Embargo Case*.[13] That case gave him a reputation for a clear and concise knowledge of the law. The opinion which he gave to the Government in that case was such an example. In August 1915 he was appointed Under Secretary for Justice as well as Crown Solicitor.

Although McCawley acquired this reputation, his appointment to the Court of Industrial Arbitration and President of that Court was made for far more fundamental political reasons. McCawley was not only appointed President of the Court of Industrial Arbitration but also later as a Judge of the Supreme Court. This was done to give the Court an increased status. McCawley was a Catholic and as a result the issue of secretarianism bubbled to the forefront. It was seen as another aspect of the issue which the conscription referendum of 1916 had brought to the forefront. Ryan, himself a Catholic, had opposed the Commonwealth Prime Minister, W.M. Hughes on conscription. Ryan and McCawley's Irish associations as well as their opposition to conscription were linked with complete opposition to the war. The appointment of McCawley over the heads of other members of the Legal Profession was seen as an attempt to assert Catholic influence and to take Judicial appointments away from the Legal Profession. Suitable Catholic public servants instead would receive the positions.

Sermons about secretarianism and the appointment of McCawley were preached in many churches both Protestant and Catholic in early January 1917.

lead him to instruct evening students at the Toowoomba Technical College. He was appointed to the public service in 1899, serving as a clerk in the Queensland Government Savings Bank. He studied for the Bar and joined the Department of Justice. After six years study, he completed his final Bar exams in 1906. He passed without failures and with an average of 70%. He was admitted to the Bar in 1907 and at twenty-two, McCawley was made first clerk in the Justice Department. He aided J.W. Blair to draw up the Workers' Compensation Act of 1905. (These details can be found in the McCawley Papers and Cuttings held by Mr. T.D. McCawley and Mr. L. McCawley of Brisbane.) Included are Queensland Public Service Examination Certificate, 1899, final year Bar exam results:- Equity 64%, Torts 68%, Criminal Law 73%, Real Property 75%, Personal Property 68%, Insolvency 75%, Admiralty 68%, Practice of the Supreme Court 65%, Practice of Inferior Courts 75%.

11. *Fowles* v. *Eastern and Australian Steamship Co.* (1913) St.R.Qd. 64, 173 (1913-14), 17 C.L.R. 149. (1916) A.C. 555. This Case resulted from an action brought by the Eastern Steamship Company claiming damages in respect of a vessel belonging to it, stranded in the port of Brisbane. It was alleged that the damages were occasioned by the Pilot. Chubb, J. held the Government liable and this decision was affirmed by the Full Court and the High Court. McCawley realized that it was important to establish clearly the exact liabilities of the Government. Ryan appeared before the Privy Council early in 1916. The Privy Council held that no greater responsibility rested upon the Government other than providing suitably qualified pilots.
12. The second Case was *Bacon* v. *Purcell* (1913) St.R.Qd. 259. (1914-15) 19 C.L.R. 241. This Case arose out of various contracts by a Rockhampton grazier Bacon, a friend of Ryan's in relation to a delivery of cattle on the 20th April 1912. The Privy Council held that the vendor should be ready to deliver on that date and complete it with reasonable despatch having regard to the number of cattle and conditions. The Privy Council rejected the Judgment of the High Court and restored that of the Privy Council.
13. This involved a challenge by the pastoralists to the Government's ban on the export of cattle from the state. The ban was upheld under S.92 of the Commonwealth Constitution, as one necessary war time measure. *Duncan* v. *The State of Queensland* (1916-17) 22 C.L.R. 556.

The Anglican Archbishop Le Fanuc devoted a whole sermon to the Government's Appointments.[14] This brought sharp rebuke from the Catholic Archbishop, Dr. Duhig who published several long statements. He remarked that:

> There are two obvious reasons for the opposition being shown to Catholics just now in Queensland. First of all, there is a Labour Government in power and on the reiterated confession of some of the most celebrated prelates of Anglicanism, that Church has never had much sympathy for Labour or with the poor ... The second reason seems to be that for the first time in nearly twenty years, Queensland has a Catholic Premier, and I do not remember one before that in the history of the state. Some of the members of the Cabinet are of the same faith and this has caused the old anti-Catholic prejudice, and there is ever present the preconceived notion that the Catholic Church must be receiving some reward or unwarranted favours from a Government thus constituted.[15]

Duhig claimed that Catholics had as much right to compete for the Public Service as anyone else. Thus, in many ways Duhig supported and reinforced the political ideas of the Labour Government. The appointment of McCawley was given his full support.

Theodore who was largely responsible for having McCawley appointed promptly defended the appointment and stated "in the appointments to the Arbitration Court the Government was anxious to secure men of legal standing and ability who were also 'temperamentally fitted' for work of this kind".[16] The Opposition seized on the phrase 'temperamentally fitted' as displaying the essential political nature of the appointment. They used the phrase continually against the Government. Fowles, quickly utilized the Council to support the senior, older and more experienced members of the Legal Profession. These included A. Feez, K.C., C. Stumm K.C., A.D. McGill, P.B. McGregor and A.D. Graham. Instead the Government had ignored, according to Fowles, all those men for the public service. As well MacNaughton, an older man with previous Industrial Court experience had not been made President. Fowles therefore argued that no appointment should be made on grounds of "politics or religion or personal friendship".[17]

Special meetings of both the Law Association and the Bar Association considered the appointment to the Supreme Court to be wrong because senior members of the Bar were not chosen. When McCawley subsequently presented his commission to the Full Court, A. Feez K.C. on behalf of the Profession entered the objections to the appointment. In making these objections he was speaking for the whole Profession except Ryan who was considered separate because of his position as Premier and Attorney-General. In the opinion of the Profession, the attainment of a position on the Supreme Court Bench:

> was the ultimate goal of the whole Profession. Such an honour should, and invariably is only bestowed on one of the Profession who by his integrity, his learning, his ability and his experience has publicly proved himself fitted for the position. The Bar has ever been until now a stepping stone to the Bench, and it is as well that it should be so for the very attributes of a good Judge include at least those which are developed by constant practice at the Bar.[18]

14. *The Daily Mail*, 8 January 1917.
15. *The Daily Mail*, 9 January 1917.
16. *The Courier*, 9 January 1917.
17. *Q.P.D.*, CXXV (1917), 3201-3268.
18. Transcript of Proceedings before the Full Court at p.2 CRS/206 Q.S.A.

Therefore the Profession viewed the appointment as a means whereby the Government was attempting to indirectly increase the number of Supreme Court Judges. The Profession voiced its objections in the form of a duty to protect the traditional method of selection for judicial appointments. Such appointments in the words of Feez should be free from any suspicion of political fitness, "otherwise public confidence in the Judiciary, one of the bulwarks of our freedom must be shattered".[19] Ryan rejected these arguments on grounds that the appointment was a political decision and that duty did not rest with the Profession.[20]

The Attitude of McCawley to Industrial Arbitration

Despite the opposition's interpretation of the phrase "temperamentally fitted" what Theodore probably envisaged was a Judge with a suitable knowledge to carry out a new form of law which the Arbitration Act was aimed at. To that extent McCawley's appointment was a political one, one consistent with the values of the Labour Party. The Industrial Arbitration Act envisaged the development of a whole new field of law with which the older members of the Legal Profession had no experience. McCawley had helped draw up the Act and knew precisely the aims and intentions of the Government. It was therefore no use appointing a Judge who would upset the principles upon which the Act was founded. When McCawley took his seat on the Court he made this obvious and acknowledged that his functions were in part legislative. That is, McCawley would have to determine the wages and conditions under which the workers of the state were to be engaged. McCawley made this clear when he remarked later, that the Act demanded a person not "dramatically opposed to the contemporary attitude of intelligent students of industrial problems".[21] Thus McCawley made it clear that he was there to implement the Act according to the principles which had guided the Government in the formation of the Act.

McCawley was very much concerned with the issues of social justice and what means could be employed to bring about the effective improvement of the less well-to-do in society. He had read the Fabian Tracts and other writings of George Bernard Shaw and Sidney Webb.[22] McCawley was also familiar with the work which H.B. Higgins, the President of the Commonwealth Arbitration Court, had begun. McCawley realized that Higgins was successful in formulating principles on industrial law, and had justified them in closely reasoned judgments. These he had constantly applied. McCawley agreed with Higgins that the work of the Commonwealth Arbitration Court should not be confined to interstate disputes, although McCawley thought that in any restructuring of the Arbitration system matters of detail should still rest with decentralized authorities.[23] Both McCawley and Higgins agreed that law and Arbitration Courts could contribute much to the settlement of industrial disputes as well as the improvement of wages and conditions for the poorer sections of the com-

19. *ibid.*, p. 4.
20. *ibid.*, p. 29.
21. T.W. McCawley, "Industrial Arbitration in Queensland", *International Labour Review*, March 1922, p. 393.
22. The remaining works from his library include: S. Webb, *How to Pay for the War Being Ideas Offered by the Fabian Research Department*. (London Fabian Society at the Bookshop George Allen & Unwin Ltd., 1916), E.E. Rathbone, *The Disinherited Family, A plea for the Endownment of the Family*, (London, Edward Arnold & Co, 1924), *The Collected Fabian Tracts*, Nos. 1-187 (London, The Fabian Society).
23. T.W. McCawley, *Industrial Arbitration*, (Brisbane, Government Printer, 1924 p. 10.

munity.[24] It was therefore important for McCawley and for the Government to demonstrate that these ideas in fact were practicable. Hence, the appointment of McCawley whose ideas seemed to be in accord with those of Theodore.

One of McCawley's continual cries was for more scientific information to enable him to carry out his task successfully. His hope was that the "new sciences", economics, statistics and political science would provide him as a Judge of the Industrial Court with the necessary means to make better decisions.[25] Before his early death in 1925, he had argued that the purpose of scientific study was merely necessary "in order that the statesman should have before him data upon which to base their prospects for social reform".[26] With this information at their disposal, the Law and Courts staffed by suitable Judges would have as their end social justice. Social justice meant for these people the improvement of wages and working conditions. McCawley considered that political power could be used for both good and bad ends. He wrote that it could be gained by men of "great altruistic qualities" or men who desired power for its own sake.[27] McCawley hoped that the men who staffed Arbitration Courts would be men of "great altruistic qualities". As an Arbitration Court judge he was determined to make judgments and assessments about working conditions. This again highlights his suitability so far as the Labour Government was concerned.

McCawley drew attention to this task when he took his seat on the Court in January 1917.[28] The decisions of the Court would according to McCawley touch upon industrial activity throughout the state. McCawley emphasized that conciliation would be one of the main features of the Act and that the Court would endeavour to induce employers and employees to "mutually adjust their differences".[29] As well the Court was not to be bound by normal positive legal rules and precedent but would instead, McCawley argued, be guided by "equity, good conscience and the substantial merits of the Case".[30] Thus he emphasized the importance of the role of the Court and himself as a Judge of the Court. This he immediately displayed when he and Macnaughton construed the section of the Act entitled "Industrial Matters" as sufficiently wide to enable the Court to still grant preference to unions. McCawley thus directly restored the full intention of the legislature and concluded that, "if this Court has jurisdiction to consider this dispute, it has also jurisdiction to decide on such manner as in the circumstances this Court may consider just".[31] McCawley completely supported the Government's ideas that the new Act was based on the full recognition of unionism.

The Operation of the Industrial Arbitration Act Under the Guidance of McCawley

The new act was now in full operation and McCawley had begun to indicate the approach he would adopt. A brief examination of two major industrial dis-

24. T.W. McCawley, "Industrial Arbitration in Queensland", *International Labour Review*, March 1922, p. 408. L.H.B. Higgins, *A New Provence for Law and Order*, (London, Conslatile & Co. Ltd., p. 155).
25. T.W. McCawley, *Industrial Arbitration*, Brisbane, Government Printer, 1924, p. 10.
26. The McCawley Papers, (held by the late Mr. T.D. McCawley, and Mr. L. McCawley, 46 Martha Street, Camp Hill, Brisbane.
27. *ibid.*
28. *Q.G.G.*, CVIII (1917), 151.
29. (1917) Q.W.N. 11.
30. *ibid.*
31. *ibid.*

putes illustrates that the Government and McCawley wanted to maintain the authority of the Court. The two disputes also indicate that the more militant and less moderate opinions of some of the union leaders, rejected Ryan's and Theodore's concept of industrial law. In 1917 McCawley was for the first time able to frame an award for the whole of the employees of the Railways. In the award, McCawley outlined his ideas about the framing of wages. The Court had to consider the "cost of living" by statistical analysis but the court also had to determine a sufficient sum to enable employees to enjoy a "fair and average standard of living". McCawley emphasized that the employees should expect their standard of living to increase as the community progressed:

> The desire to raise the standard of living is a universal and worthy one and should Industrial Courts, through too close adherence to the statistical method, adopt the present standard as a permanent standard, employees would not take too long to perceive that due advancement would not be attainable through the medium of Industrial Arbitration. That rough approximation to social justice at which Industrial Courts should aim will not be served nor will Industrial Peace be aided through the Court fettering its discretion by a rigid rule based solely upon or mainly influenced by considerations of consistency. The average employee must be given to understand that his standard of living will be advanced as the wealth of the community increased.[32]

Thus McCawley was prepared to decide and to award wages not limited solely by the "cost of living". The lot of the employees was in fact to be advanced by the Court's decisions. In this award, he however, rejected the union's claims for the award to be made retrospective. A strike followed which brought Ryan and Theodore into the controversy. The Cabinet "unanimously decided to adhere to the award of the Industrial Court",[33] and Ryan maintained that the Government would uphold "the principle of Industrial Arbitration which is a cardinal principle of the Labour Party's platform".[34]

Ryan was able to secure the return of the men to work at a Trade Union Congress convened in Brisbane on 21 August, 1917. This was done on the condition that Ryan would have the dispute submitted to the Commonwealth Prime Minister, Hughes.[35] A long political controversy followed in which Hughes refused to allow Higgins to arbitrate. Ryan was thus forced to react strongly against the unions in order to uphold his own authority. The President of the New South Wales Court also refused to act.[36] A proposal was later made to the Prime Minister of New Zealand to allow their President Mr. Justice Stringer to act. This was agreed to but when Stringer examined the cases for both sides he refused to act because the proceedings would be in the nature of an appeal.[37] By that time, the unions were unable to again resort to strike action because the public outcry would have been too great.

In this instance *The Courier* and *The Daily Mail* both saw the attempt to have the dispute referred to Higgins as a betrayal of the principle of Arbitration and a

32. *Q.G.G.*, CXXX (1917), 45.
33. Telegram, Ryan to Dash, 27 July 1917, PRE/A680, QSA. See also Telegrams Dash to Ryan, 24 July 1917, Ryan to Rhymer, 1 August 1917, Theodore to Ryan, 4 August 1917, PRE/A680, QSA.
34. *The Daily Mail*, 10 August 1917.
35. Telegrams, Theodore to Rhymer, 13 August 1917, Ryan to Hughes, 21 August 1917, Ryan to Higgins, 18 August 1917, Higgins to Ryan, 22 August 1917, Hughes to Ryan, 23 August 1917, Ryan to Hughes, 23 August, Hughes to Ryan, 23 August 1917, Rhymer to Ryan, 24 August 1917, Ryan to Rhymer, 25 August 1917, Rhymer to Ryan, 28 August 1917, PRE/A680, QSA.
36. Telegram, Ryan to Fuller, 18 September 1917, PRE/A680, QSA.
37. Telegrams, Ryan to Massey, 18 September 1917, Stringer to Ryan, 25 September 1918, PRE/A680, QSA.

disavowal of McCawley.[38] A similar reaction came from the Opposition in the Assembly and Council who presented the view that the Government had humiliated its own Court and Judge.[39] Ryan justified the action because the Government had fully supported the principle of Industrial Arbitration. He presented to the House the complete correspondence relating to the dispute and emphasized that McCawley had concurred with the suggested reference to Higgins as a mediator.[40] The Government did show on this occasion some hesitation in upholding completely the authority of the Court. It would have been better for the Government to have stood whole-heartedly behind McCawley and then such criticism would not have been made. Instead, the Government tried to placate the unions and further angered Hughes.

On the second occasion of a major challenge to the Court and McCawley, no such hesitation was demonstrated. Again the dispute was in Townsville, this time with the employers of the meat works. The Australian Meat Workers Union enjoyed a monopoly of the supply of employees. Numerous industrial disputes took place so that the company abandoned collective bargaining and applied to the Court for an award. The award McCawley granted in March 1919 included preference to unionists but further trouble led McCawley to withdraw such a concession. McCawley reiterated that the court was the legitimate way of pursuing industrial matters. The Government and McCawley in fact preferred the Court to collective bargaining although provision for it was made in the Act. McCawley remarked that "the majority of the strikes in the north were due to the desire to punish the employers for their departure from the method of collective bargaining and for approaching the Arbitration Court".[41] McCawley was not prepared to tolerate union threats designed to destroy the concept of Industrial Arbitration. McCawley concluded that the Court's function was to promote industrial peace rather than siding with those who "habitually disregard the provisions of the law".[42]

As a result of McCawley's action, disorder broke out in Townsville which was only solved by the dispatch of additional police to Townsville,[43] After protracted negotiations and a compulsory conference the dispute was brought to an end in September 1919. The dispute in itself is not as significant as the opinions about the Arbitration Court which the incident brought forth. *The Daily Standard* had argued that the advance of capitalism in Australia had been aided by the decisions of the Arbitration Courts. Hard won advantages gained by the unions had been taken away.[44] The Court's decisions had in fact put unions out of action. Members of the Meat Workers Union along with the President of the Australian Worker's Union, W.J. Riordan, argued that similar action as in the Townsville Meat Works dispute, would bring about the destruction of the system.[45] Despite the rebuke McCawley had clearly laid the blame for the dispute on the heads of the unions who were not prepared to co-operate and abide

38. *The Courier*, 1 August 1917, 13 August 1917. *The Daily Mail*, 24 August 1917.
39. *Q.P.D.*, CXVI (1917), 808.
40. *Q.P.D.*, CXVI (1917), 818-830.
41. *Q.G.G.*, CXII (1919), 425.
42. *ibid.*
43. Full details of the actual dispute can be found in the following correspondence, Telegrams, Inspector King to the Commissioner of Police, 30 June 1919, Proclamation, 30 June 1919, Telegrams, Ryan to Ogden, 2 July 1919, Ogden to Ryan, 3 July 1919, Inspector King of Townsville to Commissioner of Police, 8 September 1919, and Report of Royal Commission, PRE/A628, QSA.
44. *The Daily Standard*, 1 July 1919.
45. *The Daily Standard*, 19 July 1919.

the court's awards. He had in the award left it open for the unions to reapply for preference to be granted.[46] In this attempt to maintain the authority of the Court he had been supported completely by Ryan and Theodore against the more militant northern unions and their preference for collective bargaining and more revolutionary methods. The political leaders of the Labour Party and McCawley were therefore more moderate and prudent in their aims and demonstrated a preference for the Industrial Court and its procedures.

Despite these incidents, the Act in the opinion of McCawley had proved to be a successful measure of legal reform. The Governor, Sir Hamilton Goold-Adams, thought that the Court had failed to stop illegal strikes as in the Townsville dispute.[47] McCawley did not share this view.[48] In September 1920, on behalf of the whole Court he remarked that overall the operations of the Court had been successful. McCawley argued that when the Court was set up it was not contemplated that there would be such a large increase in the cost of living causing a large number of industrial disputes. These had been numerous but in most instances the Court had intervened to stop them developing. Through the use of conferences the Court had disposed of a large number of claims so that conciliation, a major feature of the Act had developed. McCawley contended that it was to the advantage of the employees to consolidate awards although this was hindered by the decisions of separate Wages Boards made under the old Act.[49] Despite this, numerous consolidations were made.[50] Unions, in general had co-operated with the Court. Membership of unions increased from 23,698 in 1908 to 103,784 in 1920. The Government and the Court had therefore achieved the original intention of the Act. The "temperamental fitness" of McCawley and his fundamental political role were to that extent vindicated. Through his help, unions were incorporated as a fundamental part of industrial law and industrial relations.[51] The Jurisprudence of industrial law had begun to develop into a significant field of law under the impact of McCawley's decisions.

Table 1. To illustrate the development of Industrial Arbitration and industrial agreements, the following figures have been taken from the *Official Book of the Commonwealth of Australia* Nos. 12, 13 and Quarterly Summary of Australian Statistics, *Bulletins*, Nos. 84 & 85, June and September 1921.

Date	Awards of Determinations in Force	Industrial Agreements in Force	No. of Persons Working Under State Awards Determinations Aid Industrial Agreements in Force
31 December, 1913	23	5	–
31 December, 1917	125	25	–
31 December, 1918	184	71	90,000
31 December, 1919	206	65	90,000
31 December, 1920	212	56	100,000
31 March, 1920	203	42	100,000

46. *Q.G.G.*, CXII (1919), 26.
47. Goold-Adams to Secretary of State for the Colonies, 26 January 1920, GOE/87, QSA.
48. *Q.G.G.*, CXV (1920), 1127.
49. See Table 1 below.
50. *Q.G.G.*, CXV (1920), 1127. Some of the major industries in which consolidations took plac include, bank offices, meat export industry, retail meat industry, shearing, sugar workers. I the public service, police, prison employees, public service general officers, public servic professional officers, railway construction employees, teachers, government savings ban employees.
51. Under the Industrial Peace Act of 1912, unions had been excluded completely from the syster of Industrial Arbitration and could not invoke the jurisdiction of the Court. The followin

A Minimum Wage set in 1921

In February 1921, McCawley on behalf of the Court made a formal declaration as to the minimum wage for the state. Since the establishment of the Court no such declaration had been made although the wage awarded usually conformed to a minimum of £3/17s per week. McCawley handed down a comprehensive judgment in which he reviewed the method of fixing wages throughout Australia.[52] He considered that as a corollary of interstate free trade the machinery for fixing wages and conditions throughout Australia should be co-ordinated. In 1907 Higgins in the *Harvester Case*[53] had fixed the weekly wage at 42s per week for a man, his wife and three children. It had remained as the Commonwealth wage and was adjusted in accordance with changes in purchasing power. In 1920 Higgins fixed it at 78s per week. McCawley was of the opinion that the Harvester wage was no longer adequate because:

> The fixing of a basic wage requires a determination of what ought to be the standard of living, of what approach to that standard is practicable and ought to be prescribed, and of what sum is necessary in wages for the maintenance of that standard. For the due determination of this, it is manifestly desirable that the relevant facts should be ascertained with such scientific precision as may be reasonably attainable. The Basic Wage Commission has shown how imperfect and incomplete were the materials upon which the Harvester decision was based.[54]

McCawley examined the alternatives to the Harvester decision. In New South Wales, the Board of Trade in 1920 fixed the basic wage at £4/15s. The Federal Basic Wage Commission, appointed to review the whole basis of Federal and state wages, recommended a "minimum reasonable standard of comfort for an employee". McCawley found this standard inadequate because the Commission had not inquired into what standard could be borne by the community.[55] Although the statistical information available was inadequate, McCawley thought that some attempt should be made to use the information. He thus indicated that any wage which he awarded would be more moderate and reasonable, based on an inquiry into the actual wage industry could afford to pay. Throughout all his decisions, McCawley argued that wages would be increased as industry was able to pay the increase. In that way he hoped to fulfil his objective of increased social justice to the employees. It was a moderate aim and unsuited to some of the more extravagant union demands as in this case. In addition, McCawley did think that social justice required a married man to be paid more than a single man, but this was beyond the power of the Court to award.[56]

Thus, when McCawley fixed the basic wage, he did so on a single principle. The wage awarded would be applicable to all industries of average prosperity in line with his view that the wage should be determined on the basis of what in-

figures indicate the growth of unionism in Queensland. The period 1916-1920 represents the operation of the new Act.

Year	Membership of Unions
1908	23,698
1913	5,683
1916	66,807
1920	103,784

52. (1921) Q.W.N. 2 *Q.G.G.*, CXVI (1921), 613, *The Worker*, 17 February 1921.
53. 2 C.A.R. 1.
54. (1921) Q.W.N. 2 *Q.G.G.*, CXVI (1921), 663.
55. *ibid.*
56. *ibid.*

dustry could pay. This was therefore a more moderate approach than the one adopted by the Federal Basic Wage Commission. If an industry could not afford to pay the wage, then an employer was allowed to make an application to the Court for a reduction. If the unions were of the opinion that an industry could sustain a higher wage, they too could make such an application.[57] A Basic Wage of £4/15s was fixed and was automatically applicable to all industries. This wage would then be on a par with that of New South Wales and in line with McCawley's idea that there should not be any great disparity between wage rates in each of the states. Finally in determining what an industry of average prosperity could pay, McCawley noted the fall in the export prices of beef, mutton and metals. Despite McCawley's apparent consideration of this problem he had to handle applications from the Government and the Mt. Morgan Company seeking exemption from the basic wage. The Government was already in serious financial trouble as a result of its failure to secure a loan in London as a result of the activities of the Pastoralist Lobby. McCawley granted the increase to the Public Service and so incurred additional expenditure by the Government of £800,000.[58] A Railway Economy Board was established and retrenchments followed.[59] In the case of the Mount Morgan Mining Company, McCawley refused to reduce the wage below a minimum living wage. A long industrial dispute followed. The mines were closed and some ten thousand men unemployed. An investigation carried out by Representatives of employees and unions reported that a reduction in wages by 24.8% was necessary to wipe out the Company's deficit.[60] This would have reduced the wages below that of a minimum living wage. McCawley agreed to a 20% reduction in wages only on the condition that with a Government subsidy the wage would thereby be increased from 10/10d per day to 11/9d per day.

Thus in this instance McCawley had attempted to provide the workers with a living wage as well as meet the special financial problems of the Company in order to allow it to resume operations.[61] Ryan, Theodore and McCawley were emphatic that the basis of industrial relations was to centre around the Court. McCawley in his judgments attempted to secure the successful operation of the Court by harmonising the attitudes of both sides. The unions in many instances rejected such a notion and thought that the Court should accept their opinions without any rational consideration. The Judgment of McCawley in the Mount Morgan dispute was not accepted and suggestions were made that the Government should remove McCawley from the Bench.[62]

Thus, although difficulties lay ahead for the State and Court of Industrial Arbitration, the Act itself had proved far more effective in regulating industrial relations than had its predecessor. Unions had been brought in as a fundamental part of industrial law while the status of the Court had been enhanced and its procedure improved. McCawley, the "temperamentally fitted" judge did much to ensure its success and to bring about what he called greater social justice for the less well to do. This meant not only a determination of the cost of living by statistics but also a rational decision of what ought to be the wage. He was practical in that such a wage would have to be capable of being paid by industry.

57. *ibid.*
58. *The Daily Mail*, 25 March 1921.
59. *The Daily Mail*, 31 March 1921, 9 April 1921. Report of the Railway Economy Board of February 1921, PRE/A692, QSA, Report of a deputation of Railway Employees to Theodore, 24 March 1921, PRE/A692, QSA.
60. *Q.G.G.*, CXVII (1921), 1959.
61. *ibid.*
62. *The Worker*, 3 November 1920.

Hence the formulation in 1921 of a Basic Wage on two principles; first, the desire for uniformity throughout Australia, compatible with a concept of freedom of interstate trade; and secondly, a wage based on the average prosperity of industry and hence its ability to pay. The essential difficulty which McCawley encountered was to persuade some of the union leaders that social justice could be obtained through normal legal procedure. Neither McCawley nor the political leaders of the Labour Movement such as Ryan and Theodore would tolerate the rejection of the law by more extreme union leaders. It was believed that just ends could be obtained through the operation of the Court and the law.

The Appointment of McCawley to the Supreme Court—Opposition to that Appointment

McCawley's initial appointment to the Supreme Court under the Industrial Arbitration Act had raised the whole question of judicial independence. McCawley was appointed to the new Court of Industrial Arbitration for seven years and subsequently appointed to the Supreme Court. As the Government understood its own actions the appointment to the Supreme Court was to be a life appointment. This appointment was made for two reasons. Firstly, it was the intention of the Government to increase the status of the Arbitration Court Judges. In the Commonwealth Court, Higgins occupied a similar position on the High Court. Thus there was ample precedent. Secondly, the Government thought it desirable to have a Judge of the Supreme Court who would not be as unsympathetic towards Government action against free enterprise. As already remarked the Legal Profession attacked both appointments. The appointment to the Arbitration Court was held to be valid after Ryan produced an Executive Minute showing that a salary was fixed before the appointment at £2,000.[63] When the Chief Justice, Sir Pope A. Cooper, examined the Executive Minute he found that it made no reference to a salary. The Chief Justice took the opportunity to condemn the Government, for the Court he claimed had been misled "in a very material particular".[64] No mention of salary appeared in *The Gazette*. Ryan avoided this crisis when he assured the Chief Justice that the minute had been approved by telegram and later read in the presence of the Governor. It was, he submitted not usual practice for the salary to be mentioned in *The Gazette*. The Court backed down and McCawley's appointment to the Arbitration Court was secured.

At the time of the appointment to the Supreme Court the number of Judges on the Supreme Court was five. They were the Chief Justice, Sir Pope Alexander Cooper, Patrick Real, the Senior Puisne Judge Charles Edward Chubb, William Alfred Shand and Lionel Oscar Lukin. All were appointed by non-Labour Governments. Real had a working class background and was also a Roman Catholic, he was the only Judge with an apparent Labour orientated background. The Legal Profession, throughout maintained that the appointment to the Supreme Court was unconstitutional. Firstly, it was not a life appointment and therefore inconsistent with the Orders in Council of 1859 and the Supreme Court Act of 1867. In the opinion of the Supreme Court the state had secured the necessary safeguards for maintaining the independence of the Judges of the Supreme Court.[65] The Supreme Court Act Amendment of 1903

63. Copy of Executive Minute, 18 January 1917, CRS/206, QSA.
64. Transcript of Proceedings before the Full Court, Remarks by the Chief Justice at p. 137, CRS/202, QSA.
65. Brief for the Appellant to High Court, p. 9 CRS/206, QSA.

had provided that the Supreme Court Judges should not exceed five. This had made necessary the indirect method of the appointment. In the opinion of the Supreme Court, Section 67 of the Industrial Arbitration Act opened up the possibility of the Supreme Court Bench being flooded via the Court of Industrial Arbitration.[66] That is the Supreme Court feared that the Court would be flooded with Labour orientated Judges. The legal reason for holding the appointment to the Supreme Court invalid was that the appointment to the Supreme Court would only be for seven years, that is the length of the appointment to the Arbitration Court. It was therefore inconsistent with the provisions of the Constitution. The only Judge to dissent from this opinion was Real who regarded the Arbitration Act as an amendment of the Constitution. Authority for this was based on Section 5 of the Colonial Laws Validity Act which gave authority to the Queensland Legislature to alter the provisions of the Constitution relating to Courts of Judicature in the same manner as an ordinary Act of Parliament.[67] During the argument before the Full Court, McCawley's standing as a barrister was also questioned because he had not practised at the bar. Instead, he had acted as a public servant. The Full Court rejected these arguments and found that McCawley possessed the necessary standing as a barrister.

Before the High Court, Ryan rested the Government's argument on the fact that the appointment was designed to be consistent with the concept of judicial independence. He submitted that it was the intention to make the appointment to the Supreme Court for life. The only support he found for this view came from Higgins who himself occupied an analogous position on the Commonwealth Industrial Court.[68] Thus Ryan submitted that the motive of the Government was to provide the President of the Industrial Court with greater independence:

> Because everyone knows that the work of an Arbitration Court Judge is far more likely to bring political criticism and so on from the respective parties than in the case of a Judge of the Supreme Court or High Court ... I submit that those safeguards for the independence of the Judiciary which are the characteristics of our system should apply to the Arbitration Court, even more so than to the Supreme Court or either Courts.

This submission was based on the initial memorandum which McCawley had prepared and submitted to the Full Court.[69] Even if the Court would accept the motives of the Government, Ryan argued that the dissenting opinion of Real J. based on section 5 of the Colonial Laws Validity Act was correct.

All of the Judges of the High Court except Higgins J. held that the appointment to the Arbitration Court would only last as long as the appointment to the Arbitration Court. Griffith C.J., Barton, Powers and Gavan Duffy J.J., held that it was not authorised by the Constitution.[70] Isaacs and Rich J.J., dissented and held the appointment valid. According to Isaacs J., the independence of the Judiciary was designed simply to protect the Judges from the discretion of the Crown. This did not, in Isaac's view, decrease the ultimate control of Parliament, which according to Isaacs J., could alter the state Constitution by a simple Act of Parliament.

McCawley's exact position was therefore not made clear by the High Court's

66. *ibid.*
67. *ibid.*, p. 49.
68. *ibid.*, p. 72.
69. McCawley's Memorandum can be found attached to the Brief for the Appellant, CRS/206, Q.S.A.
70. Transcript of Proceedings before the High Court, CRS/206, Q.S.A.

judgment. An appeal to the Privy Council was commenced. In this Appeal Ryan received the support of the Attorney-General of England as it was considered a case of significant constitutional importance for the whole empire.[71] Sir John Simon's main submission for the Queensland Government was that the Queensland Constitution was a flexible Constitution and that "there was no fundamental law within the scope of the Queensland Legislative power which cannot be changed in the same manner as ordinary laws".[72] This submission was based on Isaacs' opinion and allowed the Privy Council to decide that the appointment was valid even if not a life appointment as Ryan initially argued.

The Privy Council accepted these arguments and recognized that the whole issue was whether or not the Constitution of Queensland was a controlled or flexible Constitution. The Court on this question remarked:

> It was not the policy of the Imperial Legislature at any relevant period to shackle or control in the manner suggested the Legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocably, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.[73]

The judgment made it clear that judicial tenure in Britain as well as the states of Australia could be altered as easily as any other legislation. The Privy Council accepted fully the view which Isaacs and Rich J.J., had enunciated concerning judicial independence. The Privy Council expressed it in the following way:

> The Legislature of Queensland is the master of its own household except in so far as its powers have in special cases been restricted. No such intention has been established and none in fact exists, in such a case as is raised under appeal.[74]

As a result, the Legislature of Queensland is entitled to alter judicial tenure by a simple Act of Parliament.[75] The Privy Council rejected the argument which Ryan put forward that the appointment was for life and did not conflict with the Constitution. As a result the state constitutions of Australia were unlike the United States or the Commonwealth of Australia Constitution Acts which guarantee a separation of powers and therefore an "independent" judiciary in the full sense of the word, secured by lengthy judicial tenure of office. The British concept on the other hand was merely secured by a normal Act of Parliament. As the Queensland Constitution derived its original authority from the British Legislature through Section 5 of the Colonial Laws Validity Act, the legislature of the States were not restricted by the limitations placed on the Commonwealth Parliament by the Commonwealth of Australia Constitution Act. None of the Courts chose to accept that it was a life appointment but the mass of litigation which resulted from the appointment was in the end still a victory for Ryan. McCawley was thus able to take his position on the supreme Court Bench in May 1920. He had acted as President of the Court of Industrial Arbitration since 1917. Ryan was there to congratulate the man who was used to challenge the Profession's traditional notions and whose name would be linked to a significant constitutional decision.

71. Telegram, Webb to Freshfields 30 September 1918, CRS/206, Q.S.A. Privy Council Appeal Book, CRS/207. Q.S.A.
72. Transcript of Proceedings before the Privy Council, at p. 27. CRS/207, Q.S.A.
73. The *King* v. *McCawley* (1920) A.C. 691 per Lord Birkenhead, L.C. at p. 706.
74. *ibid.*
75. *ibid.*

The Appointment of McCawley as Chief Justice of the Supreme Court of Queensland

This was not the end of the political challenge to the Supreme Court, nor was the end of the political advancement of McCawley. Serious conflict had developed between the Government and the Supreme Court Judges, not only because of McCawley's appointment but because of controversies with the Judges over the remission of sentences, and the fights against free enterprise in the Courts all of which provided ample reason for the divergence and disharmony between the Supreme Court Judges and the Executive. As a result the Labour Party desired to reform the Supreme Court. It was made an issue at the elections of 1918. In the opinion of E.H. Macartney, the leader of the Opposition, the Government was out to destroy the democratic institutions of the state. The McCawley appointment was one aspect of that issue. It was merely preparatory to an attack on the Supreme Court.[76] Vacancies were in their opinion to be created for men of the right political colour. *The Courier* supported these views:

> It was because the Chief Justice felt that there was danger ahead that he sounded the note of solemn warning. The Community will disregard that warning at its peril if after three years of very illumination experience of Labour's attitude towards law and justice the electors are not prepared to "hold enough" of their toleration is greater than their widsom. The danger is real, and it threatens not merely the community as a vague impersonal entity, but every individual man and woman. It is the Caucus belief that the party must strain even the Judgment seat. Faced abruptly with a policy so destructive of the independence of the Judiciary which in time past British men have fought and died for, and that impartiality which is the guarantee that every claim for redress shall be dealt with, without regard to the wealth or the poverty, the colour or creed, the rank or the profession or the claimant, the maintenance of that independence and that impartiality is impossible, if the officials who have to administer the law, and decree justice, are subject to party pressure or are chosen because they are sympathetic to party objectives.[77]

Despite these warnings, the Government was returned at the 1918 elections with an increased majority. In the Governor's opening speech of the new session of Parliament, the introduction of a Supreme Court Acts Amendment Bill was foreshadowed.[78] One member remarked that he hoped that the first objective of such a Bill would be to provide for the appointment of younger Judges who would decide cases according to an absolute standard of Justice.[79] These remarks were obvious attacks on the Supreme Court Judges, who according to some Labour members of parliament, showed a distinct preference for free enterprise rather than for a consideration of the inherent merits of a case. Such remarks were not destined to lead to harmony between the Judiciary and the Executive.

The Judiciary showed its opposition by refusing to co-operate in moves to reduce severe prison terms. By 1920 because of the apparent lack of co-operation from the Judiciary in reducing severe prison terms, the Government abandoned all consultation with the Judges and remitted sentences without their co-operation. The Governor, Sir Hamilton Goold-Adams tried to prevail upon Theodore to at least inform the Judges directly rather than allowing them to

76. *The Courier*, 15 March 1918.
77. *The Courier*, 15 March 1918.
78. *Q.P.D.*, CXXXIX (1918), 7.
79. *Q.P.D.*, CXXXIX (1918), 25.

learn the facts indirectly.[80] Theodore accordingly informed the Judges in one case but received a polite reply from Mr. Justice W.A.B. Shand that, "as it does not appear any report is needed from me in this case I am somewhat puzzled to understand why any such intimation should have been sent to me".[81] By 1920 these incidents had caused very severe estrangement between the Government and the Judiciary. The Governor in a report to the Secretary of State for the Colonies made it clear that the Government was animated by humanitarian motives when remitting sentences. For these reasons according to the Governor "there is a lack of harmony between the Executive and the Judiciary which is far from desirable".[82] Despite his apparent sympathy for the humanitarian motives of the Government, the Governor in his report informed the Secretary of State that he had attempted to obtain the formal acknowledgement of the Courts by the Cabinet though it was not often that the Judges' remarks had been adhered to. The Governor obviously thought that the position was very serious and for that reason it was difficult for him to know exactly what to do and how much confidence to place in the unions. It was, he thought, imperative to secure a more satisfactory working between the Executive and the Judiciary.[83]

The remission of sentences was not the only cause of this conflict. The Courts had in fact developed into a battleground between the Government and free enterprise groups, particularly the pastoralists who attempted to uphold the right to contract and free enterprise against the encroachment of state intervention. State intervention was a fundamental aspect of the Labour Party's platform and state enterprises were in fact encouraged and developed. Increased state action was also required by the war. The controversies with the Judges over the remission of sentences, the fights with free enterprise and the Courts[84] and the appointment of a Judge sympathetic to Labour ideas, provided ample reason for the divergence and disharmony between the Judges and the Executive, which the Governor spoke about in 1920.

Little was done to speed the passage of the proposed Supreme Court Bill in the hope that the Judges would take it as a warning and retire. Ryan was still the Premier and opposed to more extreme measures of resolving the crisis. The Judges did not adhere to the warning. Instead in Court in 1919, Mr. Justice Real remarked that he hoped that the Bill would not be proceeded with "without previous consultation and arrangement with the Judges."[85] Despite these threats, the Judges did not resign and when Theodore became Premier, he introduced a Judges Retirement Bill in 1921. John Mullans[86] the Attorney-General was responsible for the Bills' passage through the Parliament. The Bill provided for the retirement of those Judges who had attained the age of seventy

80. Goold-Adams to Theodore, 24 December 1920, PRE/A646, Q.S.A.
81. Shand to Theodore, 31 December 1919, PRE/A646, Q.S.A.
82. Report of Governor to Secretary of State for the Colonies, 26 January 1920, Goe 187, Q.S.A.
83. *ibid.*
84. See the following cases:
Australian Alliance Assurance Co. Ltd. v. *The Attorney-General and John Goodwyn No. 1*, (1916) St.R.Qd. 135, (1917) A.C. 537.
Australian Alliance Assurance Co. Ltd. v. *John Goodwyn, The Insurance Commissioner No. 2*, (1916) St.Rd.Qd. 225.
Duncan v. *The State of Queensland* (1916-17) 22 C.L.R. 556.
Duncan v. *Theodore* (1917) St.Rd.Qd. 250, (1917) 24 C.L.R. 510 (1919) A.C. 696.
85. *The Daily Mail*, 30 August 1919.
86. John Mullan was elected in 1918, had long experience in industrial and political life of the state and Commonwealth. He was a State member and senator. Before entering politics he held a position on the Amalgamated Workers' Association and was a political organiser for the Central Party Executive.

years.[87] All future Judges would also be required to retire at the age of seventy. The present Judges would still be entitled to pensions but those who attained the retiring age in the future would not receive pensions.[88] The present Judges would be entitled to pensions equal to one half of their present salaries. Two other complementary Bills were to follow, reforming the Court structure and procedures. The District Courts were to be abolished and existing District Courts were to be elevated to the status of Judges of the Supreme Court.

The Opposition immediately rejected the Bill as one of the worst kinds of repudiation because it was aimed at the present Judges. The objection was raised to the retirement provisions for future Judges.[89] The Bill in their opinion was a sheer act of victimization.[90] The Judges did not accept the introduction of the Bill without a fight. Judge Real appeared before the Bar of the Parliament and contended that the Bill was detrimental to public interest because it proposed to deprive the present members of the Supreme Court of rights upon which they had accepted office. Real went on to attempt to enlist the sympathy of the Government by drawing attention to his favourable dissent in the *McCawley Case*. He also drew attention to his initial humble origins as an apprentice. The Judge made it clear that he and his brother Judges were annoyed that they were not consulted. They also objected to the elevation of the District Court Judges to the Supreme Court, a position they had no reason to hope they would attain.[91] Real was not the only member of the Judiciary to protest. Mr. Justice Lukin, the Central Supreme Court Judge supported the Opposition's arguments that the Bill was a repudiation of the terms of contract. Lukin was induced to give up a salary of £4,000 per annum at the Bar for a salary of 2,000 as a Judge. The Judges immediately affected by the Bill[92] were Sir Pope Cooper, the Chief Justice, aged seventy-five years, (to retire on a pension of £1,250 per annum), Mr. Justice Chubb, seventy-six years, (to retire on a pension of £1,000), and Mr. Justice Real, aged seventy-four years, (to retire on a pension of £1,000).[93]

The Government's rejection of the Judge's argument and the Opposition's arguments rested on two points. Firstly, as matter of law they claimed that the provisions of the Retirement Bill were not inconsistent with the concept of judicial independence. Clearly the Government was acting within the law since the *McCawley Case* destroyed the concept of an entrenched Judiciary. In the words of the Attorney-General, "this Parliament has an unquestionable right to amend the Constitution Act or any other Act relating to Judicial Tenure, so long as public welfare requires it".[94] Secondly, Theodore maintained that it was responsible and necessary for the whole community. Theodore sought to assure the public that the Bill was not vindictive, but introduced in the interests of the community in a desire to obtain a more efficient, modern and effective legal system.[95] To that extent, Theodore realized that the matter was one of great delicacy. The Opposition remained unconvinced by this assurance. Mr. F. Brennan,[96] the only member of the Legal Profession on the Government side sup-

87. *Q.P.D.*, CXXXIX (1921), 811.
88. *Q.P.D.*, CXXXIX (1921), 812.
89. *Q.P.D.*, CXXXIX (1921), 812.
90. *Q.P.D.*, CXXXIX (1921), 812.
91. *Q.P.D.*, CXXXIX (1921), 1007.
92. *The Daily Mail*, 28 September 1921.
93. *Q.P.D.*, CXXXIX (1921), 1007.
94. *Q.P.D.*, CXXXIX (1921), 1022.
95. *Q.P.D.*, CXXXIX (1921), 1022.
96. F. Brennan, Solicitor was first elected to the seat of Toowoomba in 1918. He was educated at the Christian Brother's School, Maryborough and Maryborough Grammar School when T.J.

ported these arguments. He stated that the Judges were warned on numerous occasions.[97]

Despite Brennan's support for the Bill, both branches of the Legal Profession opposed the Bill just as they had opposed McCawley's appointment. Special Meetings of both branches were held. In Parliament, P.B. Macgregor[98] put the objections to the Bill. He continued the arguments about the repudiation of contract and the assertion of the supremacy of Parliament over the Bench.[99] In the words of Macgregor it was a Bill providing for the "ignominous dismissal of three Judges".[100] To supplement Macgregor's arguments, *The Daily Mail* carried a series of articles beginning on 26 September 1921 under a pseudonym of "Justice". These articles were in fact organized by the legal profession. The articles claimed that the changes would result in a death blow to the traditional principle of judicial independence by men who failed to appreciate "the character and genius of British traditions and institutions".[101] A.D. Graham, a leading member of the Bar also supported Macgregor's case by publishing articles in *The Daily Mail*. The Profession wanted the changes to be made with the cooperation of the Profession by appointing a select committee or Royal Commission. On this view they were supported by the Brisbane Chamber of Commerce which held a special meeting to support the Profession's stand.[102]

In a last desperate stand four of the Judges petitioned the Governor to reserve the Bill for Royal assent. Mr. Justice Shand subsequently added his name to the petition. The Chief Justice on behalf of the Judges wrote to the Governor in which he advanced arguments against the Bill including the old one about repudiation. The possibility of the destruction of the concept of judicial independence was also continued, and the power of Parliament to remove them by an address.[103] The Governor sought the advice of the Crown Solicitor and the Attorney-General. He declined to reserve the Bill on the basis of their advice and gave assent.

The Retirement Act came into operation on 31 November 1921. The three retiring Judges, Sir Pope Cooper, Mr. Justice Real and Mr. Justice Chubb, were farewelled by the Legal Profession in the Full Court. The Court room was crowded and the Bar strongly represented. A. Feez, the leader of the Bar farewelled the Judges and expressed the Profession's deep regret at their retirement. One had presided over the Court for forty years, and the other two for thirty-two years and thirty-three years respectively. Feez remarked that it was undoubtedly a sad occasion and a unique one because never in the "whole

Ryan was Master at the Grammar School. He began work helping his Father in the grocery business but joined his brother Edgar Brennan a solicitor at Warwick and he too qualified as a solicitor. He built up a large practice in Railway union matters.

97. *Q.P.D.*, CXXXIX (1921), 1081 *The Worker*, 6 October 1921.
98. P.B. Macgregor was one of a group of brilliant people who emerged from the late 1880's and 1890's and who began their career on state scholarships. Among the barristers were J.L. Woolcock, E.W. Fowles, H. Macrossan. Macgregor attended Ipswich Grammar School while there was dux of the school. He gained a scholarship to Oxford and entered Balliol College and graduated in Arts in 1888. He was first acquainted with the law in the offices of Messrs. Lilley and O'Sullivan and in 1891 was appointed an associate to Sir Charles Lilley. He was admitted to the Bar in the same year. In 1915 he was elected to the seat of Merythe.
99. *Q.P.D.*, CXXXIX (1921), 1025.
100. *Q.P.D.*, CXXXIX (1921), 1017-1019.
101. *The Daily Mail*, 26 September 1921.
102. Secretary of Brisbane Chamber of Commerce to Theodore, 6 October 1921, PRE/A704 Q.D.S.
103. Governor to the Secretary of State for the Colonies, 5 November 1921, Gov/58 Q.S.A. Governor to Sir Pope Cooper, 31 October 1921, Gov/58, Q.S.A.

course of Judicial life in the British speaking community had such an episode as was happening here taken place".[104] *The Courier* attempted to have the last word suggesting that the main object of the Act was to "remodel the Judiciary more in accordance with Caucus ideas".[105]

On the 1 April 1922, the Attorney-General announced the new appointments to the Supreme Court. McCawley was appointed the new Chief Justice as well as President of the Court of Industrial Arbitration. Again McCawley's career was advanced as a result of political circumstances. McCawley was to receive a salary of £2,500 a year, £250 less than the retiring Chief Justice. The remaining Judges were to receive a salary of £2,000 a year which meant that those Judges elevated from the District Court would gain an extra £1,000 a year. Judge Shand was transferred from his position as a Northern Judge to Brisbane and Judge Lukin was transferred from his position as Central Judge to Brisbane.[106] The other Judges who made up the new Court came from the District Court which was abolished. They were Judge Jameson and Judge T. O'Sullivan. O'Sullivan a Roman Catholic had been appointed by the Ryan Government in 1915. He had however in fact served as an Attorney-General in previous non-Labour Governments. Only one new appointment was in fact necessary. It was given to James W. Blair, another prominent Barrister. He too served as Attorney-General in non-Labour Governments and he had been an independent member for Ipswich until his defeat in 1915. The original Workers' Compensation Act was framed by Blair in 1905.

The *McCawley Case* gave free reign to Parliamentary control of the Judiciary by a simple act of Parliament. In this way, the Government was able to elevate McCawley from his position as a Supreme Court Judge to that of Chief Justice.

104. *The Daily Standard*, 31 March 1920.
105. *The Courier*, 31 March 1921.
106. *The Telegraph*, 1 April 1922.
The Courier, 31 March 1922.
The Daily Mail, 31 March 1922.