fairly be said to be open to discussion is the question whether the appellant was or was not a bailee of the money in question. If he was a bailee there was ample evidence that he fraudulently converted the money to his own use. But the point whether he was a bailee or not was never distinctly taken. It was not taken by his advocate at the trial; it was not reserved by the learned Judge for the consideration of the Full Court; nor was it argued by learned counsel who appeared before that Court. That is a sufficient reason why we should not allow it to be raised now. We do not assume the functions of a general Court of appeal in criminal cases, such as, it has been suggested, should be established in England. We do not think that we ought to allow the point to be raised here for the first time, especially when it was not a point that learned counsel came here to raise.

We therefore think that special leave to appeal should be refused.

*Leave refused.*

Solicitor, for applicant, *H. A. Moss.*

C. A. W.

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HIGH COURT OF AUSTRALIA.]

ROBERTSON AND OTHERS . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES, NEW SOUTH WALES . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906. SYDNEY, *April* 4, 5, 9. Griffith C.J., Barton and O'Connor JJ.

*Stamp Duties Act (N.S.W.) (No. 27 of 1898), sec. 18—Assessment for stamp duty—Appeal to Supreme Court—Case stated by Commissioner—Costs awarded to successful appellant—Taxation—Qualifying witnesses—Scale to be applied—Rules of the Supreme Court of 22nd December 1902, rr. 408, 420.*

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Sec. 18 of the *Stamp Duties Act* 1898 provides that any person dissatisfied with the assessment of a Commissioner may appeal to the Supreme Court from the assessment by way of a case stated by the Commissioner for the opinion of the Court, and "upon the hearing of such case . . . the Court shall . . . decide the question of costs." On the hearing of an appeal under this section the Commissioner was ordered to pay the appellants' costs. Rule 420 of the Supreme Court Rules of December 1902, which were made under the *Common Law Procedure Act* 1899, provided that, subject to the preceding rules, the taxing officer should tax all bills of costs in actions and other proceedings according to the scale of fees and allowances then in use, so far as they should apply, and for business not comprehended in that scale recourse should be had to the old Queen's Bench practice before 1873. The scales then in use on the common law side of the Court were a set of three scales established in 1898, and an old scale which it had been the practice of the Prothonotary to apply in all common law proceedings other than actions at law in the technical sense. Rule 408 established for actions at law three scales which were identical with those established in 1898, for which they were substituted. These scales included fees and allowances for qualifying witnesses, which were not provided for in the old scale or under the Queen's Bench practice.

*Held*, that an appeal under sec. 18 came within the meaning of the words "all actions and other proceedings" in rule 420, and therefore the appellants were entitled to these costs under the scale established by the rules of 1898 and re-established in 1902 by rule 408.

*Semble.*—Even if there had been no scale applicable under those rules, a successful appellant, under sec. 18, to whom costs were awarded, would have been entitled to have his costs taxed on the same footing as if the question had been tried under some other jurisdiction of the Court in which similar questions could be raised and determined, and in which the costs of qualifying witnesses would have been allowed him on taxation, on the principle stated in *Kauri Timber Co.* v. *The Woosung*, 14 N.S.W. W.N., 38.

Decision of the Supreme Court, *Robertson* v. *Commissioner of Stamp Duties*, (1905) 5 S.R. (N.S.W.), 622, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellants were the executors of the estate of Thomas Robertson. The Commissioner of Stamp Duties for the purposes of probate duty assessed a certain station property which formed part of the estate at an amount which the appellants considered excessive. They therefore appealed from his assessment to the Supreme Court by way of case stated under sec. 18 of the *Stamp Duties Act*. *Pring* J., before whom the appeal came, sitting as the Supreme Court under that section, after taking the evidence

of witnesses in the ordinary way as in an action at law, declared the assessment of the Commissioner to be erroneous, and found in favour of the value placed upon the land by the appellants, and, as he was empowered to do by sec. 18, awarded the appellants their costs of the appeal.

The solicitor for the appellants brought in his bill of costs for taxation, and the amount at issue being more than £5,000, contended that it should be taxed according to the highest of the scales contained in the Fourth Schedule to the Rules of the Supreme Court of 22nd December 1902. It was contended on the other hand that that scale was inapplicable, and that the proper scale in such a case was an old one which had been in use since 8th May 1856, for the taxation of costs of all business in the Supreme Court in its common law jurisdiction other than actions at law, with a reference to the scale of the Court of Queen's Bench, as provided in rule 420, for business not comprehended within the scale in use, whatever that might be. On that basis no allowance to town witnesses or to witnesses for qualifying to give evidence could be made, as was decided in the case of *Lucas* v. *Lackey* (1). The Prothonotary stated on the taxation that it had been his practice, since 1st September 1898, when the scales of costs in actions at law, as adopted by the Rules of December 1902, were originally established, to tax all bills of costs in proceedings other than actions at law according to the scale in use before September 1898, and decided that, inasmuch as the last-mentioned scale contained no provision for such allowances to witnesses, and he had no power to tax the bill under the scales contained in the Fourth Schedule to the Rules of December 1902, he must disallow those items.

A summons by the appellants for review of taxation was dismissed by the Supreme Court on the ground that a case stated under sec. 18 of the *Stamp Duties Act* 1898 was not an action at law, and therefore that, inasmuch as the scales of costs established by rule 408 applied only to actions at law, and rule 420 applied only to actions other than actions at law and prescribed for them the scale in use prior to September 1898, the costs of qualifying witnesses could not be allowed on taxation: *Robertson* v. *Commissioner of Stamp Duties* (2).

(1) 4 N.S.W. L.R., 28.

(2) (1905) 5 S.R. (N.S.W.), 622.

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From this decision the present appeal was brought by special leave.

The material portions of the sections of the *Stamp Duties Act* appear in the judgments.

*Dr. Sly* K.C., and *Kelynack*, for the appellants. The proceeding in this case is in substance an action for the difference between the duty payable on the Commissioner's assessment and that payable on the valuation of the executors. The only question was, what was the value of the property, and the only evidence that could be called was evidence on that issue. Without qualifying the witnesses to give evidence by inspection of the property their evidence would be useless. "Costs" in sec. 18 must include all costs necessarily incurred; and the order of the Judge, being in the widest possible terms, must be construed as having awarded all costs that it was in his power to award under that section. Witnesses' expenses are clearly costs contemplated by the Act. By sec. 54, if the Commissioner succeeds he can recover such expenses from the person assessed, and it must have been intended that the right should be mutual. The words of the Judge's order, as they follow the words of the Act, should be construed in the same sense as that in which they are used in the Act. [They referred to *Potter* v. *Dickenson* (1).] If the Judge had intended to exclude any item that might reasonably be deemed to come within the word "costs" he could have done so, but there is no such limitation to the order. It therefore entitled the appellants to all costs that might be allowed under any scale that was applicable in the practice of the Supreme Court, and even if there were no scale provided for such proceedings in the common law jurisdiction, the costs should have been allowed according to the scale of costs recoverable under the practice of that branch of the Supreme Court in which the scale was most favourable to the appellants: *The Kauri Timber Co.* v. *The Woosung* (2). Under the Equity and Probate practice of the Supreme Court these expenses would be recoverable.

Apart from the words of the Act, the appellants are entitled to these costs under the Rules of the Supreme Court, 22nd

(1) 2 C.L.R., 668, at p. 678.

(2) 14 N.S.W. W.N., 38.

December 1902. This proceeding was an action within the meaning of rules 408 and 420. It has all the attributes of an action of law. It is a proceeding in the Supreme Court to establish a right. The old definition was "*actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur*," as quoted from Lord *Coke* in *Bradlaugh* v. *Clarke* (1). Witnesses were called and a trial had just as at *nisi prius*. It was certainly included in "actions and other proceedings" in rule 420. It was a proceeding on the common law side of the Court. That rule is a mere direction to the Prothonotary to tax costs upon the scales then in use. The scales then in use were the same as those adopted from the previous practice and established in 1898 by the rule of that date, for which the present rule 408 was substituted in 1902. The latter rule in fact merely re-establishes the existing scales, for the schedule is identical with that of the rule of 1898. The old Queen's Bench practice, referred to in rule 420, is not to be resorted to except for business not comprehended in the new scales. It does not apply to the present case, because fees for qualifying witnesses are provided for in the scales which were fixed in 1898, re-enacted in the Rules of 1902, and directed to be applied to "all actions and other proceedings" by rule 420.

[They referred also to the Rules of the Supreme Court of 1856, 1898; *Stephen, Supreme Court Practice*, schedule, p. 275; *Pilcher, Supreme Court Practice*, 2nd ed., secs. 1088-1092; 20 Vict. No. 8, sec. 3.]

*Windeyer*, for the respondent. The power of the Prothonotary to allow costs is purely statutory, and therefore the appellants must point to some statutory provision giving him the power to allow these costs. The *Stamp Duties Act* uses the word "costs" simply, and must therefore be read subject to the rules made by the Supreme Court for the regulation of its own practice in that respect. The proceeding is on the common law side, and must be governed by the common law practice. The equity practice is made under a power conferred upon the Judges by the *Equity Act* to regulate the equitable business of the Court, and there is no power in any taxing officer to apply the rules so made to proceedings on any other side of the Court.

(1) 8 App. Cas., 354, at p. 361.

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[GRIFFITH C.J.—Would it not be rational to assume that, when the legislature prescribes a new form of proceeding, it intended that its incidents should be regulated by the analogy of the procedure most applicable to it?]

The Supreme Court has by its rules regulated the practice of the Court apart from special jurisdictions, and there is a scale applicable to this form of proceeding under which the witnesses' allowances in question are not to be allowed. Up to the passing of 20 Vict. No. 8 there was a general rule in the same terms as the present rule 420, referring to scales then in use, which were well understood but not formally published. Under those scales the Prothonotary has always acted, and has never allowed these costs except in actions begun by writ of summons. 20 Vict. No. 8, sec. 3, gave the Judges power to establish scales of costs, with regard to actions at law only, and this power was exercised in 1872 and again in 1898, by the rule which is now rule 408 of 1902. Outside actions at law the scales as set out in *Pilcher, Supreme Court Practice*, 2nd ed., secs. 1099 *et seq.*, are to be applied, the Judges having no power to establish any scales for such proceedings except those adopted in the old practice.

[O'CONNOR J.—Does not sec. 3 give the Judges power to make rules to regulate any branch of the Court's jurisdiction?]

No, that only refers to actions in which there is a claim for money as in common law actions. If the line is not drawn there it extends to every jurisdiction of the Supreme Court, and the powers conferred by the Equity Act, for instance, would be unnecessary.

"Action" was used in its technical sense in the rule of 1898, and should not be extended beyond the sense in which it was then used. Rule 408 speaks of *three scales* for actions at law, but rule 420 speaks of the *scale* now in use, obviously referring to something different from the three scales of rule 408. The only possible denotation of the word scale is the old scale. That gives the same meaning to the words of rule 420 as they had in the rules of 1898. The construction then will be this, subject to rule 408 which provides for costs in actions at law, the Prothonotary shall tax costs in all proceedings upon the old scale in use before 1898, and still in use for proceedings other than actions at law

or, in other words, for proceedings other than actions at law this old scale shall be adopted. In that way all proceedings on the common law side are provided for under rules 408 and 420. Actions at law in the technical sense were expressly provided for in 1898 by the original of rule 408, and from that time onward this must be regarded as an exception to the general rule expressed in rule 4 of 8th May 1856, and finally consolidated in rule 420 of 1902, in reference to actions and other proceedings generally.

The words "so far as the same shall apply" are merely introductory to the latter half of the rule, they do not restrict the application of the preceding part. Under the Queen's Bench practice these fees were not allowed: *Mackley* v. *Chillingworth* (1); *Murphy* v. *Nolan* (2); *Ormerod* v. *Thompson* (3); *May* v. *Selby* (4); *Lucas* v. *Lackey* (5).

[GRIFFITH C.J. referred to *Gravatt* v. *Attwood* (6); and *Clark* v. *Fisherton-Angar* (7).]

Rules 408 and 420, being merely re-enactments of the rules of 1898, should receive the same construction as those rules.

The word "costs" in the *Stamp Duties Act* must be construed in accordance with the then existing practice of the Supreme Court. Anything done by the Judges of the Supreme Court since that Act cannot alter the nature of the right to recover costs as against the Crown from what it was when created.

The word "costs" in the order has the same meaning as in the Act, that is, costs according to the practice in 1898. [He referred to *In re Grundy, Kershaw & Co.* (8); *Onslow* v. *Commissioners of Inland Revenue* (9); *Allen* v. *Flicker* (10); *Severn* v. *Olive* (11).]

No inference can be drawn from sec. 54 that the appellants' costs of valuation should be recoverable. They are not costs of litigation, but are part of the ordinary expenses of executors in connection with their duties, whereas the expenses referred to in sec. 54 are expenses brought about by the improper valuation by the executors. *The Kauri Timber Co.* v. *The Woosung* (12) is not in point. The equity rules are based on the *Equity Act*, and can

(1) 2 C.P.D., 273.
(2) 7 Ir R. Eq., 498, at p. 500.
(3) 16 M. & W., 860.
(4) 4 M. & G., 142.
(5) 4 N.S.W. L.R., 28.
(6) 21 L.J. Q.B., 215.
(7) 6 Q.B.D., 139.
(8) 17 Ch. D., 108.
(9) 25 Q.B.D., 465.
(10) 10 Ad. & E., 640.
(11) 6 Moore, 235; 3 Br. & B., 72.
(12) 14 N.S.W. W.N., 38.

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have no reference to proceedings on the common law side of the Court, or to the Supreme Court in its general jurisdiction.

*Dr. Sly* K.C., in reply. The Supreme Court has jurisdiction to regulate litigant's costs even if no Statute expressly gave that power. It is enough that the Statute gives the power to award costs. The power to prescribe what costs shall be allowed is consequential: *Chitty's Archbold*, 12th ed., p. 510.

Rule 420 admittedly applies to all previous scales, and therefore cannot be limited to one old scale. All the scales are to be applied so far as they can be applied. "Scale" must mean the plural, and the rule therefore covers the whole field of practice.

"Costs" in sec. 18 of the *Stamp Duties Act* must mean such costs as would be awarded in a similar proceeding. If there were no provision for appeal by way of case stated, the appellants would have had a right of action at common law. If successful they should have all the costs that would necessarily be incurred on such an issue in such an action.

*Cur. adv. vult.*

April 9.

GRIFFITH C.J. This is an appeal from a decision of the Full Court of New South Wales, dismissing a summons for a review of taxation. The appellants were the executors under the will of Thomas Robertson, and were called upon under the *Stamp Duties Act* 1898, to pay stamp duty upon the value of the estate which they took as executors. That Act requires full particulars to be given by executors of the estate and of its value for the purpose of probate duty, and provides that, if the Commissioner of Stamp Duties is dissatisfied with the assessment or valuation put upon the property by the executors, he may make an assessment himself, subject to appeal, and in the event of there being an under value by the executors he may recover the costs of making his own assessment. That is provided by sec. 54. Sec. 18 contains general provisions for appeals to the Supreme Court against the Commissioner's decision. Sub-sec. (1) provides that "any person dissatisfied with the assessment of a Commissioner may, within fourteen days after the date thereof, and on payment of duty in conformity therewith, appeal against the assessment to

the Minister, who may confirm or modify such assessment," and if the appellant is dissatisfied with the decision of the Minister, he may appeal to the Supreme Court, and may for that purpose require the Commissioner to state and sign a case setting forth the grounds of his assessment, or may appeal direct to the Supreme Court in the first instance without appealing to the Minister. Then the section goes on to provide (sub-sec. (2)) that "The Commissioner shall thereupon state and sign a case accordingly and deliver the same to the appellant upon whose application such case may be set down for hearing in the Supreme Court," and (sub-sec. (3)) "Upon the hearing of such case . . . the Court shall determine the question submitted, and assess the duty chargeable under this Act, and also decide the question of costs." Then, (sub-sec. 4)) "If it is decided by the Court that the assessment of the Commissioner is erroneous, any excess of duty which has been paid in conformity with such erroneous assessment, together with any penalty which has been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant." Sub-sec. (5) provides that "the Court may be holden before one Judge only." In the present case the Commissioner was dissatisfied with the valuation of a portion of the estate. He put his own estimate on the estate, and the appellants appealed direct to the Supreme Court upon a case stated by him. The difference, in amount of duty, between the two valuations was £5,000. The Supreme Court then directed that the matter should be tried before a single judge, and it was tried before *Pring* J., without a jury. He decided in favour of the appellants, and by his order directed that the respondent should pay to the appellants their costs of and incidental to the hearing.

The appellants then brought in a bill of costs to be taxed, which they drew up on a scale applicable to actions in the Supreme Court. On the taxation the taxing officer refused to allow any qualifying fees for witnesses. A very large portion of the expenses incurred by the appellants was naturally in respect of such fees, because, the property in dispute being a pastoral property, it was necessary for the witnesses who gave evidence of value to be personally acquainted with it. The appellants then applied to the Supreme Court for a direction to the Prothonotary to review the taxation.

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That application was dismissed by the Supreme Court. The learned Judges held themselves bound by the construction they put upon the rules to hold that such charges could not be recovered in a proceeding of this kind. Two of them expressed regret that their decision should deprive the appellants of these costs, but held that they were bound by the literal construction of the rules so to hold. From that decision this appeal is brought to us.

Now, I do not feel pressed by the same difficulties that weighed with the learned Judges of the Supreme Court. They rested their decision entirely upon the rules. But I see no difficulty in coming to a conclusion apart altogether from any construction of the rules to which they referred, and I will, in the first instance, give my reasons for saying so, and will afterwards deal with the difficulties that pressed upon the learned Judges of the Supreme Court.

The eighteenth section of the *Stamp Duties Act* 1898 provides that the Court "shall decide the question of costs." First, I remark that a special procedure is directed by this section in such cases. The money in dispute is to be paid in the first instance, and then there is a provision for recovering it back. Now, in the absence of any special provision, that money might be recovered by some form of action in the Supreme Court, but the legislature has laid down that it is to be recovered only in a proceeding by way of special case, and that remedy, probably, is the only one which can be adopted. But that is a mere matter of procedure. The Act substitutes that remedy for any other that might be applicable in such a case, and it is a general rule that a direction as to a form of procedure is not to be construed in such a way as to affect the substantial rights of parties. The Act then goes on to say that the Court shall decide the question of costs. That is obviously an elliptical expression and must be expanded. What then do the words mean? They may be read in this way, "The Court shall direct by whom the costs of the case shall be paid," and they must have the power necessary to give such a direction. Then arises the question, what costs? The giving of a power such as this cannot have been meant to interfere with any substantial rights of the parties. In my opinion, a Statute authorizing the award of costs under a new form of procedure, and saying nothing more, must

be taken to mean such costs as would be payable if the matter had been determined in accordance with the ordinary practice of the Court in matters of a like nature. Now, applying that rule of construction, what would be the costs under the ordinary practice of the Court? What analogy is there in its practice to a proceeding of this kind? There are at least two forms of proceedings in the Supreme Court in which similar matters may be investigated. One is an action at law for the recovery of the value of property taken by the Government for public purposes, or an action for the recovery of moneys extorted in excess of the proper demand. Both these cases are very like the present. Another proceeding is very analogous to this, that is an inquiry in the Supreme Court to ascertain the value of property for the purposes of an administration suit. If then another form of procedure could have been adopted for this purpose, it might have been by action at law. In that case, and also in the case of an inquiry in an equity suit, it is admitted that these costs would be recoverable. If, then, as is admitted, under some other form of proceeding for the same purpose these costs could be recovered, why should they not be recoverable in this? I may add, before passing from this point, that if, instead of such costs being recoverable in the administrative or equitable and also in the common law procedure of the Court, they had been recoverable only in one of them, I can see no reason why the principle laid down by the Chief Justice, sitting as Judge Commissary in the Admiralty case, *Kauri Timber Co.* v. *The Woosung* (1) should not be followed. When the legislature confers upon a litigant the privilege of recovery of his costs as in the Supreme Court, it should be taken that it was intended that he should recover them upon the same footing as if he had adopted the procedure of the Court in which the scale is most favourable to him. That is, in my opinion, sufficient to establish that these costs should have been allowed. Is there then anything in the rules to lead to a contrary conclusion?

The learned Judges have referred particularly to two considerations which most influenced them, that is, to two of the rules of the Supreme Court 1902, which purport to be made under the *Common Law Procedure Act* 1899. That Act deals almost, but

(1) 14 N.S.W. W.N., 38.

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not quite, exclusively with actions at law in a technical sense, and rule 2 expressly provides that the rules shall not apply to the proceedings in other jurisdictions of the Supreme Court. Nevertheless, it is clear that some of these rules deal with matters which do not come under the *Common Law Procedure Act*; they must therefore be taken to have been made by the Judges of the Supreme Court under their general power to make rules for the regulation of the practice of the Court and for determining what costs shall be allowed to litigants. The rule which caused the principal difficulty was rule 420, which provides: [His Honor read rule 420 and proceeded:] Now, approaching that rule without any preconceived notion of what it was intended to effect, it seems to me to be to a certain extent entirely free from ambiguity. It refers to a scale of costs which may have the effect of modifying its operation. But, with that exception, it lays down a general rule that all bills of costs shall be taxed according to the scales then in use, so far as they are applicable. The difficulty, as I understand it, arises from a preceding rule, No. 408. That is to this effect: [His Honor read the rule and continued:] That merely comes to this, that, so far as the scale established by it alters that previously provided, it shall apply to actions at law. It is said that in this case the scale is a mere transcript of the scale previously in force. In that case the scales established by the rule do not alter the practice. If there is any alteration, rule 420 is to be read subject to it. What is the meaning of the term "actions and other proceedings" in rule 420? The learned Judges of the Supreme Court felt compelled to read it as excluding an action at law in the sense in which that term is used in rule 408. I confess myself quite unable to come to that conclusion. The words are plain. It is possible that the scales under rule 408 do not cover every conceivable item of costs, unless they are so perfect that nothing has by any possibility been overlooked. In my opinion rule 420 lays down a general rule governing the taxation of bills of costs in all actions and other proceedings not provided for by rule 408, or by rule 2 which limits the application of the rules in certain particulars. What then is the meaning of the term "scale now in use"? That means, in my opinion, in use immediately before the rules were drawn up in 1902. When we

inquire what was the scale then in use we find that there was more than one such scale in use, the one established in 1898, and also a general scale established under a rule of 1856, which invoked the practice of the Queen's Bench at Westminster. This rule deals with costs in actions and other proceedings, and, in my opinion, the plain meaning of rule 420 is that it refers to the scale which prescribed the costs that were to be allowed in proceedings of all kinds whatsoever in the Supreme Court, except so far as limited by rule 2.

It is necessary then to deal with the concluding words of the rule. It is said that the rules of 1898 applied only to actions at law strictly so called, and as to all other matters reference was made to the old Queen's Bench scale. Now, the words "tax all bills of costs in actions and other proceedings according to the scale of fees and allowances now in use, so far as the same shall apply" are, indeed, an ambiguous expression. They may mean according to such part of the scale as is applicable to a proceeding in that form, or they may have a wider meaning, namely, that these scales which have hitherto been in use shall in future apply to all proceedings so far as they can be made applicable, that is, so far as the items mentioned in the scale can occur in such proceedings. I refer then to the latter part of the section: "and for all business not comprehended within that scale the like fees shall be allowed as would have been allowed in respect of business of the like kind in the Queen's Bench, before the passing of the *Judicature Act* 1873." Now, what is the meaning of the words "for all business"? The term business may, I think, having reference to the other rules, and what we have been told as to the provisions for scales of costs, mean either items not comprehended in that part of the scale applicable to the particular proceeding, or any items of a character not specified in any part of that scale. It is not necessary to express a definite opinion on that subject, but, if it were, I should certainly say that the second construction is the correct one. For any item not mentioned in the old scale, you must have recourse to the old Queen's Bench scale, but as to any item of a character which you can find in the scale prescribed for all actions and other proceedings, that scale is to be applied, except so far as it has been modi-

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fied by any other of these rules. That is the same result as I get from the construction of the terms of sec. 18 of the *Stamp Duties Act* 1898.

For both reasons I feel that I am not precluded from doing what the learned Judges of the Supreme Court thought they were restrained by the rules from doing, and I therefore think that the appeal should be allowed.

BARTON J. I am of the same opinion.

O'CONNOR J. I concur in the conclusion at which my learned brother the Chief Justice has arrived, and for the reasons which he has stated. In support of that view I will add only a few words.

The right to recover these costs comes from the provisions of sec. 18 of the *Stamp Duties Act* 1898, which gives the Judge or the Supreme Court in hearing the case power to decide the question of costs. Having regard to the subject matter of the appeal dealt with by that section, there is, I think, no question that it was intended that the word "costs" should include allowances to witnesses for qualifying themselves to give evidence. The subject matter of inquiry in the appeal under sec. 18, must be to a large extent the valuation of property. That valuation must in general be supported by expert witnesses, who must necessarily be qualified to give evidence as to the value of the particular property under inquiry. It would be, indeed, an idle provision which gave the Judge power to decide the question of costs, if such a very large proportion of the costs that must necessarily be incurred should be shut out from his jurisdiction. Construing the section with reference to the subject matter, it appears to me that the word "costs" must be taken to include the costs of qualifying witnesses. The Supreme Court is one body with several jurisdictions, and the single Judge who takes this matter for the Court may be a Judge in any of these jurisdictions. If the Supreme Court, instead of appointing *Pring* J., who ordinarily sits at common law, had referred the matter to the Judge of the Probate Court, to whom it might very appropriately have been referred, for it is really an inquiry into matters falling

within the Probate jurisdiction, it is beyond question that an order made by a Judge in that jurisdiction giving the appellants their costs would be taken to include the costs now under consideration. If the Judge who presides in the equity jurisdiction had dealt with the matter and made an order for costs, these costs would have been allowed in that jurisdiction also. But it is said that, because it was referred to *Pring* J. who sits with the powers of the Supreme Court in its common law jurisdiction, his order is not to be construed in the same way and these costs cannot be allowed. Now, that seems to me to be a conclusion requiring very strong reasons to support it. *Pring* J. sitting as the Supreme Court, if he decided the question of costs himself, clearly could by express order give these costs to the appellants. If he acted directly under the power given by the Statute without the intervention of the taxing officer he might have allowed costs, and included in them the costs of qualifying witnesses. He did not do that, but, having allowed costs, referred the taxation of them in the ordinary way to the proper officer. The question is whether his direction to the proper officer to tax is to be taken as a direction to tax them in the way in which a common law proceeding in an action should be taxed, or as a direction to tax them so as to give full costs according to the practice of the Court most nearly applicable to that kind of proceeding. That brings us then to the powers of the Prothonotary. He, exercising the powers of the Supreme Court for the purpose of taxing these costs, entered upon the taxation. What is the principle which should guide him? It seems to me that the proper principle is that which was laid down by the Chief Justice of the Supreme Court of New South Wales in *The Kauri Timber Co.* v. *The Woosung* (1). That was a case in which one of the matters in controversy was what allowances should be made in the Supreme Court under an Admiralty rule which provided that the scale of fees and allowances to witnesses for loss of time and travelling expenses should be according to the scale for the time being in force in the Supreme Court. With reference to that the Chief Justice said (2):—"As regards the second point, I am of opinion it was assumed by the framer of the table of fees to be found at page 88 of the Book of

(1) 14 N.S.W. W.N., 38. (2) 14 N.S.W. W.N., 38, at p. 40.

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Admiralty rules that each Supreme Court had a scale of costs providing for allowances to witnesses wherever such witnesses resided. I am, therefore, of opinion that if there be a scale of costs in any jurisdiction of the Supreme Court that scale of costs should be adopted. I do not think it is any answer to say; 'There is no such scale at the common law side of the Supreme Court jurisdiction (perhaps it is to be regretted there is not), and, therefore, although I find there is such a scale on the equity side of the Court, I will ignore the latter.'" He then goes on to say: "The jurisdiction of the Vice Admiralty Court is a jurisdiction apart from the jurisdiction of the Supreme Court; accordingly if there be any scale of costs in the Supreme Court, no matter in which of its jurisdictions, this scale must in my opinion be followed." The principle so laid down is exactly applicable to the circumstances of this case. The Statute creates a new remedy in a form which is not an action at common law, nor a proceeding in equity, and which has no counterpart in any known form of proceeding in the Court. But the object of the Statute is that the person who appeals shall, if successful, be indemnified, in the wide meaning of that word, as far as possible. If the costs are referred to the Prothonotary, he should interpret his powers in such a way as to give effect to the order for the recovery of costs which was intended to be given by sec. 18. The power of the Prothonotary depends no doubt upon the rules, and I must admit that, if it were not for the doubts expressed by their Honors of the Supreme Court, I should not have had any difficulty in putting a plain meaning on the two rules under discussion which would enable these costs to be taxed to the fullest extent, as Dr. Sly has contended. My learned brother the Chief Justice has already gone so fully into the construction of the rules that I shall only say a few words on that subject.

Rule 408, following a form of words which has apparently been adopted for many years, establishes certain scales of costs. The object of sec. 420 is altogether different. It is a direction to the taxing officer, and it directs him, subject to the preceding rules, as follows, "to tax all bills of costs in actions and other proceedings according to the scale of fees and allowances now in use, so far as the same shall apply, and for all business not compre-

hended within that scale the like fees shall be allowed as would have been allowed in respect of business of the like kind in the Queen's Bench before the *Judicature Act* 1873." That rule, in my opinion, was intended to cover the whole field of costs and the whole duty of the Prothonotary, and to direct him to apply the Fourth Schedule under rule 408 when applicable, but also to apply the existing scale, and, in so far as the rules of 1898 were not inconsistent with the scale in the Fourth Schedule, to apply that scale. Giving that reading to the rule, it appears to me that, when the Prothonotary finds that there is a scale of costs generally applicable to an action allowing expenses of this kind, and that there is a direction to him in the Rules to apply that scale in actions and other proceedings, and costs have been awarded under a Statute clearly intended to give all costs that can be recovered, it is his duty to apply the scale which will give every right which the Statute has intended to give.

For these reasons I think that the appeal must be sustained.

*Appeal allowed. Order appealed from discharged. Order for review of taxation. Respondent to pay the costs of the summons and the appeal.*

Solicitors, for the appellants, *Sly & Russell.*

Solicitor, for the respondent, *The Crown Solicitor of New South Wales.*

C. A. W.