considerable penalty. The duty has been paid, amounting to £139 5s.

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On the whole, I think justice will be done and, in this case, the law sufficiently vindicated, if, in addition to the forfeiture, I inflict a penalty of £25 for the offences charged, with a further penalty of £25 for the fraud.

The defendant is convicted, and fined accordingly, and is ordered to pay the costs of the action.

Defendant convicted. Penalty of £50 imposed. Defendant to pay costs of action.

Solicitor, for the plaintiffs, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the defendant, *W. H. Croker & Croker.*

B. L.

[HIGH COURT OF AUSTRALIA.]

ROOM AND OTHERS . . . . . APPELLANTS;

AND

BAIRD AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 15.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Res Judicata—Order on originating summons—Trustee Act 1898 (*Tas.*) (62 *Vict. No.* 34), *sec.* 45.

A testatrix by her will gave a certain sum to trustees upon trust to pay the income to her husband for life, and after his death to pay and divide the income equally between her five children for their respective lives, with a power to appoint the capital of their respective shares by deed or will. On an originating summons under sec. 45 of the *Trustee Act* 1898, to which

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three sons were parties, an order had been made declaring that the children took life interests after the death of their father in their respective shares, with a power of appointment superadded, "the said respective shares to remain in the hands of the trustees during the respective lives" of such children. Subsequently, by an originating summons taken out by those sons, the question was asked whether in the event of the sons appointing their respective shares to themselves by deed they would be entitled absolutely to those shares subject only to the life interest of their father.

Held, that the matter was *res judicata* by reason of the former order of the Court.

Decision of the Supreme Court of Tasmania (*Dobbie* J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

By her will dated 28th July 1904 Christina Room bequeathed to the trustees of her will a sum of £10,000 upon trust to pay the income therefrom to her husband, James Henry Room the elder, during his life, and after his death upon trust to pay the said income in equal shares to her five children during their lives, and upon the death of any child who should be of age the testatrix directed that the sum of £2,000 (being his or her share of the above mentioned sum of £10,000) should be paid to such person or persons as her child so dying might by deed or will appoint and in default of appointment to his or her personal representatives. The testatrix died on 24th September 1905, leaving her surviving her husband and her five children, including three sons, James Henry Room the younger, Richard Daniel Room and William Hart Room, who were all of age at the material times.

On 18th October 1911 an application was made on originating summons by the trustees of the will, William Gunning Baird and the Tasmanian Permanent Executors and Trustees Association Ltd., for the opinion, advice, direction and order of the Court as to certain questions, and an order was made thereon by *McIntyre* J. declaring that the five children of the testatrix after the death of their father took a life interest in the £10,000 with a power of appointment superadded, and that their respective shares were to remain in the hands of the trustees during the respective lives of the children: *In re Room* (1). There was no appeal from that decision.

(1) 4 Tas. L.R., 18.

On 2nd September 1913 James Henry Room the younger by deed appointed and directed that his share of the £10,000 (then by reason of a deficiency of assets represented by the sum of £9,343 16s. 4d.) should be held in trust for and be vested in him absolutely, and that the same should immediately after the death of his father be paid to him accordingly.

On 17th October 1913 by an originating summons, to which the trustees were made defendants, the three sons applied for the opinion, advice, direction and order of the Court upon the following questions (*inter alia*):—

1. Whether James Henry Room the younger was or was not absolutely entitled to his share of the sum of £9,343 16s. 4d., subject only to the life interest therein of his father.

3. Whether in the event of Richard Daniel Room and William Hart Room appointing and directing that their respective shares of the sum of £9,343 16s. 4d. should go and belong to them absolutely they would or would not be entitled absolutely to their respective shares.

The summons was heard by *Dobbie* J., who held that the matter was *res judicata* by reason of the decision of *McIntyre* J., and dismissed the summons. From that decision the three sons now appealed to the High Court.

Martin and *Tasman Shields*, for the appellants. The appellants are entitled to ask what is the effect of an appointment by them to themselves, notwithstanding the decision on the earlier originating summons. An order made on proceedings under sec. 45 of the *Trustee Act* 1898 does not render the matter *res judicata*. There is nothing binding on the parties, but there is merely an indemnity given to the trustees. The parties to these proceedings are not in the position of parties to a suit with definite issues between them. [They referred to *Hunter* v. *Stewart* (1); *Everest and Strode on Estoppel*, 2nd ed., p. 70.]

[*Isaacs* J. referred to *Badar Bee* v. *Habib Merican Noordin* (2).]

Dennis Butler, for the respondents, was not called upon.

(1) 31 L.J. Eq., 346.

(2) (1909) A.C., 615.

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Griffith C.J.

GRIFFITH C.J. This is an appeal from an order of *Dobbie* J. dismissing an originating summons which asked for the determination of certain questions as to the construction of the will of Christina Room. The testatrix gave a sum of £10,000 (which was ultimately reduced in consequence of a deficiency of assets) upon trust to pay the income to her husband for his life and after his death to pay and divide the income equally between her five children for their respective lives, with power to appoint the capital of their respective shares by deed or will. The husband is still alive. Three of those children claim to be entitled to exercise the power of appointment by deed in their own favour, and claim that, as upon such appointment the life interest and the remainder in each share will be vested in the same person, they will respectively be absolutely entitled to the capital subject only to the life interest of their father. One of the children has already executed such a deed of appointment. *Dobbie* J. thought that their claim could not be entertained on the ground that the matter was *res judicata*, the point having been already determined against them by *McIntyre* J. in 1908 on an originating summons taken out by the trustees of the will. The present appellants were parties to that summons, and were represented by counsel on the argument. The question whether these three children were entitled to exercise the right they now claim was not specifically asked by the summons, but in the order as drawn up it was declared that they took life interests after the death of their father with general power of appointment by deed or will of their respective shares of the sum representing the £10,000, "the said respective shares to remain in the hands of the trustees during the respective lives" of such children. This was in substance a declaration that upon the proper construction of the will such appointments, whether made by deed or by will, would not take effect in possession until after the death of the appointors. The appellants contend that that decision has not the effect of *res judicata*.

As I understand the argument, it is contended that a decision upon an originating summons is not a judgment *inter partes*. It has often been assumed, and has, I think, never been doubted, that a decision *inter partes* on a question of construction upon an

originating summons is on the same footing as any other decision of the Court. The order of *McIntyre* J. could only have been made under the provisions of sec. 45 of the *Trustee Act* 1898, since the alternative provisions of a former Statute, which allowed trustees to ask for the advice of the Court, had been repealed. The form of the proceedings under which the order was obtained appears to have been rather in accordance with the repealed provision, but the order must be taken to have been made under sec. 45. Although the particular question was not asked specifically, I find on looking at the papers that the Court was asked to answer "any other questions that might arise," and it appears from the report of the case in 4 Tas. L.R., 18, that this question was solemnly argued and decided. That decision was not appealed from, and it is impossible for any Court afterwards in proceedings between the same parties to re-open the question.

The learned Judge, in giving his reasons for his judgment, referred to the language of *McIntyre* J. as reported. Strictly speaking, of course, we can only look to the formal judgment of the Court, which alone is matter of record and operates as *res judicata*. But upon reading the words of the order it is clear that the matter now sought to be raised was solemnly decided. The appellants are, therefore, not entitled to have the question re-opened, and the appeal fails.

ISAACS J. I agree. I think this case is absolutely covered by the case of *Badar Bee* v. *Habib Merican Noordin* (1).

GAVAN DUFFY J. I concur.

Appeal dismissed with costs.

Solicitors, for the appellants, *Martin & Hobkirk.*
Solicitor, for the respondents, *W. Mosey.*

B. L.

(1) (1909) A.C., 615.