

H. C. OF A. 1920. to something of a fixed and permanent nature which would prevent access to the sewer.

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v.  
GIBBS.

Eager, for the respondent, was not called upon.

PER CURIAM. The Court does not think there is any reason to doubt the correctness of the decision of Mann J. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitors for the appellant, Moule, Hamilton & Kiddle.  
Solicitors for the respondent, Fink, Best & Miller.

B. L.

[HIGH COURT OF AUSTRALIA.]

PORTA . . . . . APPELLANT ;  
DEFENDANT,

AND

HAUSER . . . . . RESPONDENT.  
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

H. C. OF A. 1919. Practice (High Court)—Appeal from Supreme Court of State—Appealable amount—  
Objection to competence of appeal not taken until hearing—Costs—Appeal book  
—Reasons for decision of Court below—Rules of the High Court 1911, Part II.,  
MELBOURNE, Sec. III., rr. 3, 11, 14, 18.

Oct. 20.

Isaacs,  
Gavan Duffy  
and Rich JJ.

Where an appeal brought as of right was at the time it came on for hearing struck out on the objection of the respondent that it was incompetent for the reason that the judgment appealed from was below the appealable amount, the

Court allowed the respondent such costs only as would have been incurred on a motion to strike out the appeal.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Laura Rosina Hauser, on behalf of herself and all other persons beneficially interested in the residuary real and personal estate of John Porta, deceased, against Leslie Elmore Frederick John Porta personally and as executor of the will and codicil of John Porta, alleging certain breaches of trust against the defendant and claiming consequential relief. The action was heard by *Irvine* C.J., who by his judgment ordered that the defendant should restore and pay to the credit of the testator's residuary estate several sums of money amounting in the whole to over £300 and including one sum of £145 9s. 3d. and another of £64 9s. 9d.

The defendant appealed to the High Court from so much of the judgment as ordered the restoration and payment of the sums of £145 9s. 3d. and £64 9s. 9d.

*Dethridge*, for the appellant.

*A. H. Davis*, for the respondent, objected that an appeal did not lie as of right.

*Dethridge* asked for special leave to appeal. If leave be refused, the respondent should have no costs, as there was no application to strike out the appeal.

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

We do not think that any special circumstance either of law or of fact has been shown which would justify us in granting special leave to appeal, and therefore in the exercise of our discretion we cannot grant special leave.

As to the costs, we think that an application to strike out the appeal should have been made earlier before the full costs of the appeal had been incurred, and, therefore, although we give costs to



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the respondent, we direct these costs to be limited to the costs of a simple motion to strike out the appeal as incompetent, which might have been made earlier after notice of appeal had been given.

We also desire to say with reference to the absence from the appeal book of any reasons of the Chief Justice from whom appeal is sought to be brought, that it is extremely inconvenient for an appeal book to be furnished without such reasons, and it is the duty of the appellant to apply to the Judge or Judges of the Court below in order to obtain from him or them such reasons as were given at the time. We presume that reasons are in ordinary practice given by the tribunal by which the judgment is pronounced.

*Appeal dismissed with costs limited to the costs  
of a motion to strike out the appeal as  
incompetent.*

Solicitors for the appellant, *Corr & Corr.*

Solicitor for the respondent, *J. R. Thompson.*

B. L.

Disced  
Australian  
Metal Co Ltd,  
In re (1921) 29  
CLR 347

[HIGH COURT OF AUSTRALIA.]

IN RE THE CONTINENTAL C. AND G. RUBBER COMPANY  
PROPRIETARY LIMITED.

H. C. OF A.  
1919.

MELBOURNE,

Oct. 29-31.

SYDNEY,

Nov. 21.

Knox C.J.,  
Barton, Isaacs,  
Gavan Duffy  
and Rich JJ.

*Contract—Effect of outbreak of war—Contract to supply goods—Progress payments—  
Failure of consideration—Right to recover—Mistake of fact or of law—Trading  
with the Enemy Act 1914-1916 (No. 9 of 1914—No. 20 of 1916), secs. 8, 9H—  
Enemy Contracts Annulment Act 1915 (No. 11 of 1915), sec. 3 (5)—Enemy Con-  
tracts Cancellation Act 1915 (Vict.) (No. 2603), sec. 3 (5).*

In April 1914 the A company entered into a contract to construct certain machinery for the B company, and to erect it on land of the B company. The contract provided for the completion, erection and delivery of the whole of the machinery by 1st December 1914, and for progress payments in respect of the construction of the machinery to be made from time to time on the