[HIGH COURT OF AUSTRALIA.]

GURNETT . . . . . APPELLANT;
PLAINTIFF,

AND

THE MACQUARIE STEVEDORING COMPANY PROPRIETARY LIMITED . . } RESPONDENT.
DEFENDANT,

[No. 2].

H. C. OF A. 1956.

SYDNEY, *April* 23;

MELBOURNE, *June* 15.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

High Court—Appellate jurisdiction—Power to "give such judgment as ought to have been given in the first instance"—Appeal from order of the Supreme Court dismissing appeal—Appeal allowed—Costs against respondent—Application for indemnity certificate as to costs in Supreme Court—Power of High Court to award—Judiciary Act 1903-1955 (*No.* 6 *of* 1903—*No.* 35 *of* 1955), *s.* 37—*Suitors' Fund Act* 1951 (*N.S.W.*), *s.* 6.*

The appellate power of the High Court under s. 37 of the *Judiciary Act* 1903-1955 to substitute for an order made on an appeal to the Supreme Court such order as that court should have made does not enable it to grant to a party who, as a result of its determination, becomes in effect an unsuccessful respondent in the Supreme Court an indemnity certificate under s. 6 of the *Suitor's Fund Act* 1951 (N.S.W.) in respect of the costs of appeal in the Supreme Court which he as a consequence of such determination becomes liable to bear.

So *held* by *McTiernan*, *Williams*, *Webb* and *Taylor* JJ., *Dixon* C.J. dissenting.

* Section 6 of the *Suitors' Fund Act* 1951 provides:—"(1) Where an appeal against the decision of any court on a question of law succeeds, the court determining the appeal may grant to the respondent thereto or to any one or more of several respondents a certificate (hereinafter in this section referred to as an 'indemnity certificate').

(2) Where a respondent to an appeal has been granted an indemnity certificate, such certificate shall entitle the respondent to be paid from the Fund—(a) the whole of the appellant's costs of the appeal ordered to be paid and actually paid by the respondent; (b) the costs of the appeal incurred by the respondent: Provided that the amount payable from the Fund pursuant to paragraph (b) of this subsection shall not exceed the amount payable pursuant to paragraph (a) hereof: Provided further that the amount payable from the Fund under or pursuant to any one indemnity certificate shall not in any case exceed the sum of five hundred pounds or such other amount as may be fixed in lieu therof by the Governor by proc-

APPLICATION ON MOTION.

By an order of the High Court an appeal in the present case was allowed and a decision in favour of the respondent company given by the Supreme Court of New South Wales was reversed (*Gurnett* v. *Macquarie Stevedoring Co. Pty. Ltd.* (1)). The respondent company now moved the High Court for the grant of an indemnity certificate under s. 6 of the *Suitors' Fund Act* 1951 (N.S.W.) in respect of the costs of appeal in the Supreme Court which as a consequence of the High Court's order it became liable to pay.

The relevant statutory provisions are fully set out in the judgments of the Court hereunder.

R. W. Fox, for the applicant (the respondent to the appeal).

M. H. Byers, for the Attorney-General for New South Wales.

There was no appearance for the appellant Gurnett.

lamation published in the Gazette. The Governor may from time to time in like manner vary or revoke any such proclamation.

(3) Where a court of appellate jurisdiction (in this subsection referred to as the 'court of higher appellate jurisdiction') grants an indemnity certificate to the respondent to the appeal heard by it, an indemnity certificate granted previously to any person who is a party to such appeal by a court of lower appellate jurisdiction in the appeal or series of appeals which preceded the appeal to the court of higher appellate jurisdiction shall be vacated.

(4) (a) An indemnity certificate shall have no force or effect during the time limited for appealing against the decision of the court which granted such certificate or, in the event of an appeal being made against that decision, during the pendency of the appeal.

(b) Where a court of appellate jurisdiction (in this paragraph referred to as the 'court of higher appellate jurisdiction') does not grant an indemnity certificate to the respondent to the appeal heard by it, an indemnity certificate granted previously to any person who is a party to such appeal by a court of lower appellate jurisdiction in the appeal or series of appeals which preceded the appeal to the court of higher appellate jurisdiction shall, if that indemnity certificate has not been vacated pursuant to subsection three of this section, be deemed, for the purpose only of paragraph (a) of this subsection, to have been granted by the court of higher appellate jurisdiction.

(5) The grant or refusal of an indemnity certificate shall be in the discretion of the court and no appeal shall lie against any such grant or refusal.

(6) An indemnity certificate shall not be granted in respect of any appeal from proceedings begun in a court of first instance before the commencement of this Act.

(7) An indemnity certificate shall not be granted in favour of the Crown or any company or foreign company having a paid-up capital of one hundred thousand pounds or more.

In this subsection 'company' and 'foreign company' have the meanings ascribed to them by subsection one of section six of the Companies Act 1936, as amended by subsequent Acts."

(1) (1955) 95 C.L.R. 99.

H. C. OF A. 1956. GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2]. June 15.

The following written judgments were delivered :—

DIXON C.J. By this application a party to an appeal in this Court seeks an indemnity certificate under the *Suitors' Fund Act* 1951 (N.S.W.) in respect of the costs of an appeal in the Supreme Court of New South Wales. We pronounced upon the merits of the appeal to this Court on 28th November 1955 (1). It was an appeal from an order dismissing an appeal. The order was made by the Full Court of the Supreme Court and the appeal thereby dismissed was instituted by a plaintiff against a verdict which, at the end of his case, had been found for the defendant at the direction of the presiding judge. This Court was of opinion that the case ought not to have been withdrawn from the jury and accordingly pronounced judgment reversing the order of the Supreme Court. The minutes of the order to give effect to this Court's decision were expressed to allow the appeal with costs, to order that the order of the Full Court of the Supreme Court be discharged, and that in lieu thereof it be ordered that the appeal to that court be allowed with costs, the verdict for the defendant be set aside and there be a new trial of the action. As to costs, it was ordered that the costs of the former trial should abide the result. No order has yet been drawn up to give effect to the minutes of the order of this Court. It is therefore open to the Court to vary or add to it. The defendant in the action now applies to the Court to vary or add to the order pronounced by providing in some way that the defendant should have an indemnity certificate in respect of the costs of the appeal in the Supreme Court. The defendant in the action was the respondent to the appeal to the Full Court of the Supreme Court and was also the respondent to the appeal to this Court. The application in effect, if not in form, is that to the minutes of that part of the order pronounced which states what order shall be made in lieu of that discharged, we should now add a provision granting an indemnity certificate under s. 6 of the *Suitors' Fund Act* 1951 (N.S.W.).

That Act, the operation of which commenced on 11th November 1951, is entitled "An Act to make further and better provision in respect to the liability for costs of certain litigation ; to establish a Suitors' Fund to meet such liability ; and for purposes connected therewith ". Section 3 establishes a Suitors' Fund and provides what moneys are to be paid into it. These moneys are described in s. 5 of the Act. The contributions consist of such percentage, not exceeding ten per cent, of the fees of court collected in State jurisdictions as may be fixed by the Governor in Council. The

(1) (1955) 95 C.L.R. 99.

assets of the fund are vested in the Under Secretary of the Department of the Attorney-General and of Justice, who is for the purpose created a corporation sole. It is s. 6 that empowers a court of appeal of the State to grant an indemnity certificate and also describes what its effect shall be. Section 6 must be read with the definitions contained in s. 2. So read sub-s. (2) of s. 6 defines the extent of the indemnity which a certificate confers upon an unsuccessful respondent to an appeal in respect of his liability to pay the costs of his adversary and in respect of his own costs, an indemnity effected by recoupment from the Suitors' Fund. The power to grant an indemnity certificate is conferred by sub-s. (1) of s. 6. It is conferred only upon a " court determining an appeal ". The sub-section provides that where an appeal against the decision of any court on a question of law succeeds, the court determining the appeal may grant to the respondent thereto or to any one or more of several respondents a certificate which is called an indemnity certificate. Sub-section (2) states the result. Where the respondent to an appeal obtains such an indemnity certificate the certificate entitles him to be paid from the fund (a) the whole of the appellant's costs of the appeal ordered to be paid by and actually paid by the respondent, and (b) the costs of the appeal incurred by the respondent. There are two limitations, fixed by provisos, upon the amount payable. One proviso says that what is payable under par. (b) shall not exceed what is payable under par. (a). The other enables the Governor to name a figure which shall be the limit of the amount payable. At present the figure named is £1,000. In sub-s. (2) the words " costs of the appeal " bear an artificial meaning as a result of the definition in s. 2, which extends the natural meaning. The expression is defined to include costs of any intermediate appeal and where the appeal is by way of motion for a new trial the costs of the first trial. Except for this the expression does not include the costs incurred in a court of first instance. An appeal is defined to include a motion for a new trial and any proceeding in the nature of an appeal. There are certain ancillary provisions made by the ensuing sub-sections of s. 6. Sub-section (3) deals with the possibility of more than one appeal. If what is called a court of lower appellate jurisdiction grants an indemnity certificate to a party before it and there is an appeal to a court of higher appellate jurisdiction which grants an indemnity certificate to the respondent to that appeal, the previous indemnity certificate is thereby vacated. Sub-section (4) has a very limited purpose, but in the second of the two paragraphs of which it consists, it manages to obscure the

H. C. OF A. 1956.

GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2].

Dixon C.J.

extent to which that purpose is to operate. The obscure paragraph, however, may be put aside as not presently material. It is enough to state the general purpose of the sub-section, which is to deprive an indemnity certificate of any force or effect during the time limited for appealing against the decision of the court which granted such a certificate and, if there be an appeal, during the pendency of the appeal. Sub-section (5) provides that the grant or refusal of an indemnity certificate shall be in the discretion of the court and no appeal shall lie against any such grant or refusal. Finally by sub-s. (7) it is provided that no indemnity certificate shall be granted in favour of the Crown or in favour of any company the paid up capital of which is of not less than £100,000.

In *Commissioner of Stamp Duties* (*N.S.W.*) v. *Owens* [*No.* 2] (1), we decided that the High Court of Australia was not a court within the operation of the *Suitors' Fund Act*. We held that the jurisdiction of this Court, which depends upon the Constitution of the Commonwealth and the laws validly made thereunder, could not in such a matter be affected by an exercise of the authority of the State legislature. Accordingly it was not a court to which s. 6 (1) of its own force could apply nor was there any reason to think that the term " court " in s. 6 (1) was intended to include the High Court of Australia (2). We also held that s. 79 of the *Judiciary Act* 1903-1950, supposing it to apply to the appellate jurisdiction of the Court, did not have the effect of arming the Court with the power created by the State legislation: " . . . it is no part of its purpose to pick up, so to speak, a provision of State law imposing on State courts such a function as that assigned to them by s. 6 (1) and convert it into a provision imposing a like function on federal courts " (3). We therefore held that this Court had no jurisdiction to grant a certificate which would have the effect of enabling the respondent to an appeal to this Court to obtain from the Suitors' Fund the costs he had incurred in this Court or to obtain reimbursement of the costs incurred by his opponent in this Court which he had been ordered to pay. That decision, as will be seen, was concerned with a claim to indemnity out of the fund in respect of costs incurred in this Court, not in respect of costs incurred in the court from which the appeal came to this Court. The claimant failed because the Act possessed no operation in relation to costs incurred in this Court; it could possess no such operation of its own direct force and it was not given such an operation by s. 79 of the *Judiciary Act*.

(1) (1953) 88 C.L.R. 168.
(2) (1953) 88 C.L.R., at p. 169.
(3) (1953) 88 C.L.R., at p. 170.

The present case concerns not the costs incurred in this Court but the costs incurred in the Supreme Court. It concerns not the power of this Court derived directly or indirectly from the State Act to pronounce initially on the question whether a certificate should be granted. What it concerns is the extent of the power of this Court under its appellate jurisdiction, exercisable in respect of judgments of the Full Court of the Supreme Court of New South Wales, a power which enables this Court to substitute for the order of the Supreme Court the order which in the opinion of this Court ought to have been made.

In the present case the decision of this Court was that the Supreme Court's decision upon the merits was erroneous and that its order must be discharged. That order dismissed an appeal. Section 6 does not authorize the Supreme Court when it dismisses an appeal to give an indemnity certificate. The Supreme Court therefore could not be asked for such a certificate. Our decision was, however, that the Supreme Court ought to have allowed the appeal. Had the Supreme Court allowed the appeal the power of that court would have arisen to grant an indemnity certificate to the unsuccessful respondent to that appeal. The question is therefore whether, when we undertake in the exercise of our appellate power to substitute for the order made by the Supreme Court the order which in our view that court ought to have made, our power extends to the grant of the indemnity certificate which would, or might have been, consequential upon an order allowing the appeal, had the Supreme Court made it.

The appellate jurisdiction of this Court involves a full appeal. On the one hand in its exercise this Court may give such judgment as ought to have been given by the court appealed from. On the other hand this Court cannot, in substitution for the order of the court appealed from, make an order which was not competent to that court. In the language of s. 37 of the *Judiciary Act* 1903-1955, in the exercise of its appellate jurisdiction the Court may confirm, reverse or modify the judgment appealed from and may give such judgment as ought to have been given in the first instance.

The question which this case raises is whether the function which s. 6 of the *Suitors' Fund Act* confides to the Supreme Court lies outside the ambit of this power of the High Court. Two grounds have been suggested for so regarding it. One ground is that an indemnity certificate does not concern the controversy between the parties but relates only to the rights of the unsuccessful party to recoupment from a governmental fund. The other is that the

H. C. OF A. 1956. GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2]. Dixon C.J.

grant of an indemnity certificate is not a function of a judicial character. This second reason severs without justification the duty of the court to exercise its discretion under the *Suitors' Fund Act* from the order it makes *inter partes* as to costs and from the view of the court of the nature and circumstances of the appeal. The function under the *Suitors' Fund Act* is new but it is consequential upon and intimately bound up with the disposition of the appeal. The first of the two reasons seems to imply an undue limitation of the appellate power. The essence of s. 6 of the *Suitors' Fund Act* is to give the State court determining the appeal an ancillary or incidental authority. It supposes that the court has determined the appeal by allowing it in whole or in part. Paragraph (a) of sub-s. (2) of s. 6 contemplates an order by the court awarding the costs of the appeal against the unsuccessful respondent. It then proceeds on that footing to authorise the court determining the appeal to give a certificate which indemnifies the unsuccessful party from the consequences of that order. It is a State law which closely affects the consequences of an appeal and of the order which the appellate court may make. Let it be supposed that, having allowed an appeal, the Supreme Court made such an order. If the unsuccessful respondent appealed to this Court and this Court set aside the order of the Supreme Court allowing the appeal, the very ground upon which s. 6 enabled the Supreme Court to grant an indemnity certificate would have been destroyed. Ought not the order of this Court then to proceed, as part of its order disposing of the appeal, to set aside the indemnity certificate? Correspondingly when the Supreme Court, by a decision which in the view of this Court is erroneous has dismissed an appeal, the error *ex hypothesi* has prevented the occasion for granting an indemnity certificate arising. Would the jurisdiction of this Court to do according to State law what the Supreme Court ought to have done in disposing of the appeal be completely exercised unless it took the further step of saying whether the Supreme Court ought or ought not, in allowing the appeal, to have granted an indemnity certificate? It is not a question of this Court exercising an independent power. It is entirely a question of this Court superseding the decision of the Supreme Court and replacing it with that decision which, according to State law, ought to have been given in disposing of the proceeding before the Supreme Court. The power given by s. 6 is new and in many ways anomalous but it appears to be a power given to State appellate courts because State law regards it as appropriate for the purpose of doing complete justice in the litigation. True it is

that it does not operate *inter partes* and that it relates to a consequence upon one party of a decision given *inter partes*. But nevertheless in my opinion it would be too narrow a view of the appellate power to regard it as not reaching far enough to cover the entire decision which the Supreme Court ought to have given in disposing of the appeal.

For these reasons I am of opinion that it is competent to this Court to add to the order pronounced upon 28th November 1955 upon the appeal a further provision as part of the order substituted for the order of the Supreme Court so that the substituted order would include the grant of an indemnity certificate in respect of the costs of the appeal in the Supreme Court.

The question remains whether in substance it is a proper case for the grant of such an indemnity certificate. Sub-section (1) of s. 6 grants a power which, as s. 6 (5) shows, is to be exercised as a matter of discretion. It provides that the court determining the appeal may grant to the respondent thereto an indemnity certificate. The power arises only when an appeal against the decision of a court on a question of law succeeds. Very little light is to be obtained from the long title or the provisions of the Act as to the considerations which should govern the exercise of the discretion to grant a certificate. But since it does not arise except in the case of a successful appeal against a decision upon a question of law, it would seem that the purpose of the legislature was to relieve litigants of the burden of costs that might be imposed upon them by reason of erroneous decisions upon questions of law. In the present case no question was involved as to any principle of law or any application of principle or as to the meaning or effect of any statutory provision. It is true that in the legal dichotomy between questions of fact and questions of law we place under the latter head a question whether there is sufficient evidence to submit to a jury in support of a cause of action. That is because it is a question for the court to decide and not for a tribunal of fact. In the present case no considerations of law affected the matter at all. It was simply a question whether the evidence adduced was enough to enable the jury to draw an inference of fact. Further, the defendant is a limited company apparently not without assets. All that we know concerning the finances of the defendant company is that its paid up capital is £84,000. At the trial the defendant company's counsel advisedly sought to withdraw the case from the decision of the jury. To take such a course involved an obvious risk. I cannot see why, because in the result it turned out badly, the defendant should

H. C. OF A. 1956.

GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2].

have a claim upon the discretion of the Court to certify for the recoupment of the costs out of a public fund. Indeed I can see no sound reason why the defendant company should be indemnified for costs out of the Suitors' Fund. In my opinion the discretion given by s. 6 should in this case be exercised by refusing a certificate. I would on that ground refuse the application of the defendant respondent.

McTIERNAN J. This is an application on behalf of the respondent in this appeal for an " indemnity certificate " under the *Suitors' Fund Act* 1951 (N.S.W.). The High Court is not a court which is vested by that Act with the discretion of granting or refusing such a certificate. But this application is made in this appeal. It is founded upon the assumption that the power of the High Court under s. 37 of the *Judiciary Act* 1903-1955 enables the Court to operate s. 6 (1) of the *Suitors' Fund Act* 1951. This provision, s. 6 (1), applies where an appeal against the decision of any court on a question of law succeeds. It was not within the discretion of the trial judge to give any indemnity certificate. The right to such a certificate was not involved in the action between these parties. It cannot be said that an order for a certificate of indemnity ought to have been made " in the first instance ", if that means in this case the trial of the action. Section 6 (1) of the *Suitors' Fund Act* 1951 provides that where an appeal to which it applies succeeds, the court determining the appeal may grant to the respondent an indemnity certificate. A motion for a new trial is an appeal for the purposes of this provision : *Suitors' Fund Act*, s. 2. It is provided by s. 6 (5) that the grant or refusal of an indemnity certificate shall be in the discretion of the court and no appeal shall lie against any such grant or refusal. The motion for a new trial was the first stage in the present case at which an indemnity certificate could be granted. If the motion had succeeded it would have been within the discretion of the Full Court to grant or refuse a certificate. The certificate would have entitled the respondent to be paid from the Suitors' Fund which is established under the Act, the whole of the appellant's costs of the motion which the court ordered him to bear and which he actually paid, besides his own costs of the motion for a new trial : s. 6 (2). The costs of the first trial could have been also covered by the certificate : s. 2 (b). As regards the grant of a certificate the Full Court of New South Wales was the court of first instance. It was too the first court that could have granted the motion for a new trial. According to the judgment of the High Court the Full Court ought to have ordered

that the motion be allowed. If the Full Court of New South Wales had made this order it is to be presumed that it would have granted to the respondent an indemnity certificate under s. 6 (1). The ground upon which the respondent applies for an indemnity certificate is that it ought to have been granted in the first instance by the Full Court of New South Wales as the court determining the "appeal", that is the motion for a new trial. The certificate for which the respondent applies to the High Court would be that which would have been within the discretion of the Full Court to grant to it. The certificate would cover the appellant's costs in the Supreme Court, which the High Court ordered the respondent to pay, but not any costs incurred by it in the appeal to the High Court. The appeal against the judgment of the Full Court brought up to this Court for consideration the motion for a new trial and under the appellate power this Court could make any order that the Full Court ought to have made in that motion. Section 6 (1) of the *Suitors' Fund Act* does not make the function of granting an indemnity certificate one to be performed by the appellate court in the course of determining the appeal. The words "the court determining the appeal" are a description of the court in which the discretion to grant or refuse an indemnity certificate is vested. The condition precedent to the grant of such a certificate is that the appeal has succeeded. Section 6 (2) contemplates that the court determining the appeal has, in the usual way, ordered the respondent to pay the appellant's costs of the appeal. The *Suitors' Fund Act* does not make the appellant a party to the application by the respondent for the certificate. In my judgment, upon the true construction of the *Suitors' Fund Act*, the right of a respondent to an indemnity certificate arises after the determination of the appeal, if it succeeds. The right is determined in an application separate from and subsequent to the appeal. If there is any party, other than the unsuccessful party to the appeal in that application, that party could possibly be the Under Secretary of the Department of the Attorney-General and of Justice, but not the successful party to the appeal. Whether the Under Secretary could be a party depends upon the true effect of s. 4 of the *Suitors' Fund Act*. It is not necessary here to express any opinion on that question. It follows that this appeal to the High Court from the judgment of the Full Court on the motion for a new trial did not bring within the appellate jurisdiction of the High Court the discretion, which the Full Court of New South Wales would have had, to grant or refuse an indemnity certificate, if that motion had succeeded there. I would refuse the application.

H. C. OF A. 1956. GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2].

WILLIAMS J. Gurnett as plaintiff sued the Macquarie Stevedoring Co. Pty. Ltd. as defendant in the Supreme Court of New South Wales at common law for damages for negligence. At the trial the presiding judge directed the jury to find a verdict for the defendant. The plaintiff appealed to the Full Supreme Court of New South Wales but the appeal was dismissed with costs. The plaintiff then appealed to this Court and the appeal was allowed with costs, the order of the Supreme Court of New South Wales was set aside and a new trial ordered and the respondent company was ordered to pay Gurnett's costs of the appeal to the Full Supreme Court. The respondent company now applies to this Court for the grant of an indemnity certificate under the *Suitors' Fund Act* 1951 (N.S.W.) as part of the order of this Court setting aside the order of the Supreme Court and ordering the company to pay Gurnett's costs of the appeal to that court. We have already decided in *Commissioner of Stamp Duties (N.S.W.)* v. *Owens [No. 2]* (1) that this Court cannot grant a certificate under the Act in respect of an appeal to this Court first because the word " court " in s. 6 (1) of the Act does not on its true construction include this Court and secondly because, if it did, such a duty could not be validly imposed on this Court by State law.

But it is submitted that s. 37 of the *Judiciary Act* 1903-1955 enables us to grant a certificate in respect of the costs of the appeal to the Supreme Court. That section, so far as material, provides: " The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance." It is submitted that because we have decided that the Supreme Court should have allowed the appeal in the first instance and ordered the company as the respondent to pay the appellant's costs of the appeal we can also decide that the Supreme Court as the " court determining the appeal " should have granted the company a certificate under s. 6 (1) of the *Suitors' Fund Act* and remedy the breach by granting it ourselves. It is submitted that we can do this because we can give such judgment as the Supreme Court should have given in the first instance.

The argument is attractive but it is to my mind fallacious. The operative order is the order of this Court made in the exercise of its appellate jurisdiction on the appeal from the Supreme Court. It supersedes the order of the Supreme Court which is set aside and ceases to exist. The question whether the Supreme Court should

(1) (1953) 88 C.L.R. 168.

in the exercise of its discretion have granted a certificate to the respondent was not part of the subject matter under appeal. It could not be because the respondent succeeded on the appeal to that court. The question whether the Supreme Court should grant or refuse a certificate is a question entirely collateral to the subject matter under appeal. It does not arise between the parties to the appeal at all. It appears to be intended that the "court determining the appeal" shall exercise the discretion *ex parte*. The Act does not require that notice of the application shall be served on any person not even on the corporation sole set up by the Act under the name of "The Under Secretary of the Department of the Attorney-General and of Justice". The successful appellant has no legal interest whatever in the fate of the application. He has at most a practical interest because in order to be reimbursed the respondent must first pay his costs. If the Supreme Court allows an appeal the grant of a certificate is no part of the order allowing the appeal. It is a separate order made on the application of one of the parties. The grant could be made whether it was applied for before or after the formal order allowing the appeal was drawn up and entered. It is no part of the order *inter partes*. It is no part of the judgment *inter partes* the Supreme Court ought to have given in the first instance.

Two things are clear. The one is that the discretion is committed to particular courts, in the present case the Supreme Court, and the other is that this Court is not and could not be one of those courts. The exercise of the discretion is in essence an exercise of original jurisdiction. An appellate court is chosen to exercise it. But it is not hearing an appeal from the exercise of a discretion. It is exercising a discretion *ab initio*. Section 37 of the *Judiciary Act* confers on this Court appellate and not original jurisdiction. It is no part of that jurisdiction to exercise on its behalf a discretion conferred on the Supreme Court and not on this Court. The words relied on in s. 37 of the *Judiciary Act* relate to the subject matter under appeal; and not to a collateral power conferred on the Supreme Court.

The application should be refused.

WEBB J. In my opinion this Court has no jurisdiction to grant the certificate sought under the *Suitors' Fund Act* 1951 (N.S.W.). I think that the scope of an appeal to this Court from a judgment of a Supreme Court under s. 73 (ii.) of the Commonwealth Constitution and s. 37 of the *Judiciary Act* is not wide enough to

H. C. OF A. 1956.

GURNETT v. THE MACQUARIE STEVEDORING CO. PTY. LTD. [No. 2].

Webb J.

include the determination of a question whether the Supreme Court of New South Wales should have granted a certificate under the *Suitors' Fund Act*. It is not submitted, or even suggested, that on an application for a certificate to the Supreme Court any party other than the applicant is entitled to be heard. I think no other party is entitled to be heard, as the application is outside the limits of the contest between the parties : it is a consequence of the appeal without being incidental to the appeal, as it has no link with or bearing on the merits of the contest. The provision in s. 6 (1) of the Act that the court determining the appeal is to deal with the application for a certificate has not, I think, the purpose of making the application part of the appeal, or an incident of the appeal : it is simply to ensure that the application will be disposed of by judges acquainted with the case. After all s. 6 (5) expressly provides that the grant or refusal of the certificate shall be in the discretion of the court. The grant is not as of course where the appeal succeeds on a question of law, although for this purpose it might seem difficult to distinguish between one question of law and another. That depends on the range of " questions of law " for the purposes of the Act. As I think that this Court has no jurisdiction in this matter I express no opinion as to what are " questions of law ". However, questions as to the sufficiency of evidence to submit to a jury, like other questions of law, have been the subject of differences of judicial opinion, and it would not be surprising if the State legislature intended this Act to apply to both kinds of question.

If, as I take to be the case, the State legislature has overlooked the position that arises where a certificate has been granted on a view of the law that, on a further appeal, is not shared by this Court or by the Privy Council, the remedy is an amendment of the *Suitors' Fund Act*.

It is not within my province to say what amendment of the *Suitors' Fund Act, if any,* would be sufficient to make the refusal of a certificate the subject matter of an appeal under s. 73 (ii.) of the Commonwealth Constitution and s. 37 of the *Judiciary Act*.

I would refuse the application.

TAYLOR J. I agree that the application should be refused.

In view of what has already been said by the majority of the Court I find it unnecessary to do more than express the view that the function committed by the *Suitors' Fund Act* 1951 to the Supreme Court, of determining whether indemnity certificates should be granted to unsuccessful respondents in appeals before it,

is not a function exercisable as part of the process of determining such appeals. At the most it is, it seems to me, a collateral function and the grant of a certificate forms no part of the judgment disposing of any such appeal. If this is so this Court has no authority to make the order sought.

Application refused.

Solicitors for the applicant, *Norton, Smith & Co.*

Solicitor for the Attorney-General for New South Wales, *F. P. McRae*, Crown Solicitor for New South Wales.

R. A. H.