the forerunner of similar claims by other States—claims which could serve to establish as a customary rule of international law that a State is justified or perhaps even bound, to take steps for the conservation of fisheries on the high seas adjacent to its coasts.

But, although there is some indication that in the United States proclamation the first step has been taken towards the recognition of another exception to the principle of the freedom of the high seas, the validity of such step remains at the present a matter of considerable uncertainty. Therefore it would seem expedient for the Australian Government to confine the operation of the Fisheries Act to Australian nationals until more positive proof is provided of the existence of such an exception, either by further unilateral claims or by the continued absence of protest against the United States proclamation. However, an extension of the operation of the Act to include foreign nationals is not at the moment necessary, for Japan, the only nation which has yet entered into any extensive competition with Australian fishermen, is obliged under s. 9 of the Peace Treaty[37] to enter into agreements for the conservation of high sea fisheries; accordingly it should be possible for Australia, by virtue of this provision, to conclude an agreement ensuring the successful conservation of the fisheries involved.*

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## THE SUITORS' FUND ACT, 1951 (N.S.W.)

The Suitors' Fund Act, although it received a pacific passage through the Houses of Parliament and has not caused great excitement either among members of the legal profession or the community in general, is nevertheless a legislative innovation of major importance. The principle embodied in the Act is by no means new. It has been enunciated by a number of writers in legal periodicals. It would seem, however, that this Act is the first attempt to translate the principle into a legislative enactment and so give it practical effect.

The principal provisions of the Act are contained in s. 6 (1) and (2) which read as follows:—

> "(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."

Where, therefore, a party to a suit endeavours to support in an appellate court a decision given in a court below but is unsuccessful in that attempt, the superior court holding that the decision in the court below is wrong in law, the unsuccessful respondent may be indemnified for the costs of the appeal out of the fund provided for that purpose.

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[37] Article 9 of the Treaty of Peace provides: "Japan will enter promptly into negotiations with the Allied powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas".

* See Note, *infra* p. 107 on the new Bills introduced Feb. 18, 1953.

The most significant point that emerges is the provision that the decision of the court from which appeal is made must have been wrong *in law*. It is this provision which gives the Act its importance from a theoretical viewpoint. It is deeply embedded in Anglo-American legal theory that judge-made law can find its outlet only as a result of private litigation. In some states, it is admitted, the courts can give advisory opinions on constitutional questions,[1] but in all other fields of law it is universally true that in order to decide a point of law a court must have a contested case before it.[2] So deeply is the principle ingrained in our system that the only part of a judgment which is binding is that confined to the particular issues before the court. The remainder of the judgment is *dicta* and must itself be the subject of litigation before it too can become certain law.

The determination of previously doubtful rules of law by private litigation is expensive and frequently causes great hardship, for there is also engrained in our law the rule that the unsuccessful litigant should pay the costs. The justice of the rule is in many cases questionable. To provide law is one of the duties owed by the modern state to its subjects. If this is so it is surely anomalous that individual citizens should carry the financial burden involved in law-making, as they must on the above assumptions, for judge-made law. And this is the more so since the rule that an unsuccessful party should pay the costs must, in any case, result in many instances of individual hardship. Thus, in *Bradfield Third Equitable Building Society v Borders*,[3] a case which clarified the law in regard to fraud, the respondent had failed at first instance. She appealed and an unanimous Court of Appeal decided in her favour. A further appeal resulted in an unanimous House of Lords reversing the decision of the unanimous Court of Appeal. Mrs. Borders was ordered to pay the costs of both appeals. From no fault of her own but as a result of the doubtful state of the law she incurred an extremely heavy liability. Whilst Mrs. Borders gained nothing the law gained a great deal. It is difficult to find the justice in the rule which made her liable for such costs.

It was with the hardships caused by such cases in mind that the New South Wales legislature passed the Suitors' Fund Act, the object of the Act being to relieve the litigant from liability for costs where those costs have been incurred as a result of the indefinite state of the law. As stated above, the indemnity provided by the Act is available only to an unsuccessful *respondent*. It follows that the appeal must succeed and that an unsuccessful appellant cannot obtain an indemnity from the fund.

An appellant would, of course, be the unsuccessful party at the hearing at first instance. The assumption seems to be that if the court of first instance and the appellate court come to the same conclusion then the question of law so decided was not previously of sufficient doubt to merit an indemnity for costs

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[1] In *Attorney-General for Ontario v Attorney-General for Canada* (1912), A.C. 571, the Privy Council held valid an act conferring on the court jurisdiction to give advisory opinions on constitutional questions. The Privy Council expressed the view that the giving of advisory opinions was not wholly inconsistent with the nature and function of a court. The constitutions of some American States expressly provide for extra judicial opinions on the validity of proposed laws (Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 766). *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 247, the High Court of Australia, without actually holding that it could not give an advisory opinion, held that an act conferring such jurisdiction on the Court was *ultra vires* the Constitution.

[2] *Glasgow Navigation Co. v Iron Ore Co.* (1910), A.C. 293; *Sun Life Assurance Co. of Canada v Jervis* (1944), A.C. 111; *Sutch v Burns* (1944), K.B. 406.

[3] (1941) 2 All E. R. 205.

incurred. In practice this is by no means always true. No litigant appeals on a question of law without obtaining legal advice and no competent legal adviser recommends such an appeal unless in his opinion there are good grounds for the appeal. It is submitted therefore that an extension of the benefits of the Act to such cases would not be inconsistent with the general tenor of the legislation. It may be contended that such an extension would have the effect of encouraging vexatious appeals. But it is provided by s. 6 (5) of the Act that the grant or refusal of an indemnity certificate shall be in the discretion of the court and it can safely be assumed that the court would exercise its discretion so as to eliminate this possibility.

In like manner it may be argued that the indemnity should not be restricted to the costs of the appeal but should extend to the costs of the hearing at first instance. Under the Act the liability for the costs of the initial proceedings remains with the respondent, the contention being that he is the party who would have borne them if the correct decision had been given in the first instance. It can be forcibly argued, however, that if a question of law was doubtful enough to merit indemnity for costs of determination of that question on appeal, then, since the same doubtful question was at issue in the court below, the indemnity should extend to the costs of that hearing.

In regard to the above submissions, however, it is recognised that the Act is not an attempt to provide an absolute and complete solution to the problems raised. It is, in its nature, novel and experimental and if successful may be the forerunner of like legislation of wider compass. It is not possible on this ground to withhold comment on the provision of Section 6 (7) of the Act. This subsection excludes from the benefits of the Act companies having a paid-up capital value of £100,000 or more. The justice of this provision is questionable. The Act provides that the fund is to be financed by an increase in court fees. These have subsequently been increased by one-ninth. Ten percent of all court fees are paid into the fund. The principle behind this means of financing the fund would seem to be that the fund is for the benefit of litigants and should therefore be financed by litigants. The effect is to create a type of compulsory insurance in the sense that by the payment of a small premium by way of additional court fees the litigant is insured against liability for heavy appeal costs incurred through no fault of his own but through the doubtful state of the law. In this sense the Act is, in a degree, analagous to the Motor Vehicles Third Party Insurance Act.

With such an analogy in mind and having regard to the fact that large companies are frequently parties to law-making litigation, how can the exclusion of them from the benefits of the Act be justified? What kind of insurance is it that obliges a person to pay its premiums but forbids him to take advantage of its benefits? These questions remain unanswered by the Act. The legislature would probably reply that the object of the Act is to alleviate hardship caused by liability for costs and that large companies do not suffer such hardship. But if it is intended that the position in regard to these companies should be left *in statu quo*, then, as they are not to receive the benefits of the Act, it may be argued that they should not have to suffer the burden. If, on the other hand, the exclusion of companies is to be explained purely on moral grounds, it is difficult to see why wealthy individuals are not also excluded. Such a provision would not cause great difficulties in administration and could be satisfied by a confidential declaration by the applicant to the effect that his assets do not exceed £100,000, or whatever other the limit prescribed.

The Act [Section 6 (3) and (4)] covers the case of the costs of trial preceding a new trial motion and the case of a succession of appeals through the hierarchy of appeal courts. In respect of the latter it should be noted that while the Act binds the Supreme Court of that State the legislature of New South Wales cannot give directions to the High Court of Australia or to the Privy Council.

It is not expected, however, that these tribunals will raise any objection to granting the required certificate.

The procedure for obtaining a payment from the Fund is for the respondent to obtain from the court, after it has decided against him, a Certificate of Indemnity. The grant or refusal of the certificate is in the discretion of the court and no appeal lies against any such grant or refusal [s. 6 (5) ]. The certificate is then presented for payment to the Under Secretary of the Department of the Attorney-General and of Justice, under whose management the Fund is placed, [s. 3], and who is declared by the Act [s. 4 (1)] to be a corporation solely for the purpose of exercising his powers under the Act.

The Fund has now been in existence for more than a year, and it is surprising to note that to date only two litigants have taken advantage of the provisions of the Act, one application being successful, one pending.

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## NOTE ON PENDING AUSTRALIAN LEGISLATION ON FISHERIES

On the 18th of February, 1953, the Commonwealth Minister for Commerce and Agriculture brought in two Bills designed to amend the Fisheries Act and the Pearl Fisheries Act. These Bills, which include amendments of a purely procedural nature having only administrative significance, also set out an expanded definition of the term "Australian Waters". The proposed definition is as follows:

"'Australian Waters' means—(a) Australian waters beyond territorial waters; (b) the waters adjacent to a Territory and within territorial limits; and (c) the waters adjacent to a Territory, not being part of the Commonwealth and beyond territorial limits."

It will be seen that sub-sections (a) and (b) of this definition are identical with the definition of "Australian waters" in the principal Acts, but that sub-section (c) is an innovation.

The object of this new sub-section is to remove doubts as to the scope of the existing provisions, which, it was felt, did not, on their literal construction, clearly extend to the extra-territorial waters of the external Territories of the Commonwealth (i.e. the Australian Territories other than the Northern Territory). The amendment is designed to ensure that there will be no doubt that the Acts extend to the waters outside the territorial limits of the external Territories of the Commonwealth (i.e. the Territories of the Antarctic, the Ashmore and Cartier Islands, Nauru, Norfolk Island, New Guinea and Papua).

These amendments, if passed, will not alter the operation of the principal Acts in any way, but they do serve to emphasise the fact that when proclaimed they will be of an essentially extra-territorial nature and thus will almost certainly raise some of the questions of international law touched upon in the foregoing note.

D.T.P.