[PRIVY COUNCIL.]

HOYSTED AND OTHERS . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

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Land Tax—Assessment—Joint owners—Deduction of £5,000—*Estoppel by judgment—Res judicata—Admission of fact—Assumption of legal quality of a fact—Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 10, 11, 38, 38A.

The admission of a fact fundamental to a particular decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact. The same principle applies to an erroneous assumption as to the legal quality of that fact, and also where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant has not been traversed.

In respect of Federal land tax for a particular year upon certain land vested in trustees under the will of a testator who died before 1st July 1910, the trustees by their return claimed seven deductions of £5,000. The Commissioner of Taxation in assessing them disallowed the deductions in respect of the beneficiaries on the ground that "the joint owners" did not any of them hold original shares in the land. The trustees lodged objections: (1) that the beneficiaries were entitled to the beneficial interest in the land or the income therefrom "in such a way that they are taxable as joint owners" and that they were the holders of original shares in the land, being entitled to the first life or greater interest in the land or the income thereof, and (2) that the trustees were entitled to seven deductions of £5,000 pursuant to secs. 38 and 38A of the *Land Tax Assessment Act* 1910-1916. The objections were, in

* Present—Lord Shaw, Lord Sumner, Lord Phillimore, Lord Darling and Lord Salvesen.

pursuance of the Act, treated as an appeal and transmitted to the High Court. The appeal came before a Justice of the High Court, who stated a case for the opinion of the Full Court upon the questions (1) whether "the shares of the joint owners," or of any and which of them, in the land were original shares within the meaning of sec. 38, and (2) what number of deductions of £5,000 should the Commissioner make in the assessment of the "joint owners" of the land. No question was asked of the Full Court as to joint ownership: this was assumed. The Full Court answered the first question by saying that the shares of the six children of the testator surviving at the date of the assessment were original shares, and the second by saying that the number of deductions of £5,000 that should be made was six. The Justice who had stated the case thereupon, without further argument, made an order that the appeal be allowed, and that the number of deductions of £5,000 to be made be six.

Held, that, on an appeal by the trustees in respect of their assessment for the following year, the Commissioner was estopped from contending that the beneficiaries were not joint owners of the land.

Decision of the High Court: *Hoysted* v. *Federal Commissioner of Taxation*, (1921) 29 C.L.R. 537, reversed.

APPEAL from the High Court to the Privy Council.

This was an appeal by the appellants from the decisions of the High Court: *Hoysted* v. *Federal Commissioner of Taxation* (1).

The judgment of their Lordships, which was delivered by Lord SHAW, was as follows:—

This is an appeal by special leave from two judgments of the Full Court of the High Court of Australia given on 16th December 1921 and 2nd November 1923. The first judgment (2) was given upon a special case which had been stated for the opinion of the Full Court by *Starke* J., upon the hearing of an appeal by the appellants against their assessment by the Commissioner of Taxation for the purpose of land tax for the financial year 1920-1921. That learned Judge, giving effect to the answers made by the Full Court to the questions in the special case, dismissed the appellants' appeal and on 2nd November 1923 the Full Court affirmed his judgment (3). The substance of the appeal has reference to the correctness of the answers given to the questions in the special case. These questions and answers will be afterwards stated.

(1) (1921) 29 C.L.R. 537; (1923) 32 C.L.R. 617.

(2) (1921) 29 C.L.R. 537.

(3) (1923) 32 C.L.R. 617.

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Mr. Charles Campbell, a merchant and station owner, resident in Melbourne, died on 13th September 1905 possessed of considerable real and personal estate in Australia. Seven children survived him. By his will he devised and bequeathed his station properties and the stock, &c., thereon upon trust to carry on and work the properties until twenty-one years from his death. The income was to be enjoyed by his children; and should any child predecease him, leaving issue, the issue was to enjoy the parent's share of income. There are various provisions as to the particular dates and periods from and during which annual income should be reckoned. In the view taken in this case, these points are immaterial. Upon the expiration of the twenty-one years the trustees were directed to sell the properties and stock, &c., and to divide the proceeds equally among such children as should be living at the expiration of the twenty-one years, grandchildren again taking their parent's share.

As mentioned, the seven children named in the will were alive at the testator's death; but one married daughter died in January 1912, leaving two children. A question was raised in the proceedings after mentioned as to the rights of these grandchildren, and it was held that they were not entitled to what is termed in the statute an "original share in the land," they not having a "first life or greater interest . . . in the land or the income therefrom." This question is frequently referred to in the course of the case: but the judgment upon it was accepted at their Lordships' Bar; and that matter is accordingly no longer in issue. The appeal may be, therefore, treated as an appeal by the six children of the testator named in his will and still surviving. The question in the case has reference to the taxation to be imposed upon the estate or various portions thereof or interests therein under Mr. Campbell's will.

This depends upon the construction to be given to certain sections and sub-sections of the *Land Tax Assessment Act* 1910-1916. The relevant provisions of the Act are as follows:—"10 (1) Subject to the provisions of this Act, land tax shall be levied and paid upon the unimproved value of all lands within the Commonwealth which are owned by taxpayers, and which are not exempt from taxation under this Act. 11 (1) Land tax shall be payable by the owner of land upon the taxable value of all the land owned by him. . . .

(2) The taxable value of all the land owned by a person is . . . (*b*) in the case of an owner . . . the balance of the total sum of the unimproved value of each parcel of the land, after deducting the sum of five thousand pounds."

So far for the simplest case, namely, that of owners.

The case of joint owners is specifically dealt with in sec. 38. The sub-sections thereof which are material to the question in the appeal are :—" (1) Joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section. (2) Joint owners (except those of them whose interests are exempt from taxation under section thirteen or section forty-one of this Act) shall be jointly assessed and liable in respect of the land (exclusive of the interest of any joint owner so exempt) as if it were owned by a single person, without regard to their respective interests therein or to any deductions to which any of them may be entitled under this Act, and without taking into account any land owned by any one of them in severalty or as joint owner with any other person. (3) Each joint owner of land shall in addition be separately assessed and liable in respect of (*a*) his individual interest in the land (as if he were the owner of a part of the land in proportion to his interest), together with (*b*) any other land owned by him in severalty, and (*c*) his individual interests in any other land."

Then come sub-secs. 7 and 8, in the construction of which arises the true subject of controversy in the appeal. These sub-sections are as follows :—" (7) Where, under a settlement made before the first day of July, one thousand nine hundred and ten, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of five thousand pounds as provided by paragraph (*b*) of sub-section 2 of section eleven of this Act, the aggregate of the following sums, namely :—In respect of each of the joint owners who hold an original share in the land under the settlement or will—(*a*) the sum of five

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thousand pounds . . . Provided that, where the same persons have a beneficial interest in land or in the income therefrom under more than one settlement or will or under a settlement and will, they shall be jointly assessed in respect of the whole of their interests under the settlements or wills or settlement and will, and there may be deducted in the joint assessment from the unimproved value of the land comprised in the joint assessment, instead of the sum of five thousand pounds as provided by paragraph (*b*) of sub-section 2 of section eleven of this Act, the aggregate of the following sums, namely :—In respect of each of the joint owners who hold an original share in the land being jointly assessed (*a*) the total sum of five thousand pounds, . . . (8) In this section, 'original share in the land' means the share of one of the persons specified in the settlement or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the settlor or after a life interest of the wife or husband of the settlor or testator."

In the full argument on the appeal much stress was laid upon the definition section of the statute and specially upon the following definitions :—" 'Owner,' in relation to land, includes every person who jointly or severally, whether at law or in equity—(*a*) is entitled to the land for any estate of freehold in possession ; or (*b*) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; and includes every person who by virtue of this Act is deemed to be the owner." " 'Joint owners' means persons who own land jointly or in common, whether as partners or otherwise, and includes persons who have a life or greater interest in shares of the income from the land."

While the present appeal concerns the assessment for the year 1920-1921, its determination may depend upon, or at least it is material to see what had been done by and decided between the parties concerning the assessment of two years before, namely, for the year 1918-1919.

By their return under sec. 15 (1) of the Act in respect of land tax for the financial year 1918-1919 the appellants claimed seven

deductions of £5,000. The respondent on that occasion, in assessing, disallowed the deductions claimed in respect of the shares of the beneficiaries. The appellants thereupon lodged objections and claimed to be entitled to seven deductions as being trustees for persons taxable as joint owners and holders of the original shares within sec. 38 of the Act. In accordance with the statute the objections were treated as an appeal, and were so transmitted to the High Court.

In the opinion of the Board it is highly important to keep fully in view what were the exact terms of that objection. (It is again explained that no question arose before the Board as to seven deductions, as it was not argued that grandchildren, but only that each of the six children, were entitled to a deduction of £5,000. For the sake of convenience accordingly the word " seven " is named as " six " throughout.) The objection was in the following terms : —" I hereby give you notice that I object to the assessment of land tax under the above register number, and contained in the notice of assessment issued by you under date 12th April 1919, for the following reasons :—1. That the beneficiaries named in the will of the testator Charles Campbell who died before the first day of July 1910, all of whom are relatives of the testator by blood, marriage or adoption, are entitled to the beneficial interest in the lands known as ' the station properties ' or in the income therefrom in such a way that they are taxable as joint owners under the *Land Tax Assessment Act* 1910-1916 and that they are the holders of original shares in such lands being entitled to the first life or greater interest in such lands or the income thereof. 2. That the taxpayer is entitled to six deductions of £5,000 each pursuant to the provisions of secs. 38 and 38A of the *Land Tax Assessment Act* 1910-1916 and any amendments thereof.—Date May 3, 1919." The Commissioner of Taxation disallowed the objection.

In the transmission to the High Court, according to the procedure under the statute, the Commissioner of Taxation thus narrated what had been done :—" And whereas pursuant to reg. 40 (1) of the Regulations made under the said Act the taxpayers being dissatisfied with such assessment did within thirty days from date of the service of the said notice of assessment namely on the 3rd day

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of May 1919, lodge an objection in writing dated the same day with the Commissioner against such assessment And whereas the Commissioner considered such objection and pursuant to reg. 40 (2) of the said Regulations gave written notice to the taxpayer on the 29th day of July 1919 wholly disallowing the said objection And whereas the taxpayers being dissatisfied with the decision of the Commissioner on the 4th day of August 1919 required the objection to be treated as an appeal and transmitted to the High Court of Australia in its original jurisdiction at Melbourne pursuant to reg. 40 (2) of the said Regulations: Now therefore the Commissioner of Taxation as required by the taxpayers as aforesaid hereby transmits the said objection to the High Court of Australia at Melbourne."

At the hearing *Gavan Duffy* J. stated a case for the opinion of the Full Court upon the questions (1) whether the shares of the joint owners or of any and which of them in the land were original shares within sec. 38; and (2) how many deductions of £5,000 the respondent should make.

The Full Court (*Knox* C.J. and *Starke* J., *Isaacs* J. dissenting), having heard the appeal, pronounced judgment thereupon, holding that the questions should be answered as follows:—(1) The shares of the six children surviving at the date of the assessment. (2) Six.

This opinion on the special case being given, the further hearing of the appeal was resumed before *Gavan Duffy* J., and upon 24th May 1920 he pronounced a final order. It narrated the notice of objection of the appellants and the memorandum of the respondent transmitting the objection for determination of formal appeal, together with the subsequent presentation of the case for the opinion of the Full Court, and it concluded: "This Court doth order that this appeal be and the same is hereby allowed and that the number of deductions of £5,000 to be made by the respondent in the said assessment be six."

The learned Judge (in the subsequent special case about to be referred to) narrated what had happened at this last stage of that litigation, in this language:—"(3) That the hearing of the appeal was purely formal. No arguments were adduced by either party. The parties treated the answers of the High Court to the questions stated as covering the whole ground of the appeal. The attention

of the Justice who heard the appeal was not directed to the question whether the beneficiaries under the will of Charles Campbell were taxable as joint owners and he did not in fact decide that question."

Matters were allowed to rest upon this footing for another year. And then, in the subsequent year, the whole matter was reopened by the action of the Commissioner of Taxation who, in respect of the same estate and the same parties, reverted to the position that the taxable deduction should not be six sums of £5,000 as decided in the former case, but one sum of £5,000. To this it was answered, to put the matter briefly, that the former decision was right upon its merits, but that, whether so or not, the respondent was estopped by the judgment already pronounced. If this argument be sound, there is an end of the case; and it will be unnecessary to enter upon the merits of the difference between the parties upon the construction of the statute.

In the opinion of their Lordships the contention of the appellants is sound, and the respondent is estopped by judgment.

It is, however, necessary to examine carefully the argument presented against such estoppel. It amounts to this: that in the former case it was not matter of decision that the appellants were joint owners, but was matter of admission. In the judgment of *Isaacs* J., who dissented from his two learned brethren, he pointed this out in such a way as to suggest that, although the Court had been bound to accept the admission, still it was erroneous in law. Accepting this hint, the respondent proceeded as for the year 1920-1921 to challenge the fact of joint-ownership which it was alleged had been matter of admission, and to assess upon the footing that the number of deductions from the capital should be one, and should not be six, as had been decided.

To this a notice of objection was lodged on 16th May 1921, the first head being that "the said assessment is erroneous in matter of law," and the second being as follows: "That the beneficiaries in the station properties trust come within the definition of joint owners and that the six deductions of £5,000 each under sec. 38 (7) of the Act as claimed in the trustee's return and as allowed by the High Court of Australia in respect of the trustee's return for 1918-1919 have wrongly been disallowed in the said assessment—and that

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such assessment should accordingly have been made on a taxable balance of £183,254."

The objection, being transmitted as an appeal, came before *Starke* J., and a special case was stated by him for the opinion of the Full Court, which contained the following questions :—" 2. How many deductions of five thousand pounds are the trustees entitled to on the footing that the Commissioner is not estopped by any judgment ? 3. Is the Commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of five thousand pounds ? "

The Full Court (*Knox* C.J., *Higgins* and *Starke* JJ.) answered as follows :—2. One—pursuant to sec. 11 of the Act. 3. No.

Higgins J. dissented as to answer 3, and stated that in his opinion the respondent was estopped by the previous judgment.

The appellants contend that the dissent of the learned Judge was right and that the question how many deductions of £5,000 the trustees are entitled to has already been settled for the years 1918-1919 and settled expressly by the High Court of Australia. This was the subject of a full argument in which the respondent contended that the previous litigation proceeded upon the footing of an admission that Mr. Campbell's children were joint owners and that such an admission was erroneous in law. Arguing on the merits, he maintained that, a proper construction being put upon the terms of Mr. Campbell's will, such error is made out, and that accordingly no decision of the Courts was obtained on what it is argued was the true point for determination in the later appeal.

As to the amount of deduction to be made under the Act being either six sums of £5,000 or one sum of £5,000, the former litigation settled six ; the judgment under appeal settled one. There is accordingly between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of opinion that that prescription was as conclusively settled in the former litigation as language could settle it, it having been " How many deductions of £5,000 the respondent should make," and the judicial answer being " six." Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants.

Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which has not been taken. The same principle of setting parties' rights to rest applies, and estoppel occurs.

Out of respect to the learned Judges in the Courts below and to the sustained argument at the Bar, one or two of the cases of outstanding authority are referred to.

In *Outram* v. *Morewood* (1), an action of trespass over a certain vein of coals lying under the close of the plaintiff, it was held that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. In a previous action an issue was found for the plaintiff and against the wife, one of the two subsequent defendants, her husband being the other defendant with her in the action under decision. Lord *Ellenborough* C.J. said (2):—"The operation and effect of this finding, if it operate at all as a conclusive

(1) (1803) 3 East 346.

(2) (1803) 3 East, at p. 353.

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bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate, or in law, would be equally bound." And in subsequent portions of his judgment he spoke as follows (1) :—" A finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." " And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

The rule extends, not merely to Courts having the same jurisdiction, but to the judgments of all Courts of competent jurisdiction. A striking instance of this was the case of *Barrs* v. *Jackson* (2), in which a judgment was pronounced by *Knight-Bruce* V.C. in the course of which much citation was made as to Courts of ecclesiastical jurisdiction. The decision of the Vice-Chancellor is compendiously stated in the head-note. It was to the following effect: " In a suit instituted in the Chancery Division for the distribution of the assets of an intestate, the grant of letters of administration is not conclusive evidence upon the question who is the intestate's sole next-of-kin." This judgment was reversed, and a judgment in a directly contrary sense was pronounced by Lord *Lyndhurst* (3).

A further instance, this time of the application of the doctrine to estoppel in the Court of Queen's Bench by reason of a judgment of a County Court, is the case of *In re Graydon*; *Ex parte Official Receiver* (4), in which a County Court Judge had held that a sum of £20 was in the nature of personal earnings on the part of a bankrupt

(1) (1803) 3 East, at pp. 354-355.
(2) (1842) 1 Y. & C. C. C. 585.
(3) (1845) 1 Ph. 582.
(4) (1896) 1 Q.B. 417.

patentee and belonged to the bankrupt. Subsequent royalties having become due, the trustee applied to the Bankruptcy Court for a declaration that they vested in him as after-acquired property. It was held that the judgment of the County Court estopped the trustee from asserting that the royalties were not the bankrupt's personal earnings. The question as to the quantum of the allowance to be made to the bankrupt was another matter, and that allowance was varied; but *Vaughan Williams* J. said that he thought the fair inference from the judgment of the County Court Judge was that he did decide that the sums in question were in the nature of personal earnings. The trustee was accordingly estopped from denying this to be the nature of the payments when made. It plainly appears that the learned Judge was himself of opinion that the royalties were not the personal earnings of the bankrupt; but this very properly made no difference upon the point of estoppel. The trustee was estopped from making that assertion by the judgment of the County Court.

But the respondent maintained with much elaboration that an analysis of the first judgment pronounced by the Full Court showed that the grounds of that judgment, which it was maintained were erroneous in law, proceeded upon an admission that Mr. Campbell's children were joint owners; and he founded strongly upon such statements from the Bench as that of *Starke* J., already quoted, that attention had not been directed to the question of joint ownership in the debates in the former case.

It might be sufficient to say, in answer to the entire argument on this head, that whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon construction of a statute, that is, as already stated, nothing to the point in considering the question of estoppel. There would be no quieting of litigation unless the judgment was taken as it stands. It is plain that the *res* in the present case was adjudged, that *res* being, in figures, that six times £5,000 should be the suitable deduction from the assessed property.

In the citation of authority upon this topic confusion is apt to be introduced by lack of the following consideration of a point peculiar in former days to English procedure.

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Two authorities were relied upon by counsel for the respondent. Taking them in order of date, they are *Carter* v. *James* (1), decided in 1844, and *Howlett* v. *Tarte* (2), decided in 1861. As is shown by passages in the judgment of *Alderson* B. in the one and *Byles* J. in the other, they depended upon the old rules of pleading. The rule that pleadings must not be double, as expressed by *Stephen on Pleading*, chap. III., sec. 3, and *Bullen and Leake*, 3rd ed., p. 441, prevented a defendant from pleading more than one plea to the declaration, or, if there were several counts in the declaration, more than one plea to each count, and prevented a plaintiff from pleading more than one replication to each plea.

The strictness of the common law rule was relaxed by the statute 4 & 5 Anne c. 16, sec. 4, enabling a defendant with leave of a Judge to plead several pleas, and by the *Common Law Procedure Act* 1852 and the rules of Hilary Term 1853, extending this principle to replications, and allowing certain specified pleas to be pleaded as of right without leave.

But till the *Judicature Acts* 1873 and 1875 it remained the law that, except in those cases specially mentioned, several pleas and several replications could only be pleaded by the leave of the Court or a Judge, and this leave was by no means obtainable as a matter of course, and was indeed not seldom refused.

It was customary, in order to save a possible estoppel, for a defendant who had two answers each of which seemed to be good, but who was limited by the rules to one, to insert in his plea or accompany his plea with a protestation, and the pleading was known as a protestando. In this way the defendant, while protesting that he had other answers to the declaration, nevertheless being confined to one answer, put forward one only. *Alderson* B. refers in his judgment already cited (3) to " the ancient practice " of pleading the facts with a protestation. Protestandos, however, were abolished by the Rules of Court of 1834, and their value was always doubtful.

While the rules against double pleading were in force, it would have led to much injustice if a suitor who had two answers to a claim, or two replies to a defence, but was prevented from raising

(1) (1844) 13 M. & W. 137. (2) (1861) 10 C.B. (N.S.) 813.
(3) (1884) 13 M. & W., at p. 148.

more than one, was deemed to have admitted that he had no other answer or reply than that to which he had to confine himself, and this is the *ratio decidendi* of the two cases on which reliance was placed for the respondent.

Thus explained, they in no way derogate from the general principles of law.

It is seen from this citation of authority that, if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the *ratio* of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson* v. *Henderson* (1) by *Wigram* V.C. as follows: —"I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This authority has been frequently referred to and followed, and is settled law.

"I think," said *Williams* J. in *Howlett* v. *Tarte* (2), "it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel."

This passage has been accepted expressly over and over again, as, for instance, by *Phillimore* J. (now Lord *Phillimore*) in *Humphries*

(1) (1843) 3 Ha. 100, at p. 114-115.

(2) (1861) 10 C.B. (N.S.), at p. 826.

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v. *Humphries* (1), and *Farwell* L.J. in the same case on appeal (2). An instance of the application of the principle to the construction of clauses in the testator's will is to be found in the judgment of this Board pronounced by Lord *Macnaghten* in *Badar Bee* v. *Habib Merican Noordin* (3). It must, however, be pointed out that *Carter* v. *James* (4) and *Howlett* v. *Tarte* (5) turned upon default in pleading in the prior proceedings, relied upon as an estoppel; but in a case like the present, where there are no pleadings at all, the main question is whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by. In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its omission was no mere default in pleading but a real attempt to divide one argument into two and to multiply litigation.

Reference may be finally made in a word to the argument submitted to the Board to the effect that the admission and assumption of joint ownership made in the former case between these parties were upon a matter which was only incidentally or collaterally related to the point actually discussed and litigated.

Much stress was laid on the fact that, in the present case, an express decision upon the point of joint ownership was come to, and that this was not so in the former case. To which the answer is contained in a reference to the language of sec. 38 (7) of the statute as follows, namely, that where, under a settlement, income is shared by relatives of the settlor "*in such a way that they are taxable as joint owners* under this Act, then, for the purpose of their joint assessment *as such joint owners*, there may be deducted . . . in respect of each of the joint owners who holds an original share in the land" £5,000. The former judgment was pronounced by the Australian Courts under that section. It was not merely incidental or collateral to the question so decided that the appellants were joint owners. It was fundamental to it. Unless it had been decided that, under the settlement, Mr. Campbell's children had a beneficiary interest in land or income "in such a way that they are taxable

(1) (1910) 1 K.B. 796, at p. 801.
(2) (1910) 2 K.B. 531, at p. 535.
(3) (1909) A.C. 615.
(4) (1844) 13 M. & W. 137.
(5) (1861) 10 C.B. (N.S.) 813.

as joint owners " they could not have been taxed at all. On this portion of the case their Lordships' opinion is entirely in accord with the judgment of *Higgins* J. in the High Court.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs to the appellants both here and below, and that it be remitted to the High Court of Australia to direct that question 3 of the special case, namely, " Is the Commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of £5,000," be answered in the affirmative, and that the other questions are thus superseded.

[HIGH COURT OF AUSTRALIA.]

THOMSON AND OTHERS . . . . APPELLANTS;
OPPONENTS,

AND

B. SEPPELT & SONS LIMITED . . . RESPONDENT.
APPLICANT,

H. C. OF A. 1925.

MELBOURNE, *Oct.* 6-8, 29.

KNOX C.J., ISAACS, HIGGINS, RICH AND STARKE JJ.

Trade Mark—Registration—Geographical name—Distinctive mark—Trade Marks Act 1905-1922 (*No.* 20 *of* 1905—*No.* 25 *of* 1922), *secs.* 16, 53A.

" Great Western " was and had been for more than sixty-five years the name of a township in Victoria in the neighbourhood of which a number of vineyards had been established and the industry of wine-making had been carried on for over sixty years. One of these vineyards, called the " Great Western Vineyard," was the property of the respondent, and the respondent and its predecessors had for over thirty years made and sold wine from grapes grown in that and in other vineyards in the neighbourhood of Great Western. The respondent having applied for the registration of the words " Great Western " as a trade mark in respect of still and sparkling wines, the Registrar of Trade Marks granted registration of the mark " for use in respect of still and sparkling wines produced from grapes grown in that district of Victoria known as ' Great Western.' "