H. C. OF A. 1931.

SAYWELL v. PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD.

the prohibition against charging or applying for commission apply to the executor whom the testator had just nominated.

I am of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Saywell & Saywell.*

Solicitor for the respondent, Permanent Trustee Company of New South Wales Limited, *S. M. Stephens.*

Solicitor for the submitting respondents, *J. McLeod.*

J. B.

Dist *Voudouris* v *Registrar-General* (1993) 30 NSWLR 195

Refd to *Melville-Smith* v *Attorney-General* [1996] 1 NZLR 596

[HIGH COURT OF AUSTRALIA.]

DEMPSTER . . . . . APPELLANT;
PLAINTIFF,

AND

RICHARDSON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1930.

SYDNEY, *Nov.* 24, 25; *Dec.* 3.

Rich, Starke and Dixon JJ.

Real Property—Assurance fund—Claim—Dimension of land less than shown on certificate of title—Land purchased without reference to dimensions—"Deprived of land"—"Error, omission, or misdescription"—"Omission, mistake, or misfeasance"—Error one of survey, not of title—Other remedy not barred—Real Property Act 1862 (*Tas.*) (25 *Vict. No.* 16), *secs.* 125,* 128.*

A certificate of title under the *Real Property Act* 1862 (Tas.) described the land by means of a diagram in which the measurement of the frontage was given. A purchaser who took a transfer which was registered by indorsement upon the certificate alleged that the frontage of the land, when ascertained

* The *Real Property Act* 1862 (Tas.) provides, by sec. 125 (as amended by the *Real Property Act*, No. 2, 1863, sec. 1), that "Any person deprived of land, or of any estate or interest in land, in consequence of fraud or through the bringing of such land under the provisions of this Act, or by the registration of any other person as proprietor of such land, estate, or interest, or in consequence of any error, omission, or misdescription, in any certificate of title, or in any entry or memorial in the register book, may, in any case in which such land has been

upon the ground, in fact measured less than the diagram stated, and that in reliance upon the certificate she had commenced to erect buildings up to the boundary given by the diagram, which the adjoining owner had pulled down.

Held, that the purchaser was not entitled to recover damages out of the assurance fund, because (1) she had not been deprived of any estate or interest in land through any error or misdescription in the certificate of title, but had obtained all the land her vendor could or did transfer; and (2) the loss alleged to be sustained by reason of acting upon the measurements given in the diagram was not within the remedy conferred by secs.125 and 128 of the *Real Property Act* (Tas.).

Oakden v. *Gibbs*, (1882) 8 V.L.R. 380, considered.

Decision of the Supreme Court of Tasmania (Full Court) affirmed.

APPEAL from the Supreme Court of Tasmania.

On 19th July 1922 Elizabeth Dempster, a married woman, entered into a contract by which she agreed to buy from Harold Richard Vicars Pinkerton an allotment of land described as "the property situate at the corner of Main Road and Peltro Street, Glenorchy, belonging to the vendor." In performance of this contract Pinkerton, on 5th September 1922, executed a memorandum of transfer to Mrs. Dempster of an estate in fee simple in a piece of land described as "containing one rood and four-fifths of a perch, be the same a little more or less, being the land comprised in" a specified certificate of title. This was a certificate certifying that Pinkerton was seised of an estate in fee simple in a piece of land containing such an area and delineated in a diagram thereon, being part of lot 14 on a specified plan of subdivision in the office of the Recorder of Titles. The area so delineated was marked lot 14,

included in two or more grants from the Crown, bring and prosecute an action at law for the recovery of damages against such person as the Governor may appoint as nominal defendant, and in any other case, against the person upon whose application such land was brought under the provisions of this Act, or such erroneous registration was made, or who acquired title to the estate or interest in question through such fraud, error, omission, or misdescription: Provided always, that except in the case of fraud, or of error occasioned by any omission, misrepresentation, or misdescription in the application of such person to bring such land under the provisions of this Act, or to be registered as proprietor of such land, estate, or interest, or in any instrument executed by him, such person shall, upon a transfer of such land bona fide for value, cease to be liable for the payment of any damages which but for such transfer might have been recovered from him under the provisions hereinbefore contained; and such damages, with costs of action, may in such last-mentioned case be recovered out of the Assurance Fund against the Recorder of Titles as nominal defendant." By sec. 128 it is provided that "Any person sustaining loss or damage through any omission, mistake, or misfeasance of the Recorder of Titles, or any of his officers or clerks in the

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

and was depicted as a rectangular piece of land at the north-eastern corner of Peltro Street and Main Road, with its southern frontage to Main Road and its western boundary abutting upon Peltro Street. It showed that the northern boundary of the land to which Pinkerton was entitled was coincident with that of lot 14, and stated its length as 77 ft. 3 in., but it showed that upon the southern boundary, fronting Main Road, Pinkerton had a frontage a little less in length than the full frontage of lot 14 on the subdivision plan, and it stated the length of Pinkerton's frontage as 74 ft. 9 in. The result was that while lot 14 had been a rectangle Pinkerton's eastern boundary commenced at the north-eastern corner of that lot but bore slightly to the west, so that when it joined the southern boundary it excluded some inches of the frontage of lot 14. The transfer to Mrs. Dempster of this piece of land was registered by indorsement upon the certificate of title on 20th September 1922. In 1923 she caused plans to be prepared for the erection upon the land of four shops of a total width of 74 ft. 9 in. The plans were approved by the municipal council, and a contract was let for the erection of the building. A point was taken upon the ground as constituting exactly the north-eastern corner of Peltro Street and Main Road, and from this point 74 ft. 9 in. were measured easterly. The erection of the eastern wall of the building was then begun upon what was supposed to be the easterly boundary of the land because it commenced at this point 74 ft. 9 in. from Peltro Street. Thomas Wilson Hay and Rosalie Mary Hay, the owners of the neighbouring land on the east, objected that the wall encroached

execution of their respective duties, under the provisions of this Act, and any person deprived of any land, or of any estate or interest in land through the bringing of the same under the provisions of this Act, or by the registration of any other person as proprietor of such land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register book, and who by the provisions of this Act is barred from bringing action of ejectment or other action for the recovery of such land, estate, or interest, may in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred, bring an action against the Recorder of Titles, as nominal defendant for recovery of damages, and in case the plaintiff recover final judgment against such nominal defendant, then the Court or Judge before whom such action may be tried shall certify to the Treasurer . . . the fact of such judgment and the amount of damages and costs recovered; and the said Treasurer thereupon . . . shall pay the amount of such damages and costs to the person recovering the same, and shall charge the same to the account of the Assurance Fund" &c.

upon their land, but such objection was not heeded, and the erection of the wall was continued. Thereupon the Hays caused the wall to be pulled down. Mrs. Dempster brought an action of trespass against them, but they showed in that action that they were the owners of the land upon which the wall was built. They were registered as the owners of an estate in fee simple by a certificate of title which described their land as containing one rood two perches and one-fifth of a perch, being lot 15 and part of lot 14 on the same subdivision and delineated in a diagram thereon. The diagram depicted their land as having a frontage to Main Road stated as 79 ft. 9 in. and as being situated between Mrs. Dempster's land, the frontage of which to Main Road was shown as 74 ft. 9 in. on the one side, and lot 16 on the other side. The evidence showed that if the position of this land were ascertained by measurement from the spot fixed as the corner of Peltro Street and Main Road, and its western boundary were fixed at a point upon its frontage 74 ft. 9 in. from that corner, then none of the land upon which the wall was built could be included in it. Thus the two certificates of title *ex facie* conformed with one another and stated Mrs. Dempster's frontage as 74 ft. 9 in. from the corner and the Hays's land as beginning 74 ft. 9 in. from that corner. It was shown that a discrepancy could not occur unless the position of lot 16 were first taken as fixed upon the ground and then, from its western boundary as a commencing point so fixed, the frontage of the two allotments between it and the ascertained corner of Peltro Street were measured and found to be together less than the sum of the lengths stated in the respective certificates of title, namely, 74 ft. 9 in. and 79 ft. 9 in., or 154 ft. 6 in. The action for trespass brought by Mrs. Dempster against the Hays was tried before *Crisp* J., who gave judgment on 13th May 1924 against Mrs. Dempster, from which the latter did not appeal.

An action was subsequently commenced by Mrs. Dempster against Allan Abraham Richardson, as Recorder of Titles, in which she claimed that the loss or damage she suffered in consequence of the destruction of the wall was sustained through an omission, mistake, or misfeasance of Richardson, or some of his officers or clerks, in the execution of their respective duties under the provisions

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

of the *Real Property Act* (Tas.), or that she was deprived of the land upon which the wall was built by an error, omission or misdescription in a certificate of title or entry in the register book, and she sought damages out of the Assurance Fund, under secs. 125 and 128 of the *Real Property Act*. Evidence was given by one John Arthur Hallam, who sold Mrs. Dempster's land to Pinkerton, that before such sale he measured the frontage and found it to be 74 ft. only in length, and only that length of frontage was sold to Pinkerton. A specific question as to whether Mrs. Dempster got the land delineated in the plan on the certificate of title was put to the jury by the trial Judge (*Nicholls* C.J.), and was answered in the negative, and damages were awarded in the sum of £218. By a majority the jury found that if Mrs. Dempster had got the whole 74 ft. 9 in. then the wall previously referred to would have been on her land. The case was referred to the Full Court, leave being reserved to Mrs. Dempster to move for a new trial on the question of damages, and to Richardson to move that a nonsuit should be entered or, alternatively, that there should be a judgment for him on the findings of the jury. These matters subsequently came before the Full Court, when a motion by Mrs. Dempster for a new trial was discharged and judgment was entered for Richardson with costs.

From this decision Mrs. Dempster now appealed to the High Court.

Further material facts appear in the judgments hereunder.

H. I. Cohen K.C. (with him *Russell Keon-Cohen*), for the appellant. The fact that the person who sold the subject land to the appellant was informed by the person from whom he bought it, that the length of frontage thereof was only 74 ft., does not prejudice the appellant. There is no question here of adverse occupation. The inaccurate measurement as to frontage shown on the certificate of title constitutes an omission, mistake, or misfeasance within the meaning of sec. 128 of the *Real Property Act* and to the extent of the inaccuracy the appellant has been "deprived of land" within the meaning of that section (*Russell* v. *Registrar-General of Land* (1); *Wells and Johns* v. *Registrar-General of Lands* (2)). The

(1) (1906) 26 N.Z.L.R. 1223. (2) (1909) 29 N.Z.L.R. 101.

words " or damage " as appearing in sec. 128 of the Tasmanian Act do not appear in the relevant section of the Victorian Act; therefore the *ratio decidendi* in *Oakden* v. *Gibbs* (1) is not present in the Tasmanian Act, and that case has no applicability here. If it were intended that the words " and who " were to govern the first and second parts of sec. 128, the Legislature could have inserted those words after the word " may," but that was not done. All the difficulties would disappear if the reasoning of *Higinbotham* J. in *Oakden* v. *Gibbs* (2) were applied to sec. 128. This is a misdescription of the land within the meaning of the section, for which the Assurance Fund is liable. A person can be deprived of an interest in land even though he never had any land (*Wells and Johns* v. *Registrar-General of Lands* (3)). The appellant is entitled to compensation for all damages sustained by her as a consequence of a mistake made in the office of the Recorder. The Assurance Fund was designed for such a purpose. The limitation imposed by sec. 130 as to the time within which actions may be brought applies only to cases of deprivation, and does not apply to actions founded on " omission, mistake, or misdescription " (*Hogg's Australian Torrens System*, pp. 860-862). If it was a " deprivation " the question arises: When was the appellant deprived of the land? The answer is: On 13th May 1924, being the date of *Crisp* J.'s judgment in the action brought by the appellant against the Hays. Until then the appellant was in possession. That being the relevant date, this action was brought within the time limited by sec. 130.

Hammond K.C. and *Beedham*, for the respondent. The appellant has failed to show that the Recorder of Titles had been guilty of omission, mistake or misfeasance. If she was deprived of land, it was only as the result of the verdict of a jury. The respondent was not a party to the action for trespass brought by the appellant against her neighbours, and therefore cannot be affected by decisions in that action. The case of *Oakden* v. *Gibbs* (1) applies here *a fortiori*. There is no evidence in this case that the appellant is barred, within the meaning of sec. 128, by the provisions of the Act, from bringing

(1) (1882) 8 V.L.R. 380.
(2) (1882) 8 V.L.R., at pp. 385 *et seq.*
(3) (1909) 29 N.Z.L.R., at p. 104.

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

an action for damages against private individuals. As the disparity between the length of frontage of the land actually bought by the appellant and that shown on the certificate of title existed before such purchase, it is quite competent for her to bring an action against her predecessors in title, both of whom are alive, in respect of the deficiency (sec. 133). The appellant could not have been deprived of land by a registration which was effected long before the appellant owned any of the land in question. The appellant's predecessor in title was informed as to the actual length of frontage. How, then, can the Recorder be held liable for a mistake? As to whether the length of frontage is less than as shown on the certificate of title depends upon whether the measurement of the subject allotment and adjoining allotments is commenced on the eastern or western side of the original subdivision. The duties of the Recorder appear in sec. 104. He is not called upon to check every transaction subsequent to the filing of the subdivision plans. When land in dispute is comprised in two certificates of title the certificate issued prior in point of date prevails (*Lloyd* v. *Mayfield* (1); see, however, *National Trustees, Executors and Agency Co. of Australasia* v. *Hassett* (2)). So far as the register is concerned the title is good. Nothing there shows the title as not lawfully issued or that the Recorder is guilty of omission, mistake, or misfeasance (*Rutu Peehi* v. *Davy* (3)). Ordinary principles of law apply in cases under the *Real Property Act* except where the Act displaces them (*Pleasance* v. *Allen* (4)). The appellant received all the land she actually bargained for. More than six years elapsed between deprivation and action (sec. 130).

H. I. Cohen K.C., in reply. Sec. 124 enumerates the circumstances in which ejectment lies. No action in ejectment was possible here. There is an insufficiency of land—not sufficient land to enable the appellant to obtain the length of frontage shown on the certificate of title. This is not a case of the appellant's land being included in the title of another person. The Act provides the Recorder with safeguards. A mistake may occur which is perpetuated and

(1) (1885) 7 A.L.T. 48.
(2) (1907) V.L.R. 404, at p. 416; 28 A.L.T. 232, at p. 238.
(3) (1890) 9 N.Z.L.R. 134.
(4) (1889) 15 V.L.R. 601, at p. 607; 11 A.L.T. 28, at p. 29.

endures to the detriment of some person. The Assurance Fund is designed to meet such a case. This case comes within the first part of sec. 128 rather than that relating to "deprivation." Damage did not follow from the issue of the certificate of title until it was decided in the action before *Crisp* J. that the appellant was not entitled to the land in dispute. The reasons for sec. 133 are contained in sec. 124 (5). There was a deprivation within the meaning of either sec. 125 or sec. 128. The appellant was "deprived" by reason of an "error, omission, or misdescription" (a) certifying that she is entitled to 9 in. of frontage more than she is; (b) certifying that her neighbours' land commenced at a point 74 ft. 9 in. from Peltro Street—this comes within the class of case in sec. 125; (c) if not, then she was deprived by error, omission, or misdescription in the memorial or entry book as to the length of frontage between lot 16 and Peltro Street. The person, if any, against whom there might have been an action for damages is no longer liable by reason of having transferred the subject land bona fide and for valuable consideration. If there is no deprivation the matter does not come within sec. 130.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

RICH AND DIXON JJ. This is an appeal by the plaintiff from a judgment of the Supreme Court of Tasmania by which judgment was entered for the defendant who, as Recorder of Titles, was sued for recovery of damages out of the Assurance Fund. On 19th July 1922 the plaintiff entered into a contract by which she agreed to buy from one Pinkerton an allotment of land described as "the property situate at the corner of Main Road and Peltro Street Glenorchy." In performance of this contract Pinkerton, on 5th September 1922, executed a memorandum of transfer to the plaintiff of an estate in fee simple in a piece of land described as containing one rood and four-fifths of a perch, be the same a little more or less, being the land comprised in a specified certificate of title. This was a certificate certifying that Pinkerton, the vendor, was seised of an estate in fee simple in a piece of land containing such an area and delineated in a diagram thereon, being part of lot 14 on a

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

Rich J. Dixon J.

specified plan of subdivision in the Recorder's office. The diagram depicted lot 14 as a rectangular piece of land at the north-eastern corner of Peltro Street and Main Road with its southern frontage to Main Road and its western boundary abutting upon Peltro Street. It showed that the northern boundary of the land to which Pinkerton was entitled was coincident with that of lot 14 and stated its length as 77 ft. 3 in., but it showed that upon the southern boundary, fronting Main Road, Pinkerton had a frontage a little less in length than the full frontage of lot 14, and it stated the length of Pinkerton's frontage as 74 ft. 9 in. The result was that, while lot 14 had been a rectangle, Pinkerton's eastern boundary commenced at the north-east corner of that lot but bore a little to the west, so that when it joined the southern boundary it excluded some inches of the frontage of lot 14. The transfer to the plaintiff of this piece of land was registered by indorsement upon the certificate of title on 20th September 1922. In the following year she caused plans to be prepared for the erection upon the land of four shops of a total width of 74 ft. 9 in. She obtained municipal approval of these plans, and let a contract for the erection of the building. A point was taken upon the ground as constituting exactly the north-eastern corner of Peltro Street and Main Road, and from this point 74 ft. 9 in. were measured. The erection of the eastern wall of the building was then begun upon what was supposed to be the easterly boundary of the land because it commenced at this point 74 ft. 9 in. from the Peltro Street corner. The owners of the neighbouring land on the east objected that the wall encroached upon their land, but in spite of their remonstrances the building of the wall went on. Thereupon the neighbouring owners pulled it down. The plaintiff brought an action of trespass against them, and in that action the neighbouring owners justified as owners of the land upon which the wall was built. The defendants in that action, the plaintiff's neighbours, were registered as the owners of an estate in fee simple by a certificate of title which described their land as containing one rood two perches and one-fifth of a perch, being lot 15 and part of lot 14 on the same subdivision, and delineated in a diagram thereon. The diagram depicted their land as having a frontage to Main Road stated as 79 ft. 9 in. and as being situated

between the plaintiff's land, the frontage of which to Main Road was given as 74 ft. 9 in., on the one side and lot 16 on the other side. If the position of this land which the diagram on the certificate so depicted were ascertained by measurement from the spot fixed as the corner of Peltro Street and Main Road and its western boundary were fixed at a point upon its frontage 74 ft. 9 in. from that corner, then none of the land upon which the plaintiff built her wall could be included in it. In other words, the certificates of title *ex facie* conform with one another and state the plaintiff's frontage as 74 ft. 9 in. from the corner and her neighbours' as beginning 74 ft. 9 in. from that corner. A discrepancy could not occur unless the position of lot 16 were first taken as fixed upon the ground and then from its western boundary as a commencing point so fixed the frontage of the two allotments between it and the ascertained corner of Peltro Street were measured and found to be together less than the sum of the lengths stated in the respective certificates, namely, 74 ft. 9 in. and 79 ft. 9 in., or 154 ft. 6 in.

The plaintiff's action against her neighbours for trespass was tried before *Crisp* J., who found that the actual line upon the ground constituting the boundary between lot 15 and lot 16, the western boundary of lot 16, was not and never had been in doubt. An examination of the title, through which the plaintiff derived, did not satisfy him that any part of Peltro Street is the point from which all measurements should radiate. Proceeding upon the view that the position of the western boundary of lot 16, being the eastern boundary of the land of the plaintiff's neighbours who were the defendants in that action, was established, his Honor necessarily was met by the fact that there were not 154 ft. 6 in., but only 153 ft. 9 in., between that point and the spot fixed as the corner of Peltro Street. He considered that the plaintiff's neighbours were entitled, according to their certificate, to 79 ft. 9 in. between the plaintiff's land and the boundary of lot 16, and therefore that the plaintiff could have only the balance, or 74 ft., unless, indeed, the corner of Peltro Street had been placed in its wrong position on the ground, i.e., at a point 9 in. too far to the east, a matter upon which he made no finding. Accordingly he was not satisfied that the disputed inches were not the property of the plaintiff,

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

Rich J. Dixon J.

and gave judgment for the defendants in that action. The plaintiff did not appeal from that judgment, but commenced this action against the Recorder of Titles. She claimed that the loss or damage she suffered in consequence of the destruction of the wall was sustained through an omission, mistake, or misfeasance of the Recorder of Titles, or of some of his officers or clerks in the execution of their respective duties under the provisions of the *Real Property Act*, or that she was deprived of the land upon which the wall was built by an error, omission, or misdescription in a certificate of title or an entry in the register book, and she sought damages out of the Assurance Fund under secs. 125 and 128 of the *Real Property Act*. Upon the trial of this action, which took place before the Chief Justice of Tasmania and a jury, the plaintiff did not prove in evidence circumstances which would warrant the conclusion arrived at on other evidence by *Crisp* J., that the position of the western boundary of lot 16 was fixed, and the defendant in this action not unnaturally objects to be bound by a proceeding to which he was not a party. The jury, however, answered "No" to a question submitted to them: "Did the plaintiff get the land delineated in the plan in the certificate of title?" and this finding, if it has any definite meaning at all, must rest upon the view that the distance is less than 74 ft. 9 in. between a point 79 ft. 9 in. west of the western boundary of lot 16 and the corner of Peltro Street when these points are correctly ascertained upon the ground. But even if it be assumed in her favour that this conclusion was established by evidence, nevertheless we do not think the plaintiff can succeed in her claim upon the Assurance Fund. We do not doubt that if there is less land between the true western boundary of lot 16 and the true corner of Peltro Street than the sum of the frontages given in the diagrams upon the plaintiff's and her neighbours' certificates, the deficiency must be ascribed to the plaintiff's title. The deficiency must be ascribed to that title because her neighbours derived their title through a transfer by the plaintiff's predecessor in title of land with a frontage of 79 ft. 9 in. out of that predecessor's certificate of title to lots 14 and 15. If there is a deficiency it must therefore be in the residue of the land. But it also follows from this fact that the plaintiff's true complaint is that whereas the land she bought from Pinkerton had a frontage of 74 ft. only, yet the diagram

upon his certificate, which was indorsed with the registration of the transfer to the plaintiff, stated the measurement as 74 ft. 9 in. This measurement was so stated because it was given in the dealings lodged with the Recorder upon which he acted. The transfer to Pinkerton upon which his certificate was founded described the land by reference to the transferor's certificate. That certificate, when it was granted, comprised lots 14 and 15 and gave the frontage to both of them as 154 ft. 6 in. From it land with a frontage of 79 ft. 9 in. was transferred as already stated, and this, as the transfer stated, left a balance of 74 ft. 9 in., which was accordingly shown upon the certificate by an alteration in the diagram. The figure 154 ft. 6 in. was taken from the original deposited plan of subdivision.

Upon these facts we think the plaintiff cannot fall within the description in secs. 125 and 128, "a person deprived of any land." She acquired and intended to acquire Pinkerton's land. This she got. The question does not directly arise which *Oakden* v. *Gibbs* (1) decided upon the Victorian statute, namely, whether a person who took an assurance which proved nugatory can be said to be "deprived" of land. The plaintiff contracted for the land identified by its situation and occupation irrespective of its dimensions.

She was not defeated in a transaction the purpose of which was to obtain nine more inches. But she considered that the land she intended to get contained 9 inches more than it did because of what was stated in the certificate which became hers by indorsement. She contends however, that by acting upon this statement of measurements she sustained loss or damage through an omission, mistake, or misfeasance of the Recorder or his officers within the meaning of sec. 128. The supposed omission, mistake, or misfeasance must consist in the failure of the Recorder or his officers to require a survey of the residue of the land in lot 14 after land with a frontage of 79 ft. 9 in. was transferred from that lot and the adjoining lot 15, before he adopted from the transfer the measurement of 74 ft. 9 in. for the residue, and in the repetition of that measurement in the certificate which became the plaintiffs. But we think the plaintiff cannot bring her loss through reliance upon such an incorrect statement of measurements, so brought about in the office of the Recorder, within the true meaning of sec. 128. The cause of action given

(1) (1882) 8 V.L.R. 380.

H. C. OF A. 1930.

DEMPSTER v. RICHARDSON.

Rich J. Dixon J.

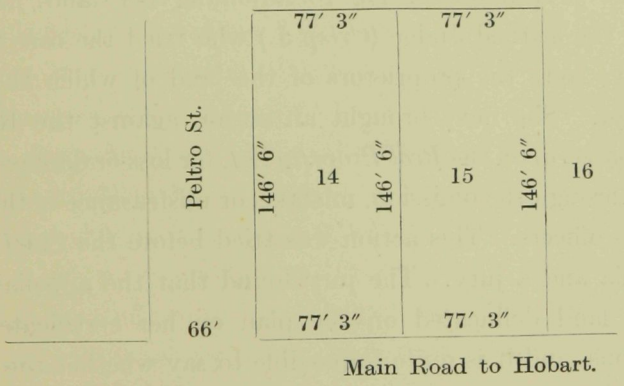
by that section is clearly and definitely governed by the condition expressed in the words " in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred." In *Oakden* v. *Gibbs* (1) *Holroyd* J. in his judgment, with which *Stawell* C.J. concurred, referred to the analogous, although not identical, clause in the corresponding Victorian section and said : " that is, we conceive, the action brought under " the section corresponding to sec. 125 " against the applicant or person acquiring title erroneously." We think that it is even clearer upon the Tasmanian provisions that this clause of sec. 128 does refer to the action given by and brought under sec. 125 " against the person upon whose application such land was brought under the provisions of this Act, or such erroneous registration was made, or who acquired title to the estate or interest in question through such fraud, error, omission, or misdescription." It follows that unless a plaintiff can show that his case is one in which that remedy is barred he cannot succeed under sec. 128. The plaintiff's complaint of loss by reason of her reliance upon the measurement stated in the certificate is quite outside the scope of the remedy given by sec. 125, and therefore of that given by sec. 128. Even if it could be said that the adoption of the measurement by the Recorder was an omission, mistake, or misfeasance within the general meaning of these words, a thing which we do not say, yet it is clear that it is not such a case that sec. 128 contemplates.

Our interpretation of the Tasmanian provisions in some respects resembles that placed upon the Victorian provisions in *Oakden* v. *Gibbs* (2), but the language in which they are expressed contains some important differences. We have not found it necessary to go beyond the words in sec. 128 which we have already set out, and those we think place a clear limitation upon that provision outside which the plaintiff's case falls. She cannot, we think, succeed under sec. 125 apart from sec. 128 because she is not a person deprived of land or of any estate or interest in land. We do not say that if she were such a person sec. 125 would give her an independent cause of action.

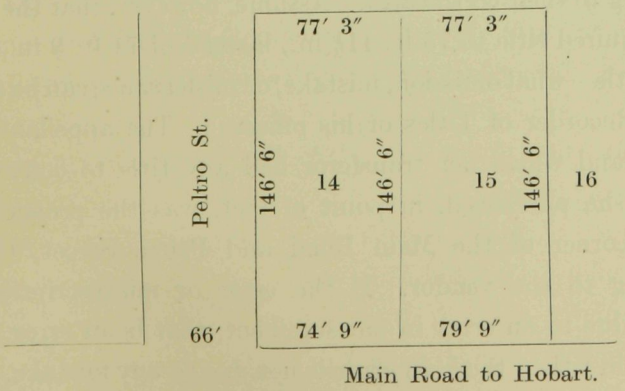
For these reasons we think the appeal must be dismissed with costs.

(1) (1882) 8 V.L.R., at p. 393. (2) (1882) 8 V.L.R. 380.

STARKE J. Certain lands near Glenorchy, in Tasmania, were, at all times material to this appeal, under the provisions of the *Real Property Act*. Some registered proprietor thereof appears to have had a survey made of the lands and to have subdivided the same into allotments and deposited with the Recorder of Titles a plan of the subdivision, duly certified pursuant to the provisions of sec. 103 or sec. 104 of the Act. John Alfred Hallam became the registered proprietor of two of these allotments Nos. 14 and 15. A plan of the two allotments is as follows :—



In 1908 Hallam transferred to one Rennie the whole of lot 15 and part of lot 14. A plan of the land transferred to Rennie and the land retained by Hallam is thus shown on the relevant certificate of title :—



Ultimately, Thomas Wilson and Rosalie Mary Hay became the registered proprietors of the piece of land transferred to Rennie. In 1921 Hallam transferred the part of allotment 14 that remained vested in him to one Pinkerton, and in 1922 the appellant, Mrs.

H. C. OF A. 1930. DEMPSTER v. RICHARDSON. Starke J.

Dempster, became the registered proprietor thereof. The title to the land and the plan of subdivision suggested no error in the measurements of the land, and no misdescription of the boundaries: the transfers and certificates of title issued upon transfers were all warranted by the title as registered. However, the appellant, Mrs. Dempster, on taking possession of the land described in the certificate of title issued to her, discovered that she could only obtain possession of 73 ft. 11½ in. on the frontage of the main road—a deficiency of 9½ in. She brought an action in trespass against the Hays, who were the proprietors of lot 15 adjoining her land. The action failed: the learned Judge (*Crisp* J.) who tried the case found that the Hays were the proprietors of the land of which they were in possession. She next brought an action against the Recorder of Titles, based upon the *Real Property Act*, for loss or damage sustained by her through the omission, mistake, or misfeasance of the Recorder or of his officers. This action was tried before the Chief Justice of Tasmania and a jury. The jury found that the appellant did not get the land delineated on the plan on her certificate. This is ambiguous, and it is quite impossible to say whether the deficiency was due to some error of measurement in the subdivisional survey or to some error in the alignment of Peltro Street, adjoining the appellant's boundary, or to the owners on the east of the appellant obtaining possession of more land than they were entitled to according to their certificates. Assume, however, that the appellant only acquired title to 73 ft. 11½ in., instead of 74 ft. 9 in., as shown by her title—what omission, mistake, or misfeasance can be attributed to the Recorder of Titles or his officers? The appellant acquired all the land which her transferor had any title to convey to her, and all she purchased, in point of fact, was the property situate at the corner of the Main Road and Peltro Street, Glenorchy, belonging to the vendor. If the error or misdescription in the title be due to an error in measurement, that is an error in survey and not in title. Such an error is not due to any mistake, omission, or misfeasance on the part of the Recorder or his officers, but to a predecessor in title of the appellant, or his surveyor (cf. sec. 133). On the other hand, if the deficiency in frontage is due to some error in the alignment of Peltro Street, or to other owners obtaining

possession of more land than shown by their titles, then the appellant's title has not been affected by any act—mistake, omission, or misfeasance—of the Recorder, but by acts of other persons which may or may not have barred her title.

Further, sec. 128 of the *Real Property Act* provides that "any person sustaining loss or damage through any omission, mistake, or misfeasance of the Recorder of Titles, or any of his officers or clerks in the execution of their respective duties, under the provisions" of the Act ". . . may in any case *in which the remedy by action for recovery of damages as hereinbefore provided is barred*" bring an action against the Recorder of Titles as nominal defendant. Now, that provision ties sec. 128 to the provisions of sec. 125, which enacts that "any person deprived of land, or of any estate or interest in land, . . . in consequence of any error, omission, or misdescription in any certificate of title . . . may . . . bring and prosecute an action at law for the recovery of damages" against certain persons. But the action is for deprivation of land, or some estate or interest in land, and not any kind of damage which may be occasioned by the mistakes or misfeasances of the Recorder of Titles or his officers (cf. *Oakden* v. *Gibbs* (1)).

It is clear, in the present case, that the appellant was not deprived of any land or of any estate or interest in land, in consequence of any error or misdescription in any certificate of title. If she did not obtain title to 74 ft. 9 in., as shown by her certificate, it was because her transferor had not title to grant that frontage, and not because of any error, omission, or misdescription in any certificate of title.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *C. Chant*, Hobart, by *Lobban, Lobban & Harney.*

Solicitor for the respondent, *A. Banks-Smith*, Crown Solicitor for Tasmania, by *Allen, Allen & Hemsley.*

J. B.

(1) (1882) 8 V.L.R. 380.