Re Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 260

[HIGH COURT OF AUSTRALIA.]

HOYSTED AND OTHERS . . . . . APPELLANTS;

AND

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

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MELBOURNE, *Oct.* 24, 25, 26.

SYDNEY, *Dec.* 16.

Knox C.J., Higgins and Starke JJ.

Land Tax—Assessment—Owner—Joint owners—Deduction of £5,000—*Trustees—Will of testator who died before* 1*st July* 1910—*Beneficiaries entitled to income from business carried on on land—Estoppel by judgment—Matter not put in issue—Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 11, 33, 38 (7).

By his will a testator who died before 1st July 1910 devised certain land to trustees upon trust to carry on, manage and work it until the expiration of twenty-one years after his death, and to stand possessed of the net annual income to arise from such carrying on upon trust for such of seven of his children as should be living at the expiration of each "annual period" during or in respect of which such income should have arisen, and he provided for the substitution in lieu of their parent of the children of any of such seven children who should have died during an "annual period." He further directed that upon the expiration of the period of twenty-one years his trustees should (subject to a power of postponement and to certain conditions) sell the land and stand possessed of the net proceeds (after making certain payments) upon trust to pay or divide the same equally amongst such of the said seven children as should be living at the expiration of the period of twenty-one years, with a proviso for the substitution in lieu of their parent of the children of such of the seven children as should be dead at the expiration of the period of twenty-one years. The term "annual period" was defined in the will as a completed period computed from the date of the testator's death to 31st January following and thenceforth from 31st January of each year to 31st January of the year following. One of the seven children died, leaving two children her surviving. On an assessment of the trustees during the period of twenty-one years after the date of the testator's death for land tax under the *Land Tax Assessment Act* 1910-1916,

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Held, by the whole Court, on the true construction of the Act and the will, that neither the beneficial interest in the land nor that in the income thereof was for the time being shared by the beneficiaries in such a way that they were taxable as "joint owners" within the definition of that term in sec. 3 of the Act, and, therefore, that the trustees were not entitled under sec. 38 (7) to more than one deduction of £5,000.

Rofe v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*), 28 C.L.R., 347, followed.

In respect of land tax upon the same land for a previous financial year, the trustees by their return claimed seven deductions of £5,000. The Commissioner in assessing them disallowed the deductions in respect of the shares 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 pursuance of the Act, treated as an appeal, and transmitted to the High Court. The appeal came before *Gavan Duffy* J., 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 children 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. *Gavan Duffy* J. thereupon, without further argument, made an order that the appeal be allowed, and that the number of deductions of £5,000 to be made should be six.

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that the question whether the beneficiaries were joint owners was not put in issue on that appeal, and therefore that, on an appeal from an assessment for the subsequent year, the Commissioner was not estopped from contending that the beneficiaries were not joint owners of the land.

Per Higgins J.: On the face of the objections to the Commissioner's assessment in the previous case, and therefore on the face of the appeal, the point of joint ownership under the same Act and the same will was directly and specifically taken, and the decision of the point was necessary for the judgment on the appeal; the point was "actually litigated and determined," though not argued; and, whether the judgment on that appeal was due to the Commissioner's consent or to his neglect, he was estopped as by issue-estoppel in other proceedings as between the same parties from denying that the beneficiaries were "joint owners."

CASE STATED.

On an appeal by Lionel Norton Hoysted, John Henry MacFarland and the Trustees, Executors and Agency Co. Ltd., as trustees of the estate of Charles Campbell deceased, to the High Court from an assessment of them for Federal income tax for the year 1920-1921, *Starke* J. stated a case for the opinion of the Full Court which, as amended at the hearing, was substantially as follows :—

1. Charles Campbell (hereinafter called the testator), late of Melbourne in the State of Victoria, merchant and station proprietor, who died on 13th September 1905, by his last will appointed Mary Helen Campbell and the above-named Lionel Norton Hoysted and the Trustees, Executors and Agency Co. Ltd. the executrix, executors and trustees thereof, and probate of such will was on 24th November 1905 duly granted to them by the Supreme Court of the said State, and on 6th July 1906 the said probate was duly resealed in their favour by the Supreme Court of the State of New South Wales.

2. The said Mary Helen Campbell died on 8th September 1911, and by deed dated 6th April 1914 the said Lionel Norton Hoysted and the Trustees Executors and Agency Co. Ltd., in exercise of the powers contained in the said will, appointed the above-named John Henry MacFarland as a trustee thereof in the place of the said Mary Helen Campbell deceased and the appellants are now the sole trustees of the said will.

3. The testator at his death was possessed of a large amount of real and personal estate in the Commonwealth of Australia, including two station properties called respectively "Murray Downs" and "Langi Kal Kal" situated in the States of New South Wales and Victoria respectively with stock and other personal property thereon (hereinafter collectively referred to as the station properties).

4. The testator left him surviving (*inter alios*) his seven children referred to in the will as "my said children," all of whom are now living except one of such children, Mrs. Mary Elizabeth Johnston, who died on 13th January 1912 leaving two children her surviving and now living.

5. By his said will the testator made special provisions as to the station properties and other provisions as to the residue of his estate.

6. As to the station properties the testator (in substance) devised

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the same to his trustees upon trust to carry on, manage and work them until the expiration of twenty-one years from his death, and to stand possessed of the net annual income to arise from such carrying on upon trust for such of his said seven children as should be living at the expiration of each "annual period" (as therein defined) during or in respect of which such income should have arisen, and he provided for the substitution in lieu of their parent of the children of any of the said seven children who should have died during an "annual period," and he directed that upon the expiration of the said period of twenty-one years his trustees should (subject to a power of postponement and to certain conditions) sell the station properties and stand possessed of the net proceeds of sale (after making certain payments) upon trust to pay or divide the same equally amongst such of the said seven children as should be living at the expiration of the said period of twenty-one years, with a proviso for the substitution in lieu of their parent of the children of such of the said seven children as should be dead at the expiration of the said period of twenty-one years.

7. As to the residue of his estate (subject to certain legacies and certain payments and outgoings) the testator (in substance) devised and bequeathed the same to his trustees upon trust for his said seven children, but directed that the shares of his daughters should be settled upon them for their lives respectively with remainder to their children.

9. The trustees by their return 1920-1921 claimed seven deductions of £5,000 in respect of the station properties—one in respect of each of the six survivors and one in respect of the two children of Mrs. Mary Elizabeth Johnston.

10. The Commissioner caused an assessment to be made against the trustees for the purpose of ascertaining the amount upon which land tax for the financial year 1920-1921 should be levied. Only the unimproved value of the station properties was included in the assessment.

11. In the assessment the Commissioner disallowed as deductions under sec. 38 (7), or otherwise, the whole of the sums claimed in respect of the persons mentioned in par. 9 hereof, on the ground that the said persons were not joint owners of the station properties.

12. The trustees, being dissatisfied with such assessment, duly lodged objections in writing against the same.

13. The Commissioner by written notice to the trustees disallowed such objections, and the trustees, being dissatisfied with the decision of the Commissioner, required the objections to be treated as an appeal and transmitted to this Court; and the Commissioner transmitted the same accordingly.

14. The appellants appealed to this Honourable Court from the assessment in respect of the station properties for 1918-1919, and upon such appeal a special case was stated. Such special case and the judgment thereon and the judgment upon such appeal, together with the report of the proceedings in *Hoysted* v. *Federal Commissioner of Taxation* (1), are to be referred to as part of this case. The matters stated in such report as facts are to be treated as facts for the purpose of this case.

15. Subsequently to the decision upon the special case mentioned in the preceding paragraph, the appeal against the 1918-1919 assessment was brought before the Justice who had stated the said case for hearing and determination.

16. 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.

17. The formal judgment given on the appeal was, so far as material, as follows: "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."

18. The appeal coming on for hearing before me, I consented at the request of the parties to state a case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law, and the questions for the opinion of the Court are:—

(1) 27 C.L.R., 400.

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(1) Are the trustees assessable on the unimproved values of the station properties at all?

(2) How many deductions of £5,000 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 £5,000?

The objections referred to in par. 12 were as follows: (1) that the said assessment is erroneous as matter of law; (2) 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 such assessment should accordingly have been made on a taxable balance of £183,254; (3) alternatively, that each of the six first named of the said beneficiaries named in the said return should have been regarded as the owner of a one-seventh share and the two last named of the said beneficiaries should have been regarded as joint owners of the remaining one-seventh share of the said station properties, and that each of such seven one-seventh shares respectively should have been separately assessed and a separate deduction of £5,000 should have been allowed in respect of each of such shares; (4) alternatively, and if no person should be regarded as having been on 30th June 1920 beneficially entitled either as a joint owner or as an owner in respect of the station properties or of a share therein, no tax is payable in respect of such station properties for the year 1920-1921.

By the will of the testator, which was part of the case, it was provided that the expression "annual period," referred to in par. 6 of the case, "shall be deemed to be a completed period computed from the date of my death to the thirty-first of January following and thenceforth from the thirty-first of January of each year to the thirty-first of January in the next succeeding year."

Weigall K.C. and *Owen Dixon*, for the appellants. In *Hoysted* v.

Federal Commissioner of Taxation (1) it was held that each of the surviving children of the testator had a life or greater interest in the land or in the income thereof, and they are therefore joint owners of the land within the definition of that term in sec. 3 of the *Land Tax Assessment Act* 1910-1916. Each of the children is entitled as long as he lives to receive his share of the income from the land, and so has, at least, a life estate in the income; and the fact that he only becomes entitled to take that share on a particular day of the year does not make any difference. But, in addition to being entitled to the income so long as he lives, each child, if he survives the period of twenty-one years, is entitled to a share of the whole estate absolutely; so that his interest is greater than a life interest. If there are no persons who can be said to be joint owners of the land, then there is no one who is taxable in respect of it; for the trustees are only liable to pay land tax for which their beneficiaries are liable (*Sendall* v. *Federal Commissioner of Land Tax* (2)). [Counsel also referred to *Trustees, Executors and Agency Co.* v. *Commissioner of Land Tax* (3).] The six children and the two grandchildren of the testator are within the definition of "owner"; for if the land were let, for instance, under the *Settled Estates and Settled Lands Act* 1915, they would be entitled to receive the rents and profits. If they are owners, then they are taxable as joint owners. The Commissioner is estopped by the decision of the High Court in *Hoysted* v. *Federal Commissioner of Taxation* (1) from denying that the beneficiaries were joint owners. There was an assertion there that the beneficiaries were joint owners, and that they were holders of original shares. The judgment which was given there could not properly have been given unless it was determined that the beneficiaries were joint owners or unless that point was conceded by the Commissioner. In either event he is not now at liberty to contest it. Where there are two distinct points each of which must be determined in order to produce the order which the Court has made, it is not open to the party against whom the order was made to raise either of the points again in subsequent proceedings (*Gray* v. *Dalgety & Co.* (4); *Badar Bee* v. *Habib Merican Noordin* (5); *In re Graydon*;

(1) 27 C.L.R., 400.
(2) 12 C.L.R., 653.
(3) 20 C.L.R., 21.
(4) 21 C.L.R., 509, at p. 542.
(5) (1909) A.C., 615.

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Ex parte Official Receiver (1)). This estoppel is based on public policy—that there shall be an end of litigation and that a person shall not be twice vexed (*Lockyer* v. *Ferryman* (2)). The material facts alleged by one party which are directly admitted by the opposite party, or which are indirectly admitted by him by taking a traverse of some other facts, if the traverse is found against the party making the traverse, are conclusive evidence between, and cannot be again litigated between, the same parties (*Boileau* v. *Rutlin* (3)).

[KNOX C.J. referred to *Concha* v. *Concha* (4) ; *Carter* v. *James* (5) ; *Hutt* v. *Morrell* (6) ; *Langmead* v. *Maple* (7) ; *Jenkins* v. *Robertson* (8) ; *Goucher* v. *Clayton* (9).]

If the matter might have been, but was not, controverted, the position is the same as if it was controverted (*Newington* v. *Levy* (10)). This was not a case of an admission being made for the purposes of the particular case only. [Counsel also referred to *In re South American and Mexican Co.* ; *Ex parte Bank of England* (11) ; *Joint Committee of the River Ribble* v. *Croston Urban District Council* (12) ; *Humphries* v. *Humphries* (13) ; *Cooke* v. *Rickman* (14) ; *Barrs* v. *Jackson* (15) ; *Kinnis* v. *Graves* (16) ; *In re Ivory* ; *Hankin* v. *Turner* (17) ; *Shoe Machinery Co.* v. *Cutlan* (18) ; *Beardsley* v. *Beardsley* (19).]

[KNOX C.J. referred to *Kennedy* v. *Kennedy* (20).

[HIGGINS J. referred to *Hall* v. *Levy* (21) ; *Great North-West Central Railway Co.* v. *Charlebois* (22).

[STARKE J. referred to *In re Surfleet's Estate* ; *Rawlings* v. *Smith* (23).]

There is no reason why an estoppel should not apply against the Crown or a taxing authority. In ordinary criminal practice the

(1) (1896) 1 Q.B., 417, at p. 419.
(2) 2 App. Cas., 519, at p. 530.
(3) 2 Ex., 665.
(4) 11 App. Cas., 541.
(5) 13 M. & W., 137.
(6) 3 Ex., 240.
(7) 18 C.B. (N.S.), 255, at p. 270.
(8) L.R. 1 H.L. (Sc.), 117, at p. 122.
(9) 34 L.J. Ch., 239.
(10) L.R. 5 C.P., 607.
(11) (1895) 1 Ch., 37.
(12) (1897) 1 Q.B., 251.
(13) (1910) 1 K.B., 796 ; (1910) 2 K.B., 531.
(14) (1911) 2 K.B., 1125.
(15) 1 Ph., 582.
(16) 67 L.J. Q.B., 583.
(17) 10 Ch. D., 372.
(18) (1896) 1 Ch., 667.
(19) (1899) 1 Q.B., 746.
(20) (1914) A.C., 215, at p. 220.
(21) L.R. 10 C.P., 154.
(22) (1899) A.C., 114.
(23) 105 L.T., 582.

Crown is bound by estoppel in the case of *autrefois convict* and *autrefois acquit* (see *In re Bank of Hindustan, China and Japan* (1); *Attorney-General for Prince of Wales* v. *Collom* (2); *Everest and Strode on Estoppel*, 2nd ed., p. 8).

Gregory, for the respondent. The question of estoppel is not open to the appellants, for it is not included in the objections (*Rules of the High Court*, Order LIA (Statutory Rules 1918, No. 52); *Land Tax Regulations* 1912, regs. 38, 40 (3)).

[KNOX C.J. referred to secs. 44, 47 and 74 of the *Land Tax Assessment Act*.]

The beneficiaries are not entitled to be taxed as joint owners. They were not "owners" within the definition, for neither were they entitled to an estate of freehold in possession in the land, nor were they entitled to receive or in receipt of, nor if the land were let to a tenant would they be entitled to receive, the rents and profits of the land. The land was not held by the trustees upon trust for the beneficiaries but for the purpose of carrying on the business, and the interest of the beneficiaries was in the profits of the business. It cannot be said that if the land were let the beneficiaries would be entitled to receive the rents and profits; for the will does not give a power of leasing and does not contemplate the land being leased. Even if being entitled to the profits of the business can be said to be equivalent to being entitled to the rents and profits, these beneficiaries could not on 30th June of any year be said to be entitled to the rents and profits; for it could not be determined until the following 1st January which of them would be entitled to the rents and profits (*Rofe* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (3)). The beneficiaries did not have an interest greater than a life interest in the land (*Trustees, Executors and Agency Co.* v. *Commissioner of Land Tax* (4)). If there are no persons who come within the definition of owners or joint owners, the trustees are taxable (*Terry* v. *Federal Commissioner of Taxation* (5); *Glenn* v. *Federal Commissioner of Land Tax* (6)). The Commissioner is

(1) L.R. 9 Ch., 1, at pp. 24, 26.
(2) (1916) 2 K.B., 193, at p. 204.
(3) 28 C.L.R., 347, at p. 356.
(4) 20 C.L.R., at pp. 32, 41.
(5) 27 C.L.R., 429, at p. 433.
(6) 20 C.L.R., 490, at p. 497.

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not estopped by the decision in *Hoysted* v. *Federal Commissioner of Taxation* (1). The trustees were taxed on the basis that the beneficiaries were joint owners, and the only question put in issue on the appeal was whether the beneficiaries were holders of original shares. The question of joint ownership not having been put in issue, there is no estoppel (*Kennedy* v. *Kennedy* (2)).

[STARKE J. referred to *Cox* v. *Dublin City Distillery* [*No.* 2] (3); *Cox* v. *Dublin City Distillery* [*No.* 3] (4).]

The Commissioner or the Crown cannot be estopped (*Robertson's Civil Proceedings by and against the Crown*, p. 576; *Sheffeild* v. *Ratcliffe* (5); *Sir Edward Coke's Case* (6); *R.* v. *Delme* (7); *Vin. Abr.*, 2nd ed., tit. "Estoppel," p. 433).

[KNOX C.J. referred to *Syme* v. *Commissioner of Taxes* (8).]

The present assessment was made under a new Act, the *Land Tax Act* 1920.

Weigall K.C., in reply. The case of *Rofe* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (9) leaves open the question whether these beneficiaries are persons who, if the land were let, would be entitled to the rents and profits; for the will in that case dealt specifically with the rents and profits. The beneficiaries here would be so entitled, because there is a primary intention in the will that those who are ultimately entitled to receive the proceeds of the property shall receive the income in the meantime, and because, if the land were let, the rents and profits would fall into residue and the children would be entitled to it. [He also referred to *Everest and Strode on Estoppel*, 2nd ed., p. 91.]

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The trustees of the late Charles Campbell have for several years been assessed to land tax, pursuant to sec. 33 of the *Land Tax Assessment Acts*. They have, upon the

(1) 27 C.L.R., 400.
(2) (1914) A.C., 215.
(3) (1915) 1 I.R., 345.
(4) (1917) 1 I.R., 203.
(5) Hob., 334, at p. 339.
(6) Godb., 289, at p. 299.
(7) 10 Mod., 199, at p. 200.
(8) (1914) A.C., 1013.
(9) 28 C.L.R., 347.

principle established in *Sendall* v. *Federal Commissioner of Land Tax* (1), claimed the same privileges and deductions as their beneficiaries would have claimed, had they been assessed. Indeed, they have in the present appeal suggested that *Sendall's Case* goes so far as to exempt a trustee from land tax if the beneficiaries cannot be assessed pursuant to the provisions of the *Land Tax Assessment Acts*. The suggestion is quite untenable, and it is but right to say that the argument was mentioned rather than pressed.

No fewer than three appeals have been brought to this Court against assessments made pursuant to the Acts, each appeal depending on the application of the *Land Tax Assessment Acts* to the provisions of the will made by Campbell. The substance of these provisions may be found in the reports of the appeals preceding the present one and in the case now stated, and need not be repeated here. In the first appeal, *Trustees, Executors and Agency Co.* v. *Commissioner of Land Tax* (2), this Court held that the children of the testator were not tenants for life within the meaning of the proviso to sec. 25 (1) of the *Land Tax Assessment Act* 1910. In so deciding, several members of the Court gave their opinion as to the interests taken by the children under the will. At most, as our brother *Higgins* expressed it, they were not tenants for life of land, but tenants for life of a term, nor were they, under the extended definition of the *Land Tax Assessment Act*, entitled to share in the income of the land for life; indeed, he doubted whether the share in the income of the business given under the will could be treated as a share in the income of land under sec. 25 of the 1910 Act. In the second appeal, *Hoysted* v. *Federal Commissioner of Taxation* (3), the question argued before the Court was how many deductions the trustees could claim under sec. 38, sub-secs. 7 and 8, of the *Land Tax Assessment Act* 1910-1916. It is to be noticed that the deductions could only be claimed if the beneficial interest in the testator's land was for the time being shared amongst certain persons in such a way that they were taxable as joint owners under the Acts. But the case drawn up by the parties and stated by our brother *Gavan Duffy* went upon the basis that the beneficiaries were taxable as

(1) 12 C.L.R., 653. (2) 20 C.L.R., 21.
(3) 27 C.L.R., 400.

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joint owners. The point did not escape the attention of the Court, and was pointedly referred to by all its members.

The present—the third—appeal involves, in substance, the question whether the beneficiaries if they had been assessed would be taxable as joint owners. If so, the deductions allowed in the second appeal were rightly allowed; if not, the trustees were allowed in that appeal deductions to which they were not entitled. We do not know, and it is quite immaterial to inquire, why the parties stated the case in the second appeal upon the basis already mentioned; it may have been intentional or it may have been due to some oversight. The point now falls for decision, and our opinion is that the beneficial interest in the testator's land and the income therefrom are not for the time being shared by his children in such a way that they are taxable as joint owners under the Acts. "*Joint owners*" means, unless the contrary intention appears, 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. "*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 an estate of freehold in possession, or (*b*) is entitled to receive, or is 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; the term also includes every person who by virtue of the Act is deemed to be the owner. The decision in the first appeal makes it clear that the surviving children are not entitled to the land for an estate of freehold in possession, nor to a life or greater interest in shares of the income from the land. The second appeal did not conflict with this decision: the majority of the Court were there of the opinion that the surviving children were, contingently on surviving the period of twenty-one years mentioned in the will, entitled to an equal one-seventh interest in the proceeds of the sale of land devised on trust for sale. Such an interest, it was held, was an interest in land. The importance of the case, however, lies in the ruling that beneficiaries within sec. 38 (7) holding interests in land in such a way that they are taxable as joint owners, were entitled

to the deductions mentioned in the section in respect of contingent interests of the duration there specified. The majority of the Court also held that the contingent interest of the surviving children in the land was greater than a life interest. Consequently, on the assumption that the surviving children were taxable as joint owners under the Act, their trustees were, according to the principle of *Sendall's Case* (1), entitled to six deductions. This decision was founded upon the true construction of sec. 38, and upon that section alone; it has, therefore, no bearing upon the true construction of the words "owner" and "joint owners" in sec. 3—as is pointed out at p. 411 of the report, and ruled by the Court in *Terry* v. *Federal Commissioner of Taxation* (2).

The case of *Rofe* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (3) disposes, in our opinion, of the contention that the surviving children of Charles Campbell were entitled to receive, or were in receipt of, or, if the land were let to a tenant, would be entitled to receive, the rents and profits thereof. In *Rofe's Case* the testator had directed that, from and after "the income distribution period" mentioned in the will, the trustees should thereafter on the 1st January in each year divide the net rents and profits of certain lands into as many equal parts as there were children of his son Thomas who were living on such day, or had died before such day over the age of twenty-one, and should pay one of such parts to each of such children, or, if any such child were under the age of twenty-one years, to his or her parent or guardian, &c. The Court pointed out that the person liable to pay was the owner within the meaning of the *Land Tax Assessment Acts* on 30th June preceding the financial year in and for which the tax is levied—this being, in *Rofe's Case*, 30th June 1916. As to the children who were under the age of twenty-one years on 30th June 1916, the Court said (4): —"None of them had any right or title to any of the income which had accrued up to that date from 1st January 1916 unless he or she survived until 1st January 1917. . . . It is clear, therefore, as to the three children under the age of twenty-one years, first, that none of them was on 30th June 1916 entitled to the land for

(1) 12 C.L.R., 653.
(2) 27 C.L.R., 429.
(3) 28 C.L.R., 347.
(4) 28 C.L.R., at p. 357.

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any estate of freehold in possession, and, secondly, that none of them was on that day entitled to receive or in receipt of the rents and profits either as beneficial owner or otherwise."

Under Campbell's will his trustees were directed to carry on and work his station properties until the expiration of twenty-one years from his death, and to stand possessed of the net annual income to arise from the carrying on of the station properties upon trust for such of his named children as should be *living at the expiration of the annual period* thereafter defined during which such income should have arisen, and also such of the children of his said children who should then be dead as should be living at the expiration of the annual period during which such income should have arisen in the same shares and proportions as they should then (that is to say, at the expiration of that particular annual period) respectively be presumptively entitled to participate in the distribution of the proceeds to arise from the sale of the stations under the trusts thereinafter in the will contained. The expression "annual period" the testator declared should "be deemed to be a completed period computed from the date of my death to the thirty-first of January following and thenceforth from the thirty-first of January of each year to the thirty-first of January in the next succeeding year."

The assessment in the present case is for the financial year beginning on 1st July 1920 and ending on 30th June 1921. Assuming now that the "annual income" under Campbell's will is "rents and profits" of the land, then his children had not at noon on 30th June 1920 (*Land Tax Assessment Act*, sec. 12) any right or title to any of the income which had accrued up to 30th June 1920 from 31st January 1920, unless he or she survived until 31st January 1921. A contention uncovered perhaps by *Rofe's Case* (1) was this: that if the land were let to a tenant the children would be entitled to receive the rents and profits thereof. The argument proceeded as follows: Assume that the trusts of the will cannot be carried out and that the land is let under the *Settled Estates Acts* or under some power outside the will; the rents and profits in this case go to the children; therefore, if the land were let to a tenant the children would be entitled to receive the rents and profits. We

(1) 28 C.L.R., 347.

pass by the assumption that the rents and profits would in such a case go to the children. The argument is untenable. The Act is providing for the case of land unlet but which could be let at the moment for determining ownership for the purposes of the tax. The provision that "owner" includes every person who by virtue of the Act is deemed to be an owner has no bearing upon this case.

The trustees however—the taxpayers—raised another contention of considerable importance and difficulty. It was this: that the Commissioner of Taxation is estopped by the judgment in the second appeal from denying their right to six deductions. The second appeal was as to the 1918-1919 assessment. The trustees claimed by their return seven deductions. The Commissioner caused an assessment to be made, and disallowed the deductions in respect of the shares of the beneficiaries in the station properties, on the ground that the joint owners did not, any of them, hold original shares in these properties as defined by sec. 38 (8). The trustees lodged objections in writing as follows: (1) that the beneficiaries named in the will of the testator, who died before 1st 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 taxpayers are entitled to seven deductions of £5,000 each pursuant to the provisions of secs. 38 and 38A of the *Land Tax Assessment Act* 1910-1916. The parties then drew up a case, and submitted it to our brother *Gavan Duffy*, who stated it for the opinion of the Court. As already remarked, this case proceeds upon the basis that the beneficiaries of Charles Campbell were "joint owners" within the *Land Tax Assessment Acts*. It was so argued, and the decision upon the case stated was upon this basis. All this may be gathered from the report in the *Commonwealth Law Reports* (1). The appeal itself was then brought for final judgment before the learned Justice who stated the case. No further arguments were

(1) 27 C.L.R., 400.

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adduced. The attention of the learned Justice was not directed to the question whether the beneficiaries were taxable as joint owners, and he did not consider it. The hearing of the appeal was purely formal, and the parties treated the answers to the questions stated in the case as covering the whole ground, and the Court so disposed of the appeal. The final order was "that this appeal be and the same is hereby allowed, and that the number of deductions . . . to be made by the respondent in the said assessment be six."

"Judgment upon the merits of a cause in litigation rendered by any Court of competent litigation is a bar to all further litigation of the same claim or demand": the matter, in the words of the books, is *res judicata* (*Bigelow on Estoppel*, 5th ed., p. 80; *Badar Bee* v. *Habib Merican Noordin* (1); *Reichel* v. *Magrath* (2); *Brunsden* v. *Humphrey* (3); *Macdougall* v. *Knight* (4)). The rights of the parties in such a case are determined by the judgment. The judgment is final "not only as to every matter which was offered or received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose" (*Cromwell* v. *County of Sac* (5)). The only inquiry is whether the causes of action are identical (*Seddon* v. *Tutop* (6); *Brunsden* v. *Humphrey* (7)). The assessment made by the Commissioner in the present case is not for the same cause of action: it is a claim for tax in respect of another and a later year and is based upon a new assessment. Consequently the principle already referred to—*res judicata*—cannot be relied upon.

Many cases, however, show that a party can rely upon estoppel by judgment "where a plea of *res judicata* could never be established" (see *Halsbury's Laws of England*, vol. XIII., pp. 330-331). This doctrine has been more often examined in America than in England, though, we think, the conclusion reached has been the same. In this Court we should follow the English law in case of difference. The effect of the English rule is: "If the defendant" (to a second

(1) (1909) A.C., at pp. 622-623.
(2) 14 App. Cas., 665, per Lord *Watson*, at p. 668.
(3) 14 Q.B.D., 141, per *Bowen* L.J., at pp. 146-147.
(4) 25 Q.B.D., 1, per *Esher* M.R., at p. 8; per *Fry* L.J., at p. 10.
(5) 94 U.S., 351, at p. 352.
(6) 6 T.R., 607.
(7) 14 Q.B.D., at pp. 147-148.

action) "attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration," *i.e.*, in the first action, which had been found against the defendant, then the defendant is estopped by the judgment in the first action from setting up in the second action any allegation inconsistent with the matter so found against him (*Howlett* v. *Tarte* (1); *Humphries* v. *Humphries* (2); *Outram* v. *Morewood* (3)). And the American rule is thus expressed by the Supreme Court of the United States:—"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the verdict or finding was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined" (*Cromwell* v. *County of Sac* (4); *New Orleans* v. *Citizens' Bank* (5); *Southern Pacific Railroad Co.* v. *United States* (6)). "The right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified" (*Hartford Life Insurance Co.* v. *Ibs* (7)).

The "traversable allegation" or the "matter in issue" or the "point controverted" can, in Courts of Record, be ordinarily ascertained from the record. In some cases an issue might not be tendered. As was said in *Cromwell* v. *County of Sac* (8), "various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A

(1) 10 C.B. (N.S.), 813.
(2) (1910) 2 K.B., 531.
(3) 3 East, 346.
(4) 94 U.S., at p. 353.
(5) 167 U.S., 371, at p. 396.
(6) 168 U.S., 1, at pp. 45 *et seq.*
(7) 237 U.S., 662, at p. 673.
(8) 94 U.S., at p. 356.

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party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction." Thus a party might not choose in one case to raise the constitutionality of a statute, and be still at liberty to raise it in a second action (*Boyd* v. *Alabama* (1)). In other cases the issue may not be raised "with sufficient precision to operate as an estoppel" (*Humphries* v. *Humphries* (2) ; *Irish Land Commission* v. *Ryan* (3) ; *Goucher* v. *Clayton* (4)). The last of these cases is instructive, for a consent judgment had been entered in a suit in which no pleadings had been delivered. *Wood* V.C. said (5) :—"There was nothing to show that the question" (that of the validity of a patent) "had ever been put in issue ; and the defendants might have submitted, either to avoid litigation or because they thought it not worth their while to try the question. In order to effect an estoppel, it was necessary that it should appear on the record that the question had been put in issue." But the case of *Shoe Machinery Co.* v. *Cutlan* (6) illustrates the other aspect, for in that case the validity of a patent was put in issue and determined, and the judgment estopped the same parties in a second action. Again, the record might contain several issues, and an examination of the record and the judgment might not disclose the actual issue or point in controversy which was determined. In such a case, we apprehend, evidence could be adduced to prove the issue actually determined (see per *Isaacs* J. in *Gray* v. *Dalgety & Co.* (7)). Or there might be no record in the proper sense, as in the present case, and still an estoppel by judgment might arise. As was said by *Brett* M.R. in *In re May* (8), "the doctrine of *res judicata* is not a technical doctrine applicable only to records." Neither is the doctrine of estoppel by judgment. The estoppel extends not only to the issue or controversy actually determined, but, it seems, to all matters within the scope of the issue or controversy, or necessarily implied in the determination (*R.* v. *Inhabitants of Hartington Middle Quarter* (9) ; *Cooke* v. *Rickman* (10)).

(1) 94 U.S., 645.
(2) (1910) 2 K.B., at p. 536.
(3) (1900) 2 I.R., 565.
(4) 34 L.J. Ch., 239.
(5) 34 L.J. Ch., at p. 240.
(6) (1896) 1 Ch., 667.
(7) 21 C.L.R., at pp 541-543.
(8) 28 Ch. D., 516, at p. 518.
(9) 4 E. & B., 780.
(10) (1911) 2 K.B., 1125.

Consequently in this case we come finally to the question: What was the issue, the point controverted, the matter litigated, between the parties in the second appeal? It is not enough to look simply at the formal judgment and to say that the question of joint ownership must have been in issue or determined; otherwise the judgment is erroneous. We must look behind the formal judgment to the record, if there be one, or, if the record be not precise or there be no record, to the issue actually litigated between the parties in the first action. In the present case the notice of objections made it possible to litigate the matter now in controversy—the question whether the children were joint owners; but the actual fact, in our opinion, is that the parties, for some reason, withdrew that question from the area of contest, as they did in the case stated to this Court. They did not put the question in controversy in issue or make it a "traversable allegation" before the learned Justice who heard the second appeal. It is impossible to treat the notice of objections as of the same precision and effect as a plea in the Courts of common law. The conduct of the parties cannot be ignored. In short, the issue or controversy submitted in fact to the Court was: Assuming that the taxpayers are joint owners, are they holders of original shares within the *Land Tax Assessment Act*?

In our opinion, therefore, the Commissioner of Taxation is not estopped in the present proceedings by the judgment in the second appeal. If he had been, the argument that an estoppel could never operate against a public taxing Act would require consideration; it has been considered in America, and rejected (*New Orleans* v. *Citizens' Bank* (1)). It is unnecessary, in the view we have taken, to pass any opinion upon the point in the present case. This point, and the question of estoppel, might have been, but were not, raised in *Syme* v. *Commissioner of Taxes* (2).

The answers to the questions stated should, in our opinion, be: (1) Yes; (2) One—pursuant to sec. 11 of the Act; (3) No.

HIGGINS J. The question is as to the Federal land tax payable for the year 1920-1921 in respect of two station properties which are subject to the will of the late Charles Campbell. The will gave

(1) 167 U.S., at pp. 396, 398, 399. (2) (1914) A.C., 1013.

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the stations, stock, &c., to the trustees upon trust to carry on, manage and work the properties until the expiration of twenty-one years from the testator's death (13th September 1905), and to pay the net annual income to such of seven children as should be living at the expiration of each annual period ending 31st January, and to such of the children of the said children who should be then dead as should be living at the expiration of the annual period. The trustees have contended that under the will these beneficiaries are "joint owners" of the land within the meaning of sec. 38 (7) of the Act, and that therefore there ought to be deducted from the unimproved value of the land the sum of £5,000 in respect of each of the seven shares. This contention the Commissioner has opposed.

Disregarding for the present the numerous and difficult cases decided with regard to sec. 38 and other sections of the Act, and also disregarding for the present the contention that the Commissioner is estopped by a previous decision as to this very will, I propose to consider the question on its intrinsic merits. The assessment is made as against the trustees; and the questions asked in the special case are as follows:—(1) Are the trustees assessable on the unimproved values of the station properties at all? (2) If so, how many deductions of £5,000 are the trustees entitled to?

I do not understand that the first question is seriously contested. Under sec. 33, "any person in whom land is vested as a trustee shall be assessed . . . as if he were beneficially entitled to the land."

But as to the second question the trustees have contended that there ought to be seven deductions because of sec. 38 (7). Under that section, where, under the will of a testator who died before 1st July 1910, the beneficial interest in any land or in the income thereof is for the time being shared among a number of persons, all of whom are relatives of the testator by blood in such a way that they *are taxable as joint owners under the Act*, then "for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land . . . in respect of each of the joint owners who holds an original share in the land under the . . . will . . . the sum of five thousand pounds." The assessment here is as against the trustees; and there might have been some doubt, perhaps, as to the provisions for deductions

being applicable. But both parties assume—and I shall assume—that they are applicable. I shall treat the assessment as if it were a joint assessment against the beneficiaries as joint owners.

Now, these beneficiaries are not "taxable as joint owners under this Act" unless they are "joint owners" within the meaning of the Act; and the meaning given by the Act to the expression "joint owners" is (unless the contrary intention appears) definite (sec. 3)—"'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." Taking the first member of this sentence, do these beneficiaries own the land "jointly or in common, whether as partners or otherwise"? The expression "jointly" and the expression "in common" are technical, and should *primâ facie* receive their technical meaning, especially when used, as here, in relation to land. Even if the statute is to be treated as giving an unusually wide meaning to the word "own," it does not follow that these beneficiaries own these station properties "either jointly or in common." The expression "whether as partners or otherwise" reinforce my doubt. But do these people "own" the land on 30th June 1920, the critical date for this assessment? They are to get their proportion of the profits of the business carried on on the land if they respectively live till 31st January 1921, and not otherwise. Looking at the definition of "owner" in the same section, they are not "entitled to the land for any estate of freehold *in possession*"; and they are not (on 30th June 1920) "entitled to receive, or in receipt of . . . the rents and profits" of the land; and if the land were conceivably let to a tenant (there is no power to let it) they would not (as on that date) be entitled to receive the rents and profits for the time being. It is by no means certain that people who are entitled to share in the profits made in a business which the testator has directed to be carried on on the land would be entitled to the rents and profits of the land if the land were let. But, at all events, these beneficiaries are not on 30th June 1920 entitled to any rents or profits, actual or conceptual; and under sec. 12 the land tax is to be charged "on land as owned at noon on the thirtieth day of June." Therefore, in my opinion, these beneficiaries do not satisfy the first member of the definition of

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"joint owners" (and see *Rofe* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (1)).

As for the second member of the definition, these beneficiaries have not either a life interest, or any interest greater than a life interest, "in shares of the income from the land." Even assuming that such interest as they have in the business (the profits of the business are not the profits of the land without stock, &c., and management) may be treated as including "shares of the income from the land," yet they have not a *life* interest, but an interest for twenty-one years from the death, and only if they respectively are alive at the expiration of the annual period ending 31st January in respect of which the income has arisen. Nor have they a greater interest than a life interest in shares of the income. It is true that the beneficiaries have a contingent interest in the proceeds of the realization of these station properties; for at the expiration of the twenty-one years (13th September 1926) the properties (land, stock, implements, &c.) are to be sold, and the proceeds—after payment thereout of any mortgages or moneys owing in respect of the properties—are to be divided between such of the seven children as shall be living at that time, and such of the children of the testator's children then dead as shall then be living—divided equally *per stirpes*. But on 30th June 1920, and for the purposes of the land tax for 1920-1921, the beneficiaries now living have no life interest, or greater than life interest, "in shares of the *income* from the land."

For these reasons, my opinion is that the questions asked should be answered in favour of the Commissioner, unless he is estopped by the previous decision from showing the true construction of the Act as applied to this will.

The question of estoppel was not included in the special case stated for this Full Court under sec. 46; but the case has been amended so as to include the question.

In pursuance of the *Land Tax Regulations* 1912 the trustees sent to the Commissioner a "notice of objection to assessment" on 3rd May 1919, stating their reasons for objecting as follows: "(1) that the beneficiaries named in the will of the testator . . . all of whom are relatives of the testator by blood, marriage or adoption,

(1) 28 C.L.R., 347.

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 seven 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." (These objections are incorporated in the special case, as they appear in the report in the *Commonwealth Law Reports* (1).)

Now, these objections were vital to the appeal. Under rule 40 of the *Land Tax Regulations* 1912, the objections have to be considered by the Commissioner; he decides upon them, and gives written notice of his decision to the taxpayer. The objections are to be "treated as an appeal," and have to be transmitted to the Court "as formal appeals." There was no appeal apart from the objections; and the trial Judge has on the appeal to decide as between the objections and the assessment. The formal order made on appeal (24th May 1920) by the trial Judge is as follows: "that the 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."

Inasmuch as the six deductions would be improper unless the beneficiaries were joint owners under the Act, the order necessarily involves a decision that six of them were such joint owners, and that the first reason for objection was valid. To get the deductions, two conditions had to concur—(1) the beneficiaries must be taxable as joint owners; (2) they must be holders of original shares. I confess that I am unable to see how we can avoid the principle of estoppel, although, under the circumstances, I should be glad to do so. If the appeal is allowed, the objections are allowed: for the objections constitute the appeal.

It is true that between 3rd May (objections) and 24th May (order on appeal) a special case was stated by the learned trial Judge for the Full Court, and answered on 10th May. There were two questions asked in that special case:—(1) Are the shares of the *joint owners*, or of any and which of them, in the station properties

(1) 27 C.L.R., at p. 404.

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original shares in the land within the meaning of sec. 38? (2) What number of deductions of £5,000 should the Commissioner make in the assessment of the *joint owners* of the said station properties?

The formal answers were :—"(1) The shares of the six children of the said Charles Campbell deceased surviving at the date of the assessment in the station properties referred to in the said case are original shares in the land within the meaning of sec. 38 of the . . . Act. (2) Six."

Having regard to the form of the questions asked, and to the statements in that special case, I feel no hesitation in saying that the decision thereon by the Full Court does not raise an estoppel. That special case assumes that the beneficiaries are joint owners; the Full Court was not asked whether they were joint owners. That point was left to the trial Judge; and the trial Judge made an order on the appeal which is not consistent with anything but joint ownership. Why does not the order of the trial Judge on the appeal—the objections to the assessment—estop the Commissioner now from saying that the beneficiaries are not joint owners? Either the order was made *in adversum* or with the Commissioner's consent; and, if it was made with his consent, estoppel applies against raising the same point in any proceeding based on a different cause of action (*In re South American and Mexican Co.*; *Ex parte Bank of England* (1); *Newington* v. *Levy* (2)). An omission on the part of the Commissioner or his counsel to argue the point will not prevent the estoppel, if the formal decision is clear upon the point (per *Farwell* L.J. in *Humphries* v. *Humphries* (3)). There is estoppel as to any matter "inconsistent with any traversable allegation in the former declaration" (here the former objection); "and such an issue is not the less traversable because the defendant fails to traverse either wholly or in part, whether such failure arises from neglect to comply with rules of the Court requiring notice" of special defence "to be given or *from omission properly to argue a point.*"

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of

(1) (1895) 1 Ch., 37. (2) L.R. 6 C.P., 180.
(3) (1910) 2 K.B., at pp. 534-535.

estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel"). As stated by Lord *Ellenborough* in *Outram* v. *Morewood* (1), "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." In the cases relating to *res judicata* in the former and stricter sense —a decision as to the same cause of action—it seems clear that the verdict and judgment are conclusive, not merely as to the points actually taken, but also as to points which *might* have been taken (*Henderson* v. *Henderson* (2); *Hall* v. *Levy* (3)). But in the case of what I call "issue-estoppel" it must appear that the precise issue was previously taken. In my opinion, there is nothing to prevent parties from contesting one point only, assuming other points—say, in some trumpery dispute—without forfeiting their right to contest the others for ever, however important the subject of future disputes. If the Commonwealth bring an action for a penalty under some Act, and the defendant merely disputes the meaning of the Act and its application to his conduct, and judgment be given for the Commonwealth, and if subsequently the Commonwealth bring another action against the same defendant for a like offence, the defendant would not be precluded from raising the point that the Act is unconstitutional and void (*Boyd* v. *Alabama* (4)). I hold this view even though the defence of unconstitutionality *might* have been raised in the previous action and was not, and though, logically, the penalty ought not to be enforced unless the Act be constitutional. The distinction which I make in the present case is that, on the face of the objections (and therefore of the appeal) in the previous case, the point of joint ownership under the same Act and the same will was directly and specifically taken, and the decision of the point was necessary for the success of the trustees on the appeal. If the Commissioner had been willing to *assume* joint ownership for the purpose of the previous case, without binding himself as to the point for future cases, it would have been easy to make arrangements to

(1) 3 East, at p. 355.
(2) 3 Ha., 100, at p. 115.
(3) L.R. 10 C.P., 154.
(4) 94 U.S., 645.

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that end. In par. 16 of the present special case it is stated there were no arguments as to joint ownership—that the parties treated the answers of the Full Court as covering the whole ground of the appeal, and that the learned Judge had not his attention directed to the question and did not "in fact" decide it. But this means merely that the actual decision on the objections was given without the attention of the Judge being called to what it involved. A point or an issue may be actually controverted, may be in actual controversy, in actual litigation, although it is not argued, or argued properly. A point may be in controversy although counsel may address no arguments to it, or may overlook certain aspects (*Jewsbury* v. *Mummery* (1); *Humphries* v. *Humphries* (2); *Macdougall* v. *Knight* (3)). In this case the objections still stood, and had to be decided, and they were decided. There was no withdrawal of the objections, or of either of them; if either had been withdrawn, the appeal could not have been allowed. If we are to take it that the Commissioner consented to the objection as to joint ownership being found against him, the estoppel applies; for a judgment by consent or confession operates as an estoppel as fully as a judgment based on an actual finding of the Court (*Brunsden* v. *Humphrey* (4); *In re South American and Mexican Co.*; *Ex parte Bank of England* (5); *Irish Land Commission* v. *Ryan* (6)).

I accept the position as stated by the Supreme Court of the United States in *Cromwell* v. *Sac County* (7):—"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined* in the original action; not what *might* have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." My view is that the point as to joint ownership was, by virtue of the formal objections, and from the nature of the judgment thereon, "actually litigated and determined" in the former proceedings; and that whether the judgment in its actual form was due to the

(1) L.R. 8 C.P., 56.
(2) (1910) 2 K.B., 531.
(3) 25 Q.B.D., 1.
(4) 14 Q.B.D., 141.
(5) (1895) 1 Ch., 37.
(6) (1900) 2 I.R., 565.
(7) 94 U.S., at p. 353.

Commissioner's consent or admission or to his neglect, he is bound by the finding of joint ownership which the judgment necessarily involves.

Perhaps, to avoid misapprehension, I should add that I recognize the right of parties in a second action to show by evidence on which issue judgment was given in the former action. If, for instance, an action be brought for £1 9s., "rent of a cottage," and there is judgment for the defendant in a County Court, evidence may be given that the judgment was so given because the Judge found the tenancy to be yearly (*Flitters* v. *Allfrey* (1); and see *Washington &c. Steam Packet Co.* v. *Sickles* (2)). A party can show by evidence on what issue a general verdict was given (*Ravee* v. *Farmer* (3); *Seddon* v. *Tutop* (4); *Thorpe* v. *Cooper* (5)). But, though such evidence may be given to supplement the information given by the formal judgment, it has never been held that evidence may be given to contradict the judgment, or to show that a specific issue presented to the Court, being essential to its judgment, was not sufficiently argued, or argued at all. Here, the trial Judge was bound to adjudicate on the objections of 3rd May 1920, and did so adjudicate.

For these reasons, I should answer question 3 by saying that the Commissioner is estopped.

Questions answered: (1) *Yes*; (2) *One—pursuant to sec.* 11 *of the Act*; (3) *No.*

Solicitors for the appellants, *Gillott, Moir & Ahern.*

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

B. L.

(1) L.R. 10 C.P., 29.
(2) 24 How., 333.
(3) 4 T.R., 146.
(4) 6 T.R., 607.
(5) 5 Bing., 116.