[HIGH COURT OF AUSTRALIA.]

GADSDEN . . . . . APPLICANT;
DEFENDANT,

AND

GIBBS . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1920.

MELBOURNE, *Feb.* 23.

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

Melbourne and Metropolitan Board of Works—"*Structure*" *erected over sewer*—*Unlocked gates*—*Offence*—*Melbourne and Metropolitan Board of Works Act* 1915 (*Vict.*) (*No.* 2696), *sec.* 148.

Sec. 148 of the *Melbourne and Metropolitan Board of Works Act* 1915 (Vict.) provides that "Every person who knowingly erects or places any building wall bridge fence or other structure or any obstruction . . . in upon over or under any sewer vested in the Board . . . without the previous consent in writing of the Board shall . . . forfeit and pay to the Board" a certain penalty.

Held, that a double-gate hung on posts, one on each side of a sewer, the two leaves of which, when shut, met over the centre of the sewer and were fastened together by a bolt drawable from either side of the gate, was a "structure" erected or placed over the sewer within the meaning of the section.

Special leave to appeal from the Supreme Court of Victoria (*Mann* J.): *Gibbs* v. *Gadsden*, (1920) V.L.R., 6; 41 A.L.T., 82, refused.

APPLICATION for special leave to appeal.

At the Court of Petty Sessions at Melbourne an information was heard whereby George Arthur Gibbs, the Secretary of the Melbourne and Metropolitan Board of Works, charged that Stanley

Wilkinson Gadsden did knowingly erect a fence, structure or obstruction, to wit, two gates, over a certain sewer vested in the Board contrary to the provisions of the *Melbourne and Metropolitan Board of Works Act* 1915. It appeared that the defendant was the owner of one of several adjoining allotments of land, and that over a strip ten feet in width comprising the rear ten feet of each of the several allotments the Board had an easement and a right of carriage way, and along the middle of the strip at a depth of about fifteen feet had constructed a nine-inch sewer. In a line with each of the side fences of his land the defendant had, without the consent of the Board, erected gate-posts, one upon each side of the ten-foot strip, upon which was hung a double-gate, the two leaves of which, when shut, as they usually were, met above the centre of the sewer and were fastened together on the inside by a bolt, but were not locked together. When the two leaves were opened wide, the whole of the ten-foot strip was left clear; and the gate might be opened from the outside by reaching over the gate and drawing the bolt. The magistrates dismissed the information, holding that the gates were not a "fence," nor a "structure," nor an "obstruction," within the meaning of sec. 148 of the *Melbourne and Metropolitan Board of Works Act* 1915.

On an order *nisi* to review this decision upon the ground that the gates were a "fence," a "structure" or an "obstruction" upon or over a sewer within the meaning of sec. 148, *Mann* J. made the order absolute, holding that the gates were a "structure" and, being closed over the sewer, were a structure over the sewer: *Gibbs* v. *Gadsden* (1).

The defendant now applied for special leave to appeal from that decision to the High Court.

Shelton, for the applicant. Neither of the gates erected by the plaintiff was a "structure" within the meaning of sec. 148 of the *Melbourne and Metropolitan Board of Works Act* 1915. Whether the gates are a "structure" or not is a question of fact, and upon the evidence it might reasonably be found that the gates are not a structure. Secs. 147 and 148, in using the word "structure," refer

(1) (1920) V.L.R., 6; 41 A.L.T., 82.

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to something of a fixed and permanent nature which would prevent access to the sewer.

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.

MELBOURNE, *Oct.* 20.

Isaacs, Gavan Duffy and Rich JJ.

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., *Sec.* III., *rr.* 3, 11, 14, 18.

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