[HIGH COURT OF AUSTRALIA.]

QUEENSLAND TRUSTEES LIMITED AND OTHERS . . . . . Appellants;
Petitioners,

AND

COMMISSIONER OF STAMP DUTIES (Q.) . Respondent.
Respondent,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 25;

SYDNEY, *Dec.* 3.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Succession Duty (Q.)—Will—Testator with dominant shareholding in company—Land owned by company—Direction to trustees to procure winding-up of company and vesting of land in themselves upon trust for testator's sons upon trusts declared—Vesting of land in trustees by nomination—Assessment of duty on nomination as settlement—Subsequent claim on vesting of property in beneficiaries to duty as a succession—Issue-estoppel—The Succession and Probate Duties Acts 1892 *to* 1952 *(Q.), s.* 4.

A testator who was a dominant shareholder in a company, by his will, directed his trustees after his death to wind up the company and in the winding-up to provide for the distribution amongst its members of its assets *in specie*, particularly certain specified land under *The Real Property Acts* 1861 *to* 1929 (Q.) owned by the company and on the distribution to vest such land in his trustees to hold and stand possessed thereof upon trust to manage it for a period of sixteen years from the date of his death or until his elder son should attain the age of fifty years whichever event should first happen and to divide the net income arising therefrom equally between his two sons, and thereafter to stand possessed of the said land upon trust for such sons absolutely in equal shares as tenants in common. On the death of the testator the course directed by him as to the winding-up of the company was duly followed by his trustees and the specified land was transferred by the liquidator of the company to the trustees by means of a nomination of trustees under s. 77 of *The Real Property Acts* 1861 *to* 1929 (Q.) with a schedule of trusts which were the same as the trusts of the will relating to the specified land except that the actual date of the death of the testator was substituted as the commencement of the period of sixteen years referred to in those trusts. The Commissioner of Stamp Duties (Q.) assessed the nomination of trustees and schedule

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of trusts for stamp duty as a settlement and his assessment on this basis was upheld on appeal by the Supreme Court of Queensland (Full Court) and also by the High Court.

When the elder son of the testator attained the age of fifty years, within the period of sixteen years from the death of the testator, the commissioner claimed that a succession arose upon the attainment by that son of fifty years and that succession duty was payable accordingly.

Held by *Dixon* C.J., *Kitto* and *Taylor* JJ. (*McTiernan* and *Webb* JJ. dissenting), that the commissioner was estopped, by the judgment obtained in the former proceedings in which he successfully claimed for stamp duty on the nomination of trustees with the schedule of trusts as a settlement of the said land, from now claiming duty on the said land as a succession, and accordingly the assessment should be set aside.

Decision of the Supreme Court of Queensland (Full Court), reversed.

APPEAL from the Supreme Court of Queensland.

By his will dated 16th August 1938, Frederick Robert Sharpe appointed Queensland Trustees Limited, Marguerite Munro and William Aramac O'Hare to be executors and trustees, and directed them without delay after his death to take the necessary steps for the voluntary winding-up of Thos. Heaslop & Co. Pty. Ltd. of which he was the dominant shareholder and in such winding-up to provide for the distribution amongst its members of any portion of its assets *in specie* or in kind and particularly the land described in certificate of title No. 353025, vol. 1877, fol. 15, and that in such distribution such land be transferred to his trustees who should thereupon hold and stand possessed of it upon trust to manage and order all the affairs thereof . . . for a period of sixteen years from the date of his death or until his elder son should attain the age of fifty years whichever event should first happen and to divide the net income arising therefrom equally between his sons Frank Victor Sharpe and Alfred Roy Sharpe and upon the expiration of the said period of sixteen years or the attainment by his elder son of the age of fifty years (whichever event should first happen), he directed his trustees to stand possessed of the said land and hereditaments upon trust for the said sons absolutely in equal shares as tenants in common.

At the dates of his will and of the death of the testator the whole legal and beneficial title to the said land was vested in Thos. Heaslop & Co. Pty. Ltd. and the testator had no title to or interest in the said land at any time.

The testator died on 27th December 1940. At the date of his death he held 94,732 shares out of the 96,667 £1 shares which had

been issued by Thos. Heaslop & Co. Pty. Ltd.; the said Marguerite Munro held the balance of such issued shares.

After the death of the testator the course prescribed by his will was duly followed by his trustees. They were registered as members of the company in respect of the shares which had belonged to the testator. The company's articles of association were altered so as to empower a liquidator in a winding-up to divide any of the company's assets among its members *in specie* with the consent of a general meeting. The company went into voluntary winding-up, and the said William Aramac O'Hare, one of the trustees, was appointed liquidator. The liquidator was authorised by a general meeting to divide the assets as he should think fit amongst the members *in specie*. The liquidator exercised this power by transferring, on 27th June 1941, the said land to the trustees by a nomination of trustees and schedule of trusts under s. 77 of *The Real Property Acts of* 1861 *to* 1929 (Q.), the company's seal being affixed thereto by the liquidator. The only variation in the schedule of trusts from the terms of the will in which the trusts were expressed was the substitution, for the death of the testator of the date on which his death in fact occurred, viz., 27th December 1940. The schedule of trusts concluded with the words: "and generally subject to the trusts in the will of the said Frederick Robert Sharpe deceased declared of and concerning the said land."

The Commissioner of Stamp Duties assessed the nomination of trustees and schedule of trusts for stamp duty as a settlement under *The Stamp Acts* 1894 *to* 1940 (Q.) and the trustees appealed to the Supreme Court of Queensland against the assessment. The appeal was heard on 3rd and 8th June 1943, and the assessment was upheld (*In re Sharpe* (1)). An appeal against the decision of the Supreme Court of Queensland was dismissed by the High Court (2).

The said William Aramac O'Hare, one of the trustees, died on 16th December 1950.

The said Frank Victor Sharpe, elder son of the testator attained the age of fifty years on 21st January 1954, and the Commissioner of Stamp Duties, claiming that the disposition in the will relating to the land conferred a succession on the brothers, assessed succession duty under *The Succession and Probate Duties Acts* 1892 *to* 1952 (Q.). The surviving trustees and the two sons of the testator appealed against such assessment. The Full Supreme Court of Queensland (*Mansfield* S.P.J., *Stanley* and *Mack* JJ.) on 29th September 1955 confirmed the assessment of the commissioner.

From that decision the appellants appealed to the High Court.

(1) (1944) Q.S.R. 26. (2) (1945) Q.S.R. 1.

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A. L. Bennett Q.C. (with him *J. D. McGill*), for the appellants. There was no succession to the land and the commissioner is precluded by this decision of this Court in *In re Sharpe* (1) from contending that there was a succession. The only source of title to the land was the company and the only disposition was the nomination of trustees (*The Real Property Act of* 1861 *to* 1929 (Q.), ss. 77, 78, 79). There was not a disposition of the land by a will upon a death.

[DIXON C.J.: If this was accomplished by a will would there be a succession ?]

Yes. This title is independent of the death of the testator. The will must wholly bring about the result if there is to be a succession (*Lord Advocate* v. *Fleming* (2); *Commissioner of Stamp Duties* v. *Overell* (3); *Re Isles Dec'd.* (4)). Once a succession is established no manipulation can get rid of it. The consequences of the will and of the nomination of trustees are set out step by step in *In re Sharpe* (5). On the question of the admissibility of extrinsic evidence in settlement duty cases see *Commissioner of Stamp Duties (Q.)* v. *Hopkins* (6); *Commissioner of Stamp Duties (N.S.W.)* v. *H. Small & Co. Pty. Ltd.* (7). What was litigated in *Sharpe's Case* (8) was the true nature of the transaction. The decision in that case was that the trusts under the will never operated on the land. The commissioner is now estopped from contending the contrary (*Hoysted* v. *Federal Commissioner of Taxation* (9); *Blair* v. *Curran* (10); *Jackson* v. *Goldsmith* (11); *In re Koenigsberg* (12)). On the question of the independent source of title see *Attorney-General* v. *Earl of Selborne* (13); *Lord Advocate* v. *Jamieson* (14); *Attorney-General* v. *Glyn Mills & Co.* (15).

H. T. Gibbs, for the respondent. There was a succession. The sons became beneficially entitled to the lands by reason of the disposition contained in the will and upon the death of the testator, although contingently upon the lands being acquired by the trustees and after an interval. The trustees had the duty to observe the directions in the will and to exercise their powers as required by

(1) (1945) Q.S.R. 1.
(2) (1897) A.C. 145.
(3) (1932) Q.S.R. 230.
(4) (1933) Q.S.R. 338.
(5) (1945) Q.S.R. 1, at p. 5.
(6) (1945) 71 C.L.R. 351, at pp. 360, 378.
(7) (1950) 80 C.L.R. 177.
(8) (1944) Q.S.R. 26; (1945) Q.S.R. 1.
(9) (1926) A.C. 155, at pp. 166, 170; (1925) 37 C.L.R. 290, at pp. 299, 303.
(10) (1939) 62 C.L.R. 464, at pp. 531, 532.
(11) (1950) 81 C.L.R. 446, at p. 460.
(12) (1949) Ch. 348.
(13) (1902) 1 K.B. 388.
(14) (1886) 23 Sc.L.R. 510.
(15) (1939) 1 All E.R. 236, at pp. 242, 243, 244; (1940) 2 All E.R. 103, at pp. 106, 109 112.

the will and the beneficiaries had a correlative right to compel the trustees to exercise their fiduciary duty which right arose by reason of the will and upon the death. At the date of the death and by reason of the will, the beneficiaries became entitled to the lands provided the trustees acquired them, and immediately the trustees acquired the lands the will operated and gave the sons a beneficial interest in them. Section 4 of *The Succession and Probate Duties Acts* 1892 *to* 1952 is concerned with the acquisition of beneficial interests not legal interest (*Wilcox* v. *Smith* (1); *Duke of Northumberland* v. *Attorney-General* (2); *Queensland Trustees Ltd.* v. *Commissioner of Stamp Duties* (3)). A settlement having been established no act on behalf of the successors could make it cease to exist (*Wolverton* v. *Attorney-General* (4); *Duke of Northumberland* v. *Attorney-General* (5)). By executing a settlement the parties could not get rid of the succession. Although the decision in *In re Sharpe* (6) estops the parties from disputing that there was a settlement, it does not follow that they are estopped from claiming that there was succession; the assumption that there was no succession is not fundamental to the decision that there was a settlement. The nomination of trustees and schedule of trusts took the form of a settlement and were intended to be the charter of rights of the beneficiaries and therefore amounted to a settlement. It was unnecessary to the decision in that case to determine what was the effect of the will. Alternatively the execution of the nomination of trustees and schedule of trusts must be read into the will so that the trusts of the nomination of trustees and schedule are the trusts of the will. It was not decided that the will did not create the same trusts as those created by the settlement. The question whether the will created a succession was not in issue in the former proceedings; the effect of the will came in issue, if at all, only incidentally (*Buzza* v. *Comptroller of Stamps* (*Vict.*) (7); *Davidson* v. *Chirnside* (8); *Lord Advocate* v. *Macalister* (9); *Sneddon* v. *Lord Advocate* (10)).

A. L. Bennett Q.C., in reply. *Sneddon* v. *Lord Advocate* (11) is distinguishable. It concerned what was property within the meaning of certain sections. (See *Morley* v. *Hall* (12).) The

(1) (1857) 4 Drew. 40, at p. 51 [62 E.R. 16, at p. 20].
(2) (1905) A.C. 406, at pp. 411, 412.
(3) (1952) 88 C.L.R. 54, at pp. 64, 66.
(4) (1898) A.C. 535, at pp. 544, 548.
(5) (1905) A.C., at p. 409.
(6) (1945) Q.S.R. 1.
(7) (1951) 83 C.L.R. 286.
(8) (1908) 7 C.L.R. 324.
(9) (1924) A.C. 586, at p. 591.
(10) (1954) A.C. 257, at pp. 265, 266.
(11) (1954) A.C. 257.
(12) (1834) 2 Dowl. 494.

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commissioner in this case has treated the land as property. As to what is a settlement see *Wedge* v. *Acting Comptroller of Stamps (Vict.)* (1); *Inland Revenue* v. *Oliver* (2); *Buzza* v. *Comptroller of Stamps (Vict.)* (3). On estoppel see *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 409, 411. It is permissible to refer to the reasons for the decision in the former case (*Marginson* v. *Blackburn Borough Council* (4)).

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

DIXON C.J. This appeal concerns a claim made on behalf of the Crown for succession duty. Frederick Robert Sharpe, the testator, made a will containing a disposition directing his trustees to manage the property to which it related for a period of sixteen years from his death or until his elder son should attain fifty years of age whichever should first happen and to divide the net income arising therefrom between his two sons equally and thereafter to hold the property upon trust for the two sons in equal shares as tenants in common.

The testator died on 27th December 1940. His elder son attained the age of fifty years on 21st January 1954.

The property in question was certain land in which the testator held no estate or interest. It was the land of a company in which the testator held shares giving him a completely commanding interest. He accordingly directed that his executors should cause the company to be wound up and the assets distributed to the shareholders *in specie*, the executors by this means obtaining a transfer of the land and thenceforward holding it upon the trusts of the will. There were similar provisions concerning other lands but they are not presently material. The executors followed these directions, employing, however, for the transfer of the land to them a conveyancing instrument the form of which must afterwards be noticed.

The claim for succession duty is based upon the simple ground that the provision in the will concerning the land amounted to a disposition of property by reason of which the two sons became beneficially entitled to property (viz. the land) upon the death of their father after an interval, either certainly or contingently. If this be established s. 4 of *The Succession and Probate Duties Acts* 1892 *to* 1952 (Q.) requires that the disposition must be deemed to

(1) (1941) 64 C.L.R. 75.
(2) (1909) A.C. 427, at p. 432.
(3) (1951) 83 C.L.R. 286, at p. 310.
(4) (1939) 2 K.B. 426, at p. 437.

confer upon the brothers a succession. That involves succession duty under s. 12.

It will be seen that to establish the foregoing proposition on behalf of the Crown the Commissioner of Stamp Duties must show that it is by virtue of the disposition contained in the will that the testator's two sons became entitled to the land. Little difficulty might be felt in attributing this operation to the disposition once the executors obtained title to the land so that the trusts attached to it. But it is here that it becomes material to take into account the form and effect of the instrument by which the land came to be vested in the executors. For, unfortunately for the Commissioner of Stamp Duties, at the time when, in 1942, that instrument was presented to him for his consideration he ascribed to it the character of a settlement and levied stamp duty upon it on that footing. Moreover he succeeded in obtaining a judicial determination that he was right in so regarding it. That in my opinion could only be done on the footing that it was that instrument, and not the will, that operated to create the trusts and interests under which the sons take. The same trusts were created by that instrument but since they were expressed without reference to the death of the testator no succession could thereby be created. The proposition, however, that the instrument had this operation cannot stand with the proposition that the will formed the effective document creating the same trusts.

The liquidator of the company might have been expected to employ a common form of transfer in order to vest the land in the executors, ignoring the trusts as irrelevant to the character of the executors as shareholders or members of the company. Why this was not done does not appear, but in fact provisions of *The Real Property Acts* 1861 *to* 1929 (Q.), ss. 77, 78, were invoked which provide for a form of instrument whereby the transferees are described as trustees and, in a schedule, the trusts on which they are to hold are stated. The name technically given to this document is " nomination of trustees ". In the schedule annexed to the instrument the only variation from the terms of the will in the expression of the trusts consisted in the substitution, for the death of the testator, of the date on which his death in fact occurred, viz. 27th December 1940. But for succession duty the variation is vital. For it meant that the period of sixteen years was expressed to run not from the testator's death but from the fixed date stated, and accordingly the trusts thus expressed contained no succession within s. 4 of *The Succession and Probate Duties Acts*. There was no disposition expressed therein by reason

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of which any person should become entitled to property upon the death of a person either immediately or after an interval.

On the other hand, if the trusts which attached to the land on its becoming vested in the executors arose from the schedule and not from the will, then there could be no doubt that the instrument effecting the transfer, together with the schedule, amounted to a settlement. *The Stamp Acts* 1894 *to* 1940 (Q.), s. 2, defines " settlement " to mean a contract deed or agreement . . . whereby any property real or personal is settled or agreed to be settled in any manner. There is an *ad valorem* stamp duty placed on a settlement : 1st schedule.

Now I cannot see how the nomination of trustees, including in that document the schedule of trusts, could constitute a settlement within this definition unless it operated to create the trusts. Otherwise it would not be true that it was a deed whereby property was settled. The definition of " settlement " is not expressed in terms compatible with the notion that the tenor of a document *ex facie* and not its operation may determine the description under which it is stamped : cf. *Commissioner of Stamp Duties* (*Q.*) v. *Hopkins* (1). To fall within that definition an instrument must, I think, be one whereby the property is in truth settled or agreed to be settled. The Commissioner of Stamps, when he claimed that the nomination of trustees was liable to stamp duty as a settlement, must therefore be taken to have ascribed to the nomination of trustees comprising the transfer and schedule of trusts an effective operation to create the trusts now in question. And indeed that was the view he in fact espoused. His claim was contested but it was judicially declared by the Supreme Court that the nomination of trustees was chargeable with stamp duty as a settlement. That declaration was affirmed on appeal to this Court. Disregarding altogether the reasons for this decision it appears to me to be, or at all events to involve, a judicial determination between the Crown and the executors that it was the nomination of trustees (including therein the schedule) which created the trusts. In face of that determination the Crown cannot now turn about and claim successfully that it was the will and not that instrument which created the trusts. On that simple ground of issue-estoppel, the claim of the Commissioner of Stamp Duties must fail. But if the reasons for the decision of this Court are looked at, it seems to me that they show that the decision of the Court directly depended upon the very conception stated above. The trusts of the will were put on one side because the testator did not die possessed of the land which therefore did

(1) (1945) 71 C.L.R. 351.

not vest in the executors as trustees except in virtue of the nomination of trustees. The view seems to have been rejected that it was the will which created the trusts which attached to the land as soon as it was acquired in lieu of the shares which in the meantime were held for the *cestuis que trust* subject to the directions of the will. The Chief Justice said : " The trustees under the will became the trustees of the lands, not by virtue of the will, as the testator did not own lands, but only by reason of the transfer to them by the company. So also the rights of the beneficiaries in relation to the land depend upon the terms of the nominations of trustees and the transfers. It is true that the trusts set forth in the nominations of trusts correspond with those set forth in the will. But those trusts did not come into existence until the lands were vested in the trustees by a transfer from the company. The form of the documents corresponds with the substance of the transaction, namely the transfer of the lands to trustees to be held upon certain specified trusts. These trusts were set forth in the will, but could not operate in relation to the lands by virtue of the will " : *In re Sharpe* (1). No doubt the view might have been adopted that the trustees took under and subject to the will first the shares and then the land and that nothing else could operate as a limitation of the equitable estates or interests taken by the beneficiaries. But that view was not adopted, as the foregoing passage shows. Its adoption must, however, have spelled a decision against the claim of the commissioner that it was as a settlement that the nomination of trustees must be stamped. The decision that the document was a settlement necessarily precludes the commissioner from now going back for the purposes of succession duty to the view that it was the will and not the nomination of trustees (including the schedule thereto) which created the trusts. It is only necessary to add that the appellants F. V. Sharpe and A. R. Sharpe were privies of the executors in the appeal against the imposition of stamp duty as on a settlement.

For these reasons I think that the appeal should be allowed.

McTiernan J. The judgment and reasons of the Full Court, delivered by *Mansfield* S.P.J., are, in my opinion, right. His Honour stated the question at issue and reasons for answering it adversely to the present appellants in a passage with which I entirely agree, and upon which I could not improve. It is as follows : " The whole question in issue in this case depends upon the terms of s. 4 of *The Succession and Probate Duties Act* 1892. The

(1) (1945) Q.S.R. 1, at p. 5.

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word ' property ' as used in that section covers every form of right or benefit, and the matter therefore depends entirely on (a) the meaning of the words ' upon the death of any person ', and (b) the substantial effect of the will in relation to circumstances in which it operated (cf. *Commissioner of Stamp Duties (Q.)* v. *Donaldson* (1), per *Isaacs* J.). To come within s. 4 so as to be conferred as a succession the property must ' by reason of ' the disposition—that is, by reason of the terms of the will relevant to that property—have passed to another at the given moment, namely, upon the death of the testator (*ibid.*). The date of the entitlement is the date of death, and if the circumstances of the case reveal that after date of death of the person alleged to be the successor, some other person is by reason of a disposition shown to be entitled to a benefit which can be classed as property within the meaning of the Act, and to which he was not entitled before that death, then a ' succession ' will take place and it will be liable to succession duty under the section. If the entitlement takes place after an interval or is subject to a contingency the duty is payable on the expiration of that interval or upon the happening of the contingency, as the case may be. In the instant case, the beneficiaries, by reason of the will of the testator and upon his death became beneficially entitled to certain rights. The testator as a shareholder in the company held a controlling interest therein which passed to his trustees upon his death. The trustees were bound to act in accordance with the testator's directions, and because of the control which they then possessed they were able to alter the articles of the company and acquire the lands specified by the testator and hold them on the trusts directed by him. The interest in the lands which the appellants Frank Victor Sharpe and Alfred Roy Sharpe received was the fruit of the testator's interest in the company and the directions contained in his will. The important point is that the exercise of the trustees' power and the performance of their fiduciary obligation must, so to speak, be read into the will, so that the benefit which the beneficiaries obtained must be considered to pass under the will (cf. *Queensland Trustees Ltd.* v. *Commissioner of Stamp Duties* (2)). There is in my opinion no new and independent title which precluded the operation of the provisions of the will, and there was therefore a succession. As the contingency to which the acquiring of an absolute interest was subject, has now happened, the succession duty thereon is payable." It was argued for the appellants that all parties are estopped in relation to the question by way of issue-estoppel. This argument is based upon the judgment in the case of

(1) (1927) 39 C.L.R. 539, at p. 545. (2) (1952) 88 C.L.R. 54.

In re Sharpe; *Queensland Trustees Ltd. v. Commissioner of Stamp Duties* (1). In that case the Supreme Court of Queensland decided that the " nomination of trustees " and the " schedule of trusts " constituted a settlement within the meaning of s. 2 of *The Stamps Acts* 1894 *to* 1940 and as such were liable to *ad valorem* duty. The majority of the court (*Philp* and *Mansfield* JJ.) applied *Davidson* v. *Chirnside* (2). Actually, they decided the case without reference to the will of the testator. " The instrument must be assessed by what appears on its face, and on its face it sufficiently appears to be a settlement of the lands described therein without reference to the will " per *Philp* J. (3) " By s. 4 a tax is imposed upon instruments—not upon transactions—and, as *Higgins* J. said in *Davidson* v. *Chirnside* (4), ' the more instruments you want, the more stamps you must buy.' By s. 2 the term ' instrument ' means and includes any written or printed document.

It is therefore apparent that in order to determine whether a particular document is liable to stamp duty the document itself must be examined; and if it falls within the description of any of the documents set out in the schedule to the Act, it is liable to duty unless it is expressly exempted by the Act.

If a document on its face purports to be a charter of future rights and obligations with respect to the property comprised in it and contains such limitations as are ordinarily contained in settlements, it is a settlement or an agreement to settle within the meaning of the schedule and is liable to stamp duty although the terms of the settlement could be proved *aliunde*. In cases in which a trust may be created without writing, an instrument is none the less a settlement in the ordinary sense of the term because the trusts declared by it have already been declared by word of mouth. Nor is it material that the rights declared by the instrument are, so far as regards the effective enjoyment of the property, substantially the same as rights already existing, whether under a previous instrument or otherwise: *Davidson* v. *Chirnside* (5) ", per *Mansfield* J. (6).

An appeal from this judgment to the High Court was dismissed. *Latham* C.J. said: " I agree with the judgments of *Philp* J. and *Mansfield* J. in the Full Court, which deal with the whole matter fully and satisfactorily " (7).

Previously *Latham* C.J. had made these observations :—" So also the rights of the beneficiaries in relation to the land depend upon the terms of the nominations of trustees and the transfers " (7).

(1) (1944) Q.S.R. 26.
(2) (1908) 7 C.L.R. 324.
(3) (1944) Q.S.R., at p. 36.
(4) (1908) 7 C.L.R. 324, at p. 347.
(5) (1908) 7 C.L.R. 324, at p. 340.
(6) (1944) Q.S.R., at p. 37.
(7) (1945) Q.S.R. 1, at p. 5.

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He continued :—" It is true that the trusts set forth in the nominations of trusts correspond with those set forth in the will. But those trusts did not come into existence until the lands were vested in the trustees by a transfer from the company. The form of the documents corresponds with the substance of the transaction, namely the transfer of the lands to trustees to be held upon certain specified trusts.

These trusts were set forth in the will, but could not operate in relation to the lands by virtue of the will " (1). Reliance is placed upon these observations as showing that it was indispensable to the conclusion reached in the case that the will was not a disposition within s. 4 of *The Succession and Probate Duties Acts* 1892 *to* 1952 (Q.), and therefore the judgment finally closed the question whether, in the events which happened, the will conferred " a succession ". In my opinion this is not a correct construction of those observations. *Philp* J. and *Mansfield* J. explicitly decided the case upon what appeared on the face of the documents " without reference to the will ". *Latham* C.J. expressly agreed with their judgment.

It is correct as is said in the judgment of the Full Court in the present case :—" The terms of the trust correspond with the terms of the will and the trustees have therefore carried out the duties imposed upon them by the will. If, however, the trusts set out in the documents had contained terms less advantageous to the beneficiaries than those contained in the will, such as a clause providing that the lands should in addition be charged with the payment of an annuity to some third person, the trustees would have been guilty of a breach of trust, and, apart from any right which the beneficiaries under the will might have had to set aside the transaction would have rendered themselves liable to make good to those beneficiaries the amount or value of the disadvantage. In other words, no action by the trustees could place the beneficiaries in any worse position than that to which they were entitled under the will, and therefore the total benefit obtained by them as a result of the testator's directions is to be measured by the terms of the will and not necessarily by the terms of the nomination of trustees."

I would dismiss the appeal.

WEBB J. This is an appeal from a judgment of the Full Court of Queensland upholding an assessment to succession duty under *The Succession and Probate Duties Acts* 1892 *to* 1952 (Q.) in the estate of Frederick Robert Sharpe deceased. The duty was assessed at

(1) (1945) Q.S.R., at p. 5.

£11,986 18s. 0d. The assessment was made when the elder son of the deceased attained the age of fifty, and was made on the assumption that the sons then took an absolute interest in certain lands under the will and not solely under a transfer and nomination of trustees of those lands which, with modifications, repeated the trusts of the will, i.e., that there was a disposition to the sons and a succession as defined by s. 4 of *The Succession and Probate Duties Acts* 1892 *to* 1952 (Q.).

By his will the deceased directed that his trustee should take steps to secure the voluntary winding-up of a company in which he was the dominant shareholder, and in the winding-up to provide (1) for the distribution among the members of the company of portion of the assets *in specie* or in kind, including more particularly lands under *The Real Property Acts* of Queensland; and that (2) in such distribution the lands should be transferred to his trustees to hold subject to the trusts to pay the income to his sons for sixteen years or until the elder son attained the age of fifty, whichever first happened, and then absolutely for the sons. There was no express provision in the will, as there was in *Davidson* v. *Chirnside* (1), for a further deed containing trusts corresponding with those in the will.

On the testator's death the company was wound up and the lands in question were by the liquidator of the company transferred under *The Real Property Acts* 1861 *to* 1929 (Q.) to the trustees, as directed. But instead of a mere transfer, a nomination of trustees was employed repeating the trusts in the will and referring to the will and providing that the income should be paid as from a date which was in fact the date of the testator's death but without revealing that fact. It might seem that the transfer and the will would have operated to give effect to the will without the necessity for a further declaration of trusts. However, the nomination of trustees was assessed to stamp duty under *The Stamp Acts* as a settlement, and on appeal the Full Court of Queensland by a majority upheld this assessment (2). An appeal from the Full Court's decision to this Court was dismissed (3). Nothing is to be gained by reviewing the arguments before and the reasons for judgment of the Full Court: what is important is the argument before this Court on the appeal and the reasons for the judgment of this Court, which was delivered by *Latham* C.J. For the Crown it was submitted by the Solicitor-General that *the rights of the cestui que trustent were created by the transfer and not by the will*; that the lands were held by the company

(1) (1908) 7 C.L.R. 324.
(2) (1944) Q.S.R. 26.
(3) (1945) Q.S.R. 1.

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and free of the trusts of the will; and that *the company created the trusts*. On the other hand it was submitted for the trustees that the lands were subject to the trusts of the will independently of the nomination of trustees. The Crown's argument succeeded. *Latham* C.J. said the lands were owned by the company; that *the testator owned shares in the company but not lands*; that *when he died no person acquired any interest or rights in the lands by his will*; that *the trustees became trustees of the lands, not by the will but by the transfer*; and that *the rights of the beneficiaries depended on the nomination of trustees and the transfer*.

Now whatever the merits of this reasoning, the Crown is estopped from questioning the decision in these proceedings between the same parties. See *Hoysted* v. *Federal Commissioner of Taxation* (1). In *Reg.* v. *Hartington Middle Quarter* (2) *Coleridge* J. for the Court of Queen's Bench said: "... it was a judgment between the same parties: in the matters which were cardinal the present litigation cannot now be disputed, without asserting that the decision upon them in the former case was erroneous. But this they cannot do directly; they have passed their time; and neglected the lawful mode; they cannot now show by adducing new evidence that the Court was misled as to the facts, nor by new argument or authority that it drew a wrong conclusion in law ..." (3).

This reasoning is applicable here. Indeed this case is *a fortiori*: if, as appears, the appellant trustees of the deceased's estate are bound by the decision of this Court in the earlier proceedings, although they claimed that the nomination of trustees was not a settlement, as it was redundant and unauthorised, it follows that the respondent commissioner is at least equally bound, seeing that he secured the decision he sought and on the grounds on which he sought it, namely that the nomination of trustees and not the will created the sons' absolute interest in the lands now claimed by the commissioner to be a disposition and a succession under the will.

But the Full Court of Queensland in the present proceedings held that "the trustees' power and the performance of their fiduciary obligations must, so to speak, be read into the will, so that the benefits which the beneficiaries obtained must be considered to pass under the will". In other words their Honours held that the proceedings in the winding-up brought about by the trustees as shareholders, including the execution of the nomination of trustees and transfer of the lands by the liquidator, must be read into the

(1) (1926) A.C. 155; (1925) 37 C.L.R. 290.
(2) (1855) 4 E. & B. 781 [119 E.R. 288].
(3) (1855) 4 E. & B., at p. 794 [119 E.R., at p. 293].

will. In support of this view their Honours referred to this Court's judgment in *Queensland Trustees Ltd.* v. *Commissioner of Stamp Duties* (1) that " . . . as has often been held with respect to special powers of appointment, when property passes under an exercise of such a power, it is the creation of the power, and not the exercise of it, by reason of which the property is taken . . . . The important point is that the exercise of the trustees' power is, so to speak, to be read into the settlement. . . " (2). Their Honours' view would certainly have prevailed if the High Court had adopted the reasoning of the majority of the Full Court in the earlier proceedings, who had excluded the will from consideration merely for the purposes of *The Stamp Acts*. However, although *Latham* C.J. referred to the " full and satisfactory " reasons of the majority, he expressly stated, after taking the will into consideration, that is to say, after taking into account the whole transaction, which the majority had refused to do, that the trustees became trustees of the lands not by the will but by the transfer, and that the rights of the beneficiaries in the lands depended on the nomination of trustees and the transfer. Now is this consistent with the view that the beneficiaries' absolute interest in the land passed under the will ? With some hesitation I think it is. It is true that the liquidator of the company was not acting in any legal sense for the testator but for the company, which was not identified with the testator because he was the dominant shareholder. The reading of the nomination of trustees and transfer into the will in those circumstances might appear not to be warranted because an appointment under a special power given by the will would be read into it, as such an appointment would be made directly in pursuance of the will ; whereas the nomination of trustees and transfer was executed by the liquidator in pursuance of a resolution of the company, although as a result of the exercise of the voting strength of the trustees of the will as shareholders. But the distinction is too fine, and I think it is not sufficient to prevent the will and the nomination of trustees and transfer from being held to be a disposition creating a succession within s. 4 of *The Succession and Probate Duties Acts*. The fact is that the will had a legally coercive effect throughout as, by legal action, the trustees of the will could have been compelled to do what they did in the winding-up of the company, and the liquidator of the company could likewise have been compelled to execute the transfer to the trustees who would have held the lands subject to the trusts of the will.

(1) (1952) 88 C.L.R. 54.

(2) (1952) 88 C.L.R., at p. 65.

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It would be simply because of this too fine distinction that the nomination of trustees and transfer could not be read into the will. Clearly we cannot say that the instrument was not authorised or required by the will. If this Court had held that to be the case the instrument would have been disregarded, as the Court took the will into consideration. Then there is issue-estoppel not only as to the scope and exclusive effect of the nomination of trustees and transfer but also as to its validity.

Lord Advocate v. *Fleming* (1), *Commissioner of Stamp Duties* v. *Overell* (2) and *Re Isles Dec'd.* (3) are distinguishable.

I would dismiss the appeal.

KITTO AND TAYLOR JJ. The appellants in this case unsuccessfully appealed to the Supreme Court of Queensland against an assessment of succession duty made by the respondent commissioner under the provisions of *The Succession and Probate Duties Act* 1892 (Q.) as amended. The appeal was instituted by petition, and by consent an order was made that all points of law arising on the petition be argued before the Full Court. That Court, having heard argument, dismissed the petition and confirmed the assessment. From the Full Court's order the appellants now appeal to this Court.

Section 4 of the Act, so far as material, provides that " Every . . . disposition of property, by reason of which any person . . . shall become beneficially entitled to any property . . . upon the death of any person . . . either immediately or after any interval, either certainly or contingently . . . shall be deemed . . . to confer on the person entitled by reason of such disposition . . . a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, testator . . . or other person from whom the interest of the successor . . . shall be derived ".

Section 12 imposes duty in respect of every succession according to the value thereof at the time when the succession takes effect; and s. 20 makes the duty payable in general when the successor becomes entitled in possession.

The property which the respondent has treated as chargeable with duty in this case consists of certain land under the provisions of *The Real Property Acts* 1861 *to* 1952 (Q.), being the whole of the land comprised in certificate of title No. 353025, volume 1877 folio 15. The disposition of property which is relied upon as having conferred

(1) (1897) A.C. 145.
(2) (1932) Q.S.R. 230.
(3) (1933) Q.S.R. 338.

a succession in respect of that land is the will of one Frederick Robert Sharpe, who died on 27th September 1940 and who will be referred to as the testator. Of that will, the appellants Queensland Trustees Limited and Marguerite Munro are the existing trustees. The other appellants, Frank Victor Sharpe and Alfred Roy Sharpe, are sons of the testator, and if the assessment is correct, it is they who are accountable for duty as the successors.

The testator had no title to or interest in the land at any time ; but at the respective dates of his will and death the whole legal and beneficial title were vested in a company called Thos. Heaslop & Co. Pty. Limited, and in that company he had a controlling interest, being the holder of 94,732 out of the 96,667 issued shares. By his will he made a provision concerning the land which, so far as it need here be recited, was as follows :—" I Direct my Trustees without delay after my death to take the necessary steps for the voluntary winding up of Thos. Heaslop & Co. Pty. Limited of which I am the dominant shareholder and in such winding up to provide for the distribution among its members of any portion of its assets in specie or in kind and particularly inter alia of the lands described in the following Deeds namely in Certificate of Title No. 353025 Volume 1877 Folio 15 . . . and in such distribution that such lands be transferred to my Trustees who shall thereupon hold and stand possessed of the said lands upon and subject to the following trusts that is to say . . . Upon Trust to manage and order all the affairs thereof as regards letting occupation repairs alterations insurance against fire rebuilding in case of fire receipt of rents indulgences and allowances to tenants and all other matters for a period of sixteen years from the date of my death or until my elder son shall attain the age of fifty years whichever event shall first happen and to divide the net income arising therefrom equally between my sons Frank Victor Sharpe and Alfred Roy Sharpe and upon the expiration of the said period of sixteen years or the attainment by my elder son of the age of Fifty years (whichever event shall first happen) I Direct my trustees to stand possessed of the said lands and hereditaments Upon Trust for my said sons absolutely in equal shares as tenants in common." Then followed provisions to take effect in case one or both of the sons should die before the happening of either of the events referred to. There was also an express declaration to the effect that the land in question should not vest until one of those events should occur.

The respondent has made the assessment on the view that by reason of these provisions of the will the sons became entitled to the

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land upon the death of the testator, after an interval and contingently, and that the will must therefore be deemed to have conferred on them a succession. If this be so, succession duty became payable on 21st January 1954, since on that date the elder of the sons, Frank Victor Sharpe, attained the age of fifty years and both sons became entitled in possession.

The course prescribed by the will was duly followed by the trustees. The company's articles of association were altered so as to empower a liquidator in a winding-up to divide any of the company's assets amongst the members *in specie* with the consent of a general meeting. The company went into voluntary winding-up, and the liquidator was authorised by a general meeting to divide the assets as he should think fit amongst the members *in specie*. The appellant trustees (and another trustee of the will, since deceased) being then the members of the company holding the shares which had belonged to the testator in his lifetime, the liquidator exercised the power thus given him by putting the company's seal to an instrument of transfer with respect to the subject land. The instrument so executed was not the appropriate instrument for the purpose. It was expressed to transfer the land to the three transferees, and its subsequent registration was no doubt effectual to pass the legal title; but it was a " Nomination of Trustees " in the form prescribed by s. 77 of *The Real Property Acts* 1861 *to* 1929 (Q.) for use by a registered proprietor desirous of vesting his land in trustees. The company and the liquidator had no concern with the trustee character of the shareholders to whom the land was to be transferred. It was to them as members, and not as trustees, that the company could properly be described as desirous of transferring the land. The transfer should therefore have been made to them by means of a memorandum of transfer under s. 48 of *The Real Property Acts* 1861 *to* 1929 (Q.). Such a memorandum, of course, would not have referred to the trusteeship of the transferees: see form D in the schedule. The instrument in fact used, however, not only described the transferees in the body of it as trustees, but (in conformity with form I in the schedule as prescribed by s. 77) it included a " Schedule of Trusts ", executed by the company and the trustees, which set out that it was agreed that the land should " be held by the above-named trustees, the trustees of the Will of Frederick Robert Sharpe deceased, upon the trusts following that is to say ", and proceeded to paraphrase the relevant provisions of the will.

The paraphrase differed very little from the actual words of the provisions. In describing the period during which the trustees were to have power of management and were to divide the net income

between the two sons Frank and Alfred, instead of the words " for a period of sixteen years from the date of my death or until my elder son shall attain the age of fifty years whichever event shall first happen ", the words used were : " for a period of sixteen years from the twenty-seventh day of December 1940 or until Frank Victor Sharpe of Brisbane in the State of Queensland shall attain the age of fifty years (whichever event shall first happen)." There was a corresponding change also in the description of the alternative events upon which the trust for the two sons in equal shares as tenants in common was to take effect. The express declaration against absolute vesting until the happening of the first of those events was not reproduced. The trusts to take effect in the event of either of the sons dying before the happening of the first of those events were repeated with the substitution of names for descriptions of persons. The document concluded with the words : " and generally subject to the trusts in the Will of the said Frederick Robert Sharpe deceased declared of and concerning the said land ".

The concluding words show, as the fact was, that the schedule of trusts was nothing more than an acknowledgment by the trustees that the land was bound in their hands by the trusts declared with respect to it by the testator's will. There is nothing to suggest that it was intended to be more, and as a matter of law it could not be more. The liquidator executed the instrument in pursuance of an authority which extended only to transferring from the company to the holders of the testator's shares an estate in fee simple in the subject land. It was not in his power to prescribe what beneficial interests should arise upon the transfer taking effect. The transferees, on the other hand, were the holders of the testator's shares in virtue of their position as trustees of his will, and for that reason they were bound to hold the land, when transferred to them, in accordance with the trusts of the will and not otherwise. The will gave them no power to alter those trusts or to substitute others for them. In the Supreme Court the view was taken that the will authorised them to settle the land in accordance with the provisions it contained, and that the execution of the nomination of trustees and the schedule of trusts was an exercise of that authority. No such authority, however, was entrusted to them. The will declared fully and finally what the trusts were which should attach to the land when it became vested in the trustees. Accordingly, even if the schedule, on its true construction, had purported to be a fresh disposition of beneficial interests, it could not have operated as such. The trustees must still have obeyed the will ; and the beneficiaries must still have appealed to the will as the continuing source of

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their rights. The schedule of trusts afforded evidence that the trusts of the will bound the lands and evidence of what those trusts in substance were; but that is all that it did. Cf. *Wedge* v. *Acting Comptroller of Stamps* (*Vict.*) (1).

It follows clearly enough that if no further relevant event had occurred the conclusion would have now to be reached that the respondent's contention is correct. The sons, of course, did not become entitled immediately upon the death of the testator to any interest in the subject land, for at that time it was the company's land and the trusts of the will had not yet attached to it. But the elements necessary to constitute the land a succession by virtue of s. 4 of *The Succession and Probate Duties Acts* 1822 *to* 1952 (Q.) were all present. There was a disposition of property, namely the shares in the company, or at least that portion of the rights comprised in them which were to be satisfied by the transfer and acceptance of the subject land. It was a disposition by reason of which the sons then became entitled, first, to have the trustees so use the voting power which the shares gave them as to procure a transfer of the subject land from the company to themselves, and, secondly, to have the trustees hold the land when so acquired upon trust for the sons as tenants in common after an interval of time and contingently upon their both surviving until the 21st January 1954. It is nothing to the point that the property disposed of by the will was not the land itself, for, as is clear on the language of s. 4 itself, a disposition, in order to confer a succession, "need not . . . be a disposition of the property which constitutes the succession: the successor may become entitled to 'any property'": *Green's The Death Duties*, 2nd ed., (1947), p. 396.

It was in fact conceded by counsel for the appellants that if their beneficial interests in the land, which became absolute on 21st January 1954, are now vested in them by force of the testator's will and not by force of the schedule of trusts, and if there is nothing in the case to preclude the respondent from asserting that that is so, it must be held that succession duty was rightly assessed against them. But it was argued that whatever may be the right conclusion on the facts which so far have been stated, the appeal must be decided against the respondent by reason of further facts. When the trustees produced for stamping the nomination of trustees and schedule of trusts, the commissioner assessed duty on the footing that the instrument, considered as a whole, was a "settlement" within the meaning given to that word for the purposes of *The Stamp Acts* 1894 *to* 1940 (Q.) by s. 2 of that Act, namely "any contract, deed,

(1) (1941) 64 C.L.R. 75, at pp. 79, 80, 82.

or agreement . . . whereby any property . . . is settled or agreed to be settled in any manner whatsoever". The question whether the instrument was such a settlement was then litigated between the trustees and the commissioner by means of a special case. The Full Court of the Supreme Court answered the question in the affirmative (1), and its decision was affirmed by this Court on appeal (2). The argument is that, as a consequence of its success in those proceedings, the Crown, here represented by the commissioner, is now estopped from denying that the operative instrument which gave the sons the interests which fell into possession on 21st January 1954 was the nomination of trustees and schedule of trusts. The principle of law which is relied upon is that for which *Hoysted* v. *Federal Commissioner of Taxation* (3) is the leading authority in the Privy Council. If the Crown is so estopped, the assessment of succession duty cannot stand, for the nomination and schedule was an instrument which operated *inter vivos*, and the trusts which it stated in favour of the sons were expressed without reference to the death of any person.

The case therefore turns upon a question of issue-estoppel. The crucial inquiry must be whether a decision that that instrument, and not the testator's will, was the disposition of property which gave the sons their interests in the land was necessarily involved in the conclusion that the nomination and schedule constituted a settlement within the meaning of *The Stamp Acts*. This is an inquiry, not as to the reasons which in fact led the Supreme Court, or this Court, to decide in the commissioner's favour the appeal against the assessment of stamp duty, but as to the matters legally indispensable to the conclusion reached, "the essential foundation or groundwork of the judgment, decree or order": *Blair* v. *Curran* (4). See also *Brewer* v. *Brewer* (5). What had to be held, if the assessment of stamp duty was to be sustained, was that the land was "settled" by the instrument on which the duty was charged. The instrument had, of course, a resemblance to a settlement, for in addition to being a transfer of the legal title in favour of persons which it called trustees, it contained provisions such as might be found in an instrument falling within the ordinary conception of a settlement and expressed in terms appropriate to an operative limitation of equitable interests in the property transferred. But, as appears from the petition before us and the reports which are there referred to (as to which see *Jackson* v. *Goldsmith* (6)), an issue was raised as

(1) (1944) Q.S.R. 26.
(2) (1945) Q.S.R. 1.
(3) (1926) A.C. 155; (1925) 37 C.L.R. 290.
(4) (1939) 62 C.L.R. 464, at p. 533.
(5) (1953) 88 C.L.R. 1, at p. 15.
(6) (1950) 81 C.L.R. 446, at p. 467.

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to whether it was from the instrument that the beneficial interests prescribed by the testator took their rise. The opposing contentions appear clearly enough. The Crown was asserting that the testator at his death had no interest in the land and no power to compel its transfer to his trustees; that immediately before the execution of the nomination and schedule the land belonged to the company free from any trust; and that the nomination and schedule effectually imposed upon the land the trusts therein contained, the company being therefore the settlor. The appellants, on the other hand, were asserting that the only trusts subsisting with respect to the land were imposed upon it by force of the testator's will at the moment of the vesting in the trustees, and that they would have taken effect just the same even if the instrument had made no mention of a trusteeship and had contained no specification of beneficial interests. Here, the appellants were contending, the nomination and schedule had no operative effect to create beneficial interests. The issue clearly emerged: whose instrument was it that bound the land by the subsisting trusts—the testator's or the company's? And a decision of the case in favour of the Crown required the answer: the company's. As has already been said, we have not now to examine the reasoning which in fact led to this answer being given; nor have we to speculate as to whether it would have been given if the case of *Commissioner of Stamp Duties (Q.)* v. *Hopkins* (1) had already been decided. The important point is that this answer was essential to the conclusion, in the sense that to deny the correctness of the answer would necessarily be to deny the correctness of the decision itself, not merely by invalidating a step in the reasoning which led to it, but by rejecting the very foundation upon which, as a matter of legal necessity, it rested.

For this reason it must be held that the Crown is estopped by the judgment it obtained in the former proceedings from asserting that the absolute vesting which occurred on 21st January 1954 was the taking effect of a succession conferred by the testator's will. The claim for succession duty must therefore fail.

The appeal should be allowed with costs. The order of the Supreme Court should be set aside, and in lieu thereof an order should be made allowing with costs the appeal against the assessment of succession duty and setting that assessment aside.

Appeal allowed with costs. Order of the Full Court of the Supreme Court of Queensland discharged. In lieu thereof: Order that the prayer of the

(1) (1945) 71 C.L.R. 351.

petition of the appellants be granted and that it be declared that the assessment is contrary to law; and further order that the assessment be reduced to nil accordingly and that the respondent the Commissioner of Stamp Duties repay to the appellants the duty paid by them in pursuance of the assessment to him; and order that the commissioner pay the costs of the petition in the Supreme Court, including costs reserved.

Solicitors for the appellants, *F. J. Fitzgerald & Seymour.*

Solicitor for the respondent, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland.

T. J. L.