

[HIGH COURT OF AUSTRALIA.]

SAYWELL AND OTHERS APPELLANTS;
 DEFENDANTS,

AND

PERMANENT TRUSTEE COMPANY OF NEW }
 SOUTH WALES LIMITED AND OTHERS } RESPONDENTS.
 PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

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 1931.

SYDNEY,
 Mar. 25;
 April 2.

Gavan Duffy
 C.J., Starke,
 Dixon, Evatt,
 and McTiernan
 JJ.

Will—Implied revocation by codicil—Appointment of trustee company—Intention implied to remunerate — Permanent Trustee Company of New South Wales (Limited) Act 1888 (N.S.W.), sec. 13— Permanent Trustee Company of New South Wales Limited (Amendment) Act 1918 (N.S.W.), sec. 18.**

A testator appointed his five sons to be the executors and trustees of his will, and declared that no executor or trustee of his will should at any time be entitled to charge or apply to the Court for payment of commission on either capital or income in respect of his duties or work done as such executor or trustee. By a codicil the appointment of the sons was revoked and a trustee company was appointed in their stead. The testator confirmed his will and earlier codicil in all other respects, no express reference being made to the declaration prohibiting payment of commission.

*Sec. 13 of the *Permanent Trustee Company of New South Wales (Limited) Act 1888* (N.S.W.), as amended by sec. 18 of the *Permanent Trustee Company of New South Wales Limited (Amendment) Act 1918* (N.S.W.), provides that "The Company shall be entitled to receive, in addition to all moneys properly expended by it, and chargeable against any estate of which the administration shall be committed to the Company, whether as executor . . . trustee," &c., "a commission at a rate to be fixed from time to time by the board of directors of the Company,

but not to exceed in any case two pounds ten shillings for every one hundred pounds of the corpus or capital value of any such estate, and five pounds for every one hundred pounds of the annual income of any such estate received by the Company . . . and such commission shall be payable out of the moneys in the possession of the Company representing the estate upon which the same shall be chargeable, and shall be accepted by the Company in full satisfaction of any claim to remuneration for acting as such executor . . . trustee," &c. "and no other

Held, that the trustee company was entitled to charge commission pursuant to the provisions of the *Permanent Trustee Company of New South Wales (Limited) Act 1888* (N.S.W.), as amended by the *Permanent Trustee Company of New South Wales Limited (Amendment) Act 1918* (N.S.W.):

By *Gavan Duffy C.J.*, *Dixon* and *McTiernan JJ.*, on the ground that the codicil exhibited an intention that the Company should act as executor and trustee for a remuneration in the ordinary course of business;

By *Starke* and *Evatt JJ.*, because of the operation of the Act itself.

Decision of the Supreme Court of New South Wales (*Harvey C.J.* in Eq.) affirmed.

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APPEAL from the Supreme Court of New South Wales.

Thomas Saywell died on 23rd November 1928 having made his will on 2nd August 1921 the material portion of which is as follows:—“I appoint my five sons George Frederick Saywell . . . Ross Saywell . . . Thomas Stanley Saywell . . . Victor Claude Saywell . . . and Frank Saywell . . . to be trustees and executors of my said will and I declare that this appointment of them is made as individuals and not as directors of any company And I declare that no executor or trustee of my said will shall at any time be entitled to charge or to apply to the Court for payment of commission on either capital or income in respect of his duties or work done as such executor or trustee.” From time to time the testator made several codicils but only the second one, made on 19th February 1923, has any relevancy to this report and, so far as material, was as follows:—“And whereas by my will I appointed my five sons therein named to be trustees and executors of my said will now I hereby revoke the said appointment and in substitution of my said five sons I appoint the Permanent Trustee Company of New South Wales Limited to be trustees and executors of my said will and the codicils thereto In all other respects I confirm my said will and first codicil.” The said five sons were the principal

charges beyond such commission and moneys properly expended by the Company shall be made or allowed. Provided that if in any estate the Chief Judge or Judge in Equity shall be of opinion that the rate of commission charged is excessive such Judge may review and reduce such commission. Provided also that the commission to be charged by the Company against

any estate shall not exceed the amount of the published scale of charges of the Company at the time when the administration of such estate was committed to the Company, nor shall this enactment prevent the payment of any commission directed by a testator in his will either in addition to or in lieu of the commission hereinbefore authorized.”

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beneficiaries under the will and codicils, probate of which was granted to the Permanent Trustee Company of New South Wales Ltd.

An originating summons was taken out by that Company for the determination of the question (*inter alia*) whether upon the true construction of the will and codicils of the testator or otherwise the said Company was entitled under the provisions of the *Permanent Trustee Company of New South Wales (Limited) Act 1888* as amended by the *Permanent Trustee Company of New South Wales Limited (Amendment) Act 1918* or otherwise to charge or to apply to the Court for payment of commission on either capital and/or income in respect of its duties as executor and trustee of the will and codicils of the said testator. The defendants to the summons were the testator's widow Rebecca Elizabeth Saywell, Maud Saywell and other beneficiaries and representatives of beneficiaries under the will and codicils.

The summons was heard by *Harvey C.J.* in Eq., who held that the Company was entitled to commission on the terms of the relevant section in its private Act.

From that decision Maud Saywell and some of the other defendants to the originating summons now appealed to the High Court, the respondents being the Permanent Trustee Company of New South Wales Ltd. and other defendants to the summons (the latter of whom either did not appear on the appeal or appeared and submitted to such order as the Court might make).

Flannery K.C. (with him *Mason* and *McGechan*), for the appellants. By the terms of the declaration contained in the will, all executors and trustees, whether they be the persons originally appointed or those who follow them, are forbidden to charge a commission. The Company must be deemed to have taken the position as executor and trustee on the terms laid down by the testator. The Company could have refused to accept the office, and would then have been entitled to make a contract with the beneficiaries which would have been binding on them. In the absence of such a contract the Company is bound by the declaration of the testator dealing with the specific subject of commission. A section similar to sec. 13 of

the *Permanent Trustee Company of New South Wales (Limited) Act* 1888-1918 was considered in *MacBean v. Trustees, Executors and Agency Co.* (1). The Act should be regarded as an enabling Act which allows the Company to act as, and to fulfil all the functions of, executors and trustees, and sec. 13 is only a limitation of the Company's right to receive commission when it is entitled to receive commission. Whether it is entitled to receive commission depends upon the document from which the appointment is derived. If the document is silent on the point, then the provisions of the Act apply. The last proviso of sec. 13 to some extent incorporates the will. A testator can prescribe any rate of commission less than the maximum amount, and the Company has the option of deciding whether or not it will accept the position on such terms. The Act in effect says that the testator's intention, as expressed in his will, is to have an overriding effect. It is a well known principle of testamentary law that the testator remains master of the situation. An executor cannot accept in part and refuse in part (*Halsbury's Laws of England*, vol. XIV., p. 143, par. 258); therefore an executor who accepts is bound by a declaration in the will that he shall not charge for his services. On a proper construction of the will and codicil it is clear that the testator intended that commission should not be payable to the executor. The will should not be disturbed further than to the required extent (*Jarman on Wills*, 7th ed., vol. I., p. 164). As to applications to the Court for commission, see *Nissen v. Grunden* (2). Payment of commission conflicts with provisions in the will that certain annuitants should receive the full amount of their respective annuities. The Company has no statutory right to commission in face of a prohibition in the will.

[DIXON J. referred to *In the Will of James Tyson* (3).]

The offerer is the testator and, if the Company in exercise of its powers accepts, then it accepts on the conditions contained in the offer.

Teece K.C. (with him *Harrington*), for the respondent Permanent Trustee Company of New South Wales Ltd. On the true construction

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(1) (1916) V.L.R. 425; 38 A.L.T. 27.

(2) (1912) 14 C.L.R. 297.

(3) (1909) 9 S.R. (N.S.W.) 287, at p. 293.

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of the will there was no prohibition as regards remuneration intended to apply to the Company, such prohibition applied to the original appointees only. The presence of the word "his" in the material clause of the will shows that the testator was referring to "persons," and not to a company. The word is used in its strict sense, that is, in its ordinary natural meaning. As to whether it can be applied to an artificial person see *Pharmaceutical Society v. London and Provincial Supply Association* (1). When the testator revoked the appointment of his sons and appointed the Company he not only expressly revoked the appointment of such sons but he impliedly revoked the prohibition against the payment of commission. The testator must be taken to have known the relevant provisions of the Company's Act (*Cahill v. London and North Western Railway Co.* (2)) referred to in *Craies on Statute Law*, 3rd ed., p. 488). When the testator inserted the Company's name he meant the Company with all the rights and privileges conferred upon it by its Act which, being inconsistent with the previous provision in the will, impliedly revoked such provision. In any event the Company is entitled to commission. The preamble of an Act is conclusive of the intention of Parliament (*Craies on Statute Law*, 3rd ed., p. 40). According to the preamble of the Company's Act, sec. 13 thereof was designed for the benefit of the public as well as of the Company. A statutory contract exists between the Company and those persons who avail themselves of its services (*Countess of Rothes v. Kirkcaldy and Dysart Waterworks Commissioners* (3); *Netherseal Colliery Co. v. Bourne* (4)). An illusory commission by a testator is frequently disregarded by the Court (*Re Will of James Gibbon* (5)). In South Australia the Courts are not bound by the testator's wishes in this respect (*In re Johnson* (6)). Sec. 13 was a deliberate substitution by the Legislature of a fixed rate of commission in lieu of the old power of an executor of applying to the Court. Such charges by the Company are published for general information. The Company is not prevented by its Act from accepting more than the fixed charges if the testator so provides. If it is suggested that the Company

(1) (1880) 5 App. Cas. 857, at pp. 862, 869.

(2) (1861) 10 C.B. (N.S.) 154; 142 E.R. 409.

(3) (1882) 7 App. Cas. 694, at p. 707.

(4) (1889) 14 App. Cas. 228.

(5) (1888) 3 Q.L.J. 120.

(6) (1924) S.A.S.R. 31.

has waived its rights to commission the consideration for such waiver must be shown. The provisions of the Act are incorporated into the will (*In the Will of James Tyson* (1)). A testator cannot debar an executor from getting remuneration for his services, and similarly a testator cannot debar the Company from receiving commission as provided in its Act (*Re Will of James Gibbon* (2)). The true law is that the jurisdiction of the Court to grant commission cannot be ousted by any act of the testator. As to how the Court has exercised its discretion in the granting of commission, see *In the Will of Steele* (3) and *Re Murphy* (4). The words "shall be entitled to receive" as appearing in sec. 13 are imperative (*Salford Guardians v. Dewhurst* (5)).

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Flannery K.C., in reply. The words "shall be entitled to receive" in sec. 13 mean entitled to receive in the manner there set forth; they do not mean that in each and every case a commission must be charged. There is nothing in that section to prevent the Company from making arrangements with clients as to the rate or amount of commission payable to the Company, provided that such rate or amount be less than that shown in the Act. The section should be interpreted in such a way as to leave parties free to contract in the matter. Sec. 13 deals with matters on which the document is either silent or not contradictory to its provisions. The testator and not the Company is the offerer, the Company being the offeree which accepted the offer as made, that is, to act as executor and trustee without remuneration, and, therefore, the provisions of the Act as to commission do not apply.

Cur. adv. vult.

The following written judgments were delivered:—

April 2.

GAVAN DUFFY C.J. In my opinion the appeal should be dismissed. I agree with the reasons of my brother *Dixon*.

STARKE J. The Trustee Company, I agree, is entitled to charge commission pursuant to the provisions of its Act. The old rule was that an executor should have no allowance for personal trouble or loss

(1) (1909) 9 S.R. (N.S.W.) 287.

(3) (1915) 15 S.R. (N.S.W.) 247.

(2) (1888) 3 Q.L.J. 120.

(4) (1928) S.R. (Q.) 1.

(5) (1926) A.C. 619, at p. 624.

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of time incurred in the execution of his duties. But the Act of the Permanent Trustee Company authorizes it to receive commission or remuneration for its services in the office of executor and otherwise. What is there in this case to discharge that right or authority? Nothing except a direction by the testator that no executor or trustee of his will shall at any time be entitled to charge or apply to the Court for payment of commission on either capital or income in respect of his duties or work done as such executor or trustee. The suggestion is that the will in some way annexes to the Company's office as executor the duty of acting gratuitously. The Act is to the contrary in its provision for remuneration, and the trustee has not by agreement with the testator or anyone else so stipulated. Does the Company's conduct then, in accepting office, discharge its right, or show it gives it up, or estop it from relying on that right? If a legacy be given to a person appointed executor, no doubt the presumption is that the legacy is given to him in that character, and it is on him to repel the presumption (*In re Appleton*; *Barber v. Tebbit* (1); *National Trustees, Executors and Agency Co. of Australasia v. Doyle* (2)). But here the Company gets nothing. No Court on these facts could presume that the testator or anyone else altered his position on the faith of any act of the Company. And still less could it presume that the Company undertook an onerous and responsible office gratuitously when it was entitled to charge for its services. It is for these reasons that I think *Harvey J.* was right in substance. But I do not agree that the clause in the testator's will that his executor shall not charge commission is revoked by the codicil appointing the Permanent Trustee Company executor, or that the Company does not fall within the terms of the clause.

DIXON J. By his will the testator appointed his five sons to be trustees and executors of his will, and he declared that this appointment of them was made as individuals and not as directors of any company. He further declared that no executor or trustee should at any time be entitled to charge or apply to the Court for payment of commission on either capital or income in respect of his duties

(1) (1885) 29 Ch. D. 893.

(2) (1899) 24 V.L.R. 626; 20 A.L.T. 161.

or work done as such executor or trustee. The will contained provisions in favour of the shareholders of what appear to have been family companies, and these provisions operated in favour of the five sons named as executors and trustees. The testator afterwards made a codicil which contained the following provision: "Whereas by my will I appointed my five sons therein named to be trustees and executors of my said will now I hereby revoke the said appointment and in substitution of my said five sons I appoint The Permanent Trustee Company of New South Wales Limited to be trustees and executors of my said will and the codicils thereto." The Permanent Trustee Company of New South Wales Ltd. has accepted office as executor and trustee under the will and codicils of the testator, and the question is whether it is entitled to remuneration. In my opinion it is entitled to remuneration as executor and trustee. The Company is authorized by the *Permanent Trustee Company of New South Wales (Limited) Act* 1888, as amended by an Act of 1918, to act as executor, administrator, receiver, committee and guardian as a business. It is given special statutory powers and in return it undertakes special statutory duties. The purpose of the Company is to carry on at a profit derived from remuneration by way of commission the business of performing services of a fiduciary nature, and to do so in a manner and under conditions which give advantages that might not otherwise be obtainable. The essential purpose of the Company is to earn remuneration. If it is not beyond its powers to act gratuitously, it is certainly beyond its province. When the testator appointed it by his codicil as his executor and trustee in substitution for his sons, he must have intended it to accept and exercise these offices. By the choice of such a company as his executor and trustee, it appears to me that the testator evinced with sufficient clearness an intention that it should act pursuant to its statute and for the remuneration which the statute authorizes. It may be objected that this intention does not appear from the language used by the testator, but from the nature and the legal attributes of the body which he has appointed to administer his estate. But in determining the true meaning and effect of the provision making the appointment, it is proper to consider the nature of the body appointed, and if the

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meaning of the testator then becomes clear, it is no objection that it is only understood when the subject dealt with is comprehended. When in substitution for the executors and trustees appointed by his will, who were denied remuneration by that instrument because of the beneficial interests given to them, he appointed an independent body whose business it is to exercise the office, the testator raised so high a probability of his intending the body to receive the ordinary remuneration incident to its business that a contrary intention cannot be reasonably supposed. I am therefore of the opinion that the codicil exhibits an intention that the Permanent Trustee Company shall act as executor and trustee for a remuneration in the ordinary course of its business. Such an intention is inconsistent with the application to the Permanent Trustee Company of the provision in the will that no executor or trustee shall be entitled to charge commission in respect of his duties or work done as such executor or trustee. If therefore the provision would otherwise apply to the Company it is revoked by the subsequent inconsistent intention disclosed by the codicil. In my opinion the order made by *Harvey C.J.* in *Eq.* is right.

The appeal should be dismissed with costs.

EVATT J. I have come to the conclusion that the Trustee Company is entitled to charge commission on both capital and income in respect of the performance of its duties as executor and trustee of the will and codicils of the testator.

The same result was arrived at by the learned Chief Judge by way of construction of the testamentary documents. "Where a person," he said, "appoints one of the trustee companies as executor, he deliberately selects a body which has a statutory right to certain payment for its services, and he must be taken to know that."

For my own part, I prefer to base my opinion upon the effect of the Act of Parliament itself. In this view actual or imputed knowledge of the terms of the statute becomes immaterial: it simply operates by its own supreme force.

Sec. 13 of the Act gives the Trustee Company a statutory right to be paid commission, even if the will is interpreted as containing

a prohibition against the receipt of commission by the Company: just as sec. 1 of the Act enables it to perform and discharge the duties of executor.

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No doubt the Company might, in an appropriate case, make a bargain to accept remuneration on a basis different from that provided for in sec. 13. If it did so, it could no longer fall back on the section. So, too, if it deliberately chose to accept remuneration in terms of an instrument appointing it, it might well be prevented from making any further claim based upon the section.

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In this case, however, there is not present any circumstance which prevents the application of the statutory mandate as to remuneration, and effect must be given to it.

McTIERNAN J. By his will dated 2nd August 1921 the testator appointed his five sons, whom he mentioned *nominatim*, to be trustees and executors of his will. After declaring that such appointment of them was made as individuals and not as directors of any company, the testator made the following declaration, namely: "And I declare that no executor or trustee of my will shall at any time be entitled to charge or to apply to the Court for payment of commission on either capital or income in respect of his duties or work done as such executor or trustee." The five sons whom the testator nominated as his executors and trustees were the principal beneficiaries under his will. The declaration that no executor or trustee should at any time be entitled to charge or to apply to the Court for payment of commission was followed by a declaration that Bruce Saywell, one of the testator's sons, should not take any share in the testator's estate or benefit under his will, for the reason that the testator had, in his lifetime, fully provided for him. This son was not nominated by the testator as one of his executors and trustees. On 19th February 1923 the testator made a codicil to his will, by which he directed that his daughters and his sons, with the exception of the said Bruce Saywell, should share equally in the residuary estate. This direction was immediately followed by a clause in these terms: "And whereas by my will I appointed my five sons therein named to be trustees and executors of my said will, now I hereby revoke

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the said appointment and in substitution of my said five sons I appoint the Permanent Trustee Company of New South Wales to be trustees and executors of my said will and the codicils thereto In all other respects I confirm my said will and first codicil."

By an Act to confer powers upon the Permanent Trustee Company of New South Wales Limited, enacted in 1888 and amended in 1918, it is provided that whenever the Company has been or should be named as executor in the will, or in the codicil to the will of any testator, it should be lawful for the Company to act as executor and to apply for and to obtain probate of the will of the testator and to perform and to discharge all other the acts and duties of an executor as fully and effectually as any other executor (sec. 1).

In my opinion the codicil by which the testator nominated the Permanent Trustee Company of New South Wales Ltd. as his executor and trustee must be read with the Act, which empowered the Company to apply for and to obtain probate and to perform and discharge executorial acts and duties. Sec. 5 provides that an affidavit made by one of the officers of the Company therein specified shall be received in any case in which the Company is empowered to apply for probate, instead of any affidavit required by any Charter, Act of Parliament or Rule of Court to be made by persons making application for probate. Sec. 6 provides that the assets of the Company shall be liable for the proper administration of any estate of which the Company shall act as executor. Proceeding to sec. 13, it is provided that "the Company shall be entitled to receive, in addition to all moneys properly expended by it, and chargeable against any estate of which the administration shall be committed to the Company, . . . as executor . . . a commission at a rate to be fixed from time to time . . . but not to exceed in any case two pounds ten shillings for every one hundred pounds of the corpus or capital value of any such estate . . . and such commission shall be payable . . . and shall be accepted by the Company in full satisfaction of any claim to remuneration for acting as such executor . . . and no other charges beyond such commission and moneys properly expended by the Company shall be made or allowed. Provided that if in any estate the Chief Judge or Judge in Equity shall be of opinion that the rate

of commission charged is excessive such Judge may review and reduce such commission. Provided also that the commission to be charged by the Company against any estate shall not exceed the amount of the published scale of charges of the Company at the time when the administration of such estate was committed to the Company, nor shall this enactment prevent the payment of any commission directed by a testator in his will, either in addition to or in lieu of the commission hereinbefore authorized." In the absence of the Act the nomination of the Company to act as executor would have been in vain. Sec. 13 applies as well as the other sections which I have mentioned. By declaring as his testamentary wish that the services of the Company should be availed of, the testator impliedly incorporated the words of sec. 13 of the Act into the codicil by which he nominated the Company as his executor and trustee (*In the Will of James Tyson* (1)). If the testator intended that the prohibition against an executor or trustee charging or applying for commission should apply only to the executors and trustees whom he had nominated, *cadit quæstio*. In my view however, the question raised by this appeal may be determined without considering whether the words of the prohibition exhibit that limited intention. Assuming that those words are construed so as to apply not only to the executors whom he had nominated, but also to any executor or executors whom he might afterwards nominate in lieu of or in addition to his five sons, I think that the codicil of 19th February 1923, read with the Act, would, on that construction, be inconsistent with the terms of the clause in the will containing the prohibition, and the provisions of the codicil with sec. 13 annexed would prevail. In my opinion the codicil read with sec. 13 contains the last testamentary wish of the testator with respect to the remuneration of his executor. Since the appointment of the Company by the codicil, with all its implications, would modify the prohibition expressed in the will, that is, assuming it to be capable of having a general application, the concluding words of the codicil, "In all other respects I confirm my said will and first codicil," were intended to confirm the will, subject to the amendments made by the codicil, and were not intended to make

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(1) (1909) 9 S.R. (N.S.W.), at p. 293.

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

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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.*

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[HIGH COURT OF AUSTRALIA.]

DEMPSTER APPELLANT ;
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AND

RICHARDSON RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
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H. C. OF A. *Real Property—Assurance fund—Claim—Dimension of land less than shown on*
1930. *certificate of title—Land purchased without reference to dimensions—“ Deprived of*
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SYDNEY, *feasance ”—Error one of survey, not of title—Other remedy not barred—Real*
Nov. 24, 25 ; *Property Act 1862 (Tas.) (25 Vict. No. 16), secs. 125,* 128.**
Dec. 3.

Rich, Starke
and Dixon JJ.

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