However, it should be remembered that if this was the view of Dixon and Rich JJ. in *Ex parte Nelson (No. 2)*, the contrary was maintained by Isaacs and Starke JJ., so that it is not yet possible to regard all doubts as having been resolved.[28]

I. C. F. SPRY

CAFFOOR v. INCOME TAX COMMISSIONER[1]

Estoppel—Per rem judicatum—Issue estoppel—Income tax

This case came before the Judicial Committee of Privy Council on an appeal from the Supreme Court of Ceylon. The appeal was against assessments of income tax upon the income of a trust of which the appellants were trustees.

The respondent Commissioner had made five assessments for the revenue years 1950-1951 to 1954-1955 on the income of the trust. The appellants claimed that the trust was exempted from liability to tax as being an 'institution of a public character established solely for charitable purposes' within the meaning of the Ceylon Income Tax Ordinance of 1932. This question had in fact been decided in their favour by the Board of Review, constituted under the Ordinance on an appeal by the appellants in respect of an assessment for the previous year 1949-1950. The appellants, therefore, sought to treat this decision of the Board of Review as setting up an estoppel on the question of the exemption from tax of the trust income. Their plea was rejected in turn by the Commissioner of Income Tax, the Board of Review, the Supreme Court of Ceylon and finally by the Judicial Committee of the Privy Council. The Judicial Committee held that the decision of the Board of Review did not raise an estoppel *per rem judicatum*. (They further held that, on a construction of the trust in question, it was a family trust and not a trust of a public character established solely for charitable purposes.) The trust income was, therefore, not entitled to the exemption claimed.

On the question of estoppel, the arguments before the Judicial Committee were largely concerned with the status of the Board of Review, as to whether or not it was a judicial court of competent jurisdiction determining a dispute *inter partes*. It was argued by the appellants that *res judicata* applied because the status and the functions of the Board were not merely those of an estimating authority or other administrative tribunal, but were of a judicial nature and it made final decisions subject only to the dissatisfied party's right to appeal on questions of law. The respondent argued that no question of *res judicata* arose as, until the

[28] One writer takes the view that prohibition affecting the Commonwealth alone or the States alone should be regarded as capable of raising *inter se* questions, on the basis that whether the limits are phrased by way of definition of a power or by a prohibition the same thing is involved, that is, the point of demarcation of authority between Commonwealth and States: see Z. Cowen, 'Inter Se Questions and Commonwealth Exclusive Powers' (1961) 35 *Australian Law Journal* 239.

[1] [1961] 2 W.L.R. 794; [1961] A.C. 584; [1961] 2 All E.R. 436. Judicial Committee of Privy Council; Lord Morton of Henryton, Lord Radcliffe, Lord Morris of Borth-y-Gest and the Rt. Hon. L. M. D. de Silva. The judgment of the Committee was read by Lord Radcliffe.

matter reached the Supreme Court, it was not judicial at all—the Board of Review being part of an administration of assessment, and its function was purely one of valuation.

The Judicial Committee, however, did not take this approach. In their Lordships' opinion, the question of estoppel could not be decided merely by inquiring to what extent the Board of Review exercised judicial functions:

> The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged.[2]

Their Lordships treated the decision of the Board of Review as limited to the amount of assessable income for the one year. It could not, therefore, operate as an estoppel on the amount of assessable income for other years. Lord Radcliffe, speaking for the Committee, continued:

> It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with 'eadem questio' as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel.[3]

In support of this principle their Lordships rested heavily on an earlier decision of the Privy Council: that of *Broken Hill Proprietary Co. Ltd v. Municipal Council of Broken Hill.*[4] In that case the earlier judgment in which it was sought to set up as an estoppel was one given by the High Court of Australia by way of appeal under the tax procedure. In dealing with this point, Lord Carson said:

> The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question —namely, the valuation for a different year and the liability for that year. It is not 'eadem questio' and therefore the principle of res judicata cannot apply.[5]

Their Lordships concluded that the principle of the Broken Hill decision should apply. In support of this principle they cited a number of English authorities.[6] The most important of these was a recent decision of the House of Lords in *Society of Medical Officers of Health v. Hope.*[7] In dealing with a similar problem, Lord Radcliffe (with whom Viscount Simonds and Lord Cohen concurred) observed:

> it is not in the nature of a decision given on one rate or tax that it should settle anything more than the bare issue of that one liability and that, consequently, it cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for ad-

[2] [1961] W.L.R. 794, 800. [3] *Ibid.* 801. [4] [1926] A.C. 94. [5] *Ibid.* 100.
[6] *Commissioners of Inland Revenue v. Sneath* [1932] 2 K.B. 362; *Patrick v. Lloyd* (1944) 171 L.T. 340; *Regina v. Hutchings* (1880) 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope* [1960] A.C. 551.
[7] [1960] A.C. 551.

judication. The question of this liability is a 'new question'. It is not 'eadem questio'.[8]

A decision contrary to these cases was one delivered by the Privy Council in the same year as the *Broken Hill* decision. In *Hoystead v. Commissioner of Taxation*,[9] estoppel *per rem judicatum* was successfully asserted against the taxing authority in respect of an assessment for the year 1920-1921 by reason of a decision given by the High Court of Australia relating to the year 1918-1919. However, as their Lordships pointed out, the argument that the assessment for 1920-1921 was a new subject-matter in relation to the assessment for 1918-1919 was not delivered to the Board, nor adjudicated upon by them. Their decision was devoted to considering whether there can be estoppel in respect of an issue, of law which, though fundamental to the issue, has been conceded and not argued in the earlier proceeding. Thus, their Lordships were of the opinion 'that it was impossible to treat *Hoystead's* case[10] as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment'.[11]

From the foregoing it is apparent that the conflict between *Hoystead's* case and the other decisions is due to a misunderstanding of the principles involved in the law of estoppel. As has been pointed out in the High Court on a number of occasions,[12] there are two quite distinct and different principles involved: *res judicata* and issue estoppel.[13] The two are unfortunately confused.[14] *Res judicata* arises where the same course of action between the same parties has been previously determined and passed into judgment. In order to support this plea it is necessary to show that the subject-matter in each action was the same. Issue estoppel arises when the same issue of fact as law has been judicially determined in a previous, though different, action between the same parties (or their privies).

In order to support this plea it is not necessary to show that the subject-matter was the same in each action, but merely that the issue was the same.[15] It is clear that a party may rely on a plea of issue estoppel where a plea of *res judicata* could never be established[16]—when the issue is the same but the course of action is different in each case.

Thus, while it may be perfectly correct to say that there cannot be

[8] *Ibid.* 562. [9] [1926] A.C. 155. [10] *Ibid.* [11] [1961] A.C. 584, 600.

[12] *Hoystead v. Commissioner of Taxation* (1920) 29 C.L.R. 537, 560-561 (reported in the Commonwealth Law Reports as *Hoysted v. Commissioner of Taxation*); *Jackson v. Goldsmith* (1950) 81 C.L.R. 446, 466; *Brewer v. Brewer* (1953) 88 C.L.R. 1, 14; *Blair v. Curran* (1939) 62 C.L.R. 464, 531-532.

[13] This term seems to have been first used by Higgins J. in *Hoystead v. Commissioner of Taxation* (1920) 29 C.L.R. 537, 561. It was later adopted by Dixon J. in *Blair v. Curran* (1939) 62 C.L.R. 464, 532.

[14] Confusion led to harm in *Johnson v. Cartledge and Matthews* (1939) 3 All E.R. 654. See Fullagar, 'Legal Terminology' (1957) 1 *M.U.L.R.* 1, 7.

[15] See rule stated by Lord Ellenborough in *Outram v. Morewood* (1803) 3 East 346, 355; also *Flitters v. Allfrey* (1874) L.R. 10 C.P. 29; *Barro v. Jackson* (1845) 1 Ph. 582; *Re Graydon* [1896] 1 Q.B. 417; *Cooke v. Rickman* [1911] 2 K.B. 1125; *Marginson v. Blackburn Borough Council* [1939] 2 K.B. 426.

[16] *Halsbury's Laws of England* (3rd ed., 1956) xv, 182.

estoppel *per rem judicatum* in respect of successive years of tax assessment, it is not necessarily correct to say that there cannot be issue estoppel. In the present case it is true that there is no estoppel *per rem judicatum* as the decision of the Board of Review related to a different subject-matter, namely the amount of assessable income for one year. But there may be issue estoppel in respect of the issue that was decided by the Board of Review—that the trust income was exempt from liability to tax on the ground that it was a trust of a public character established solely for charitable purposes. This point was not taken in the present case and it is submitted that, had it been taken, the result may well have been different. Whether there would be issue estoppel in this case would then depend on whether the Board of Review could be regarded as a judicial court of competent jurisdiction and whether the dispute that was determined by the Board could properly be regarded as a *lis inter partes*.[17]

Issue estoppel is not recognized in England as a distinct and different principle from that of *res judicata*. As a consequence all the authorities[18] that were relied upon by the Privy Council in the present case were solely devoted to the question of whether there could be an estoppel *per rem judicatum*. The distinction was clearly recognized by the High Court of Australia in *Hoystead's* case. In the joint majority judgment, Knox C.J. and Starke J. expressly held that the principle of *res judicata* did not apply as 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 later year and is based upon a new assessment.[19]

They found, however, that the plea of issue estoppel was established.[20] Higgins J., who dissented, was 'fully aware' of the distinction between issue estoppel and *res judicata*.[21] It is clear that the High Court regarded that case as one of issue estoppel. When this case went on appeal to the Privy Council this matter was not argued—the sole question being whether estoppel extended to issues assumed and not argued, though fundamental to the decision. It is therefore submitted that *Hoystead's* case was not truly one of *res judicata* but of issue estoppel, and the decision can be justified on that basis.

The basic principle behind estoppel is that it puts an end to litigation. It is especially important in the field of tax and rate assessments, as it would cause great inconvenience to parties to allow the question of liability or non-liability for tax on successive annual amounts to be

[17] *Commissioners of Inland Revenue v. Sneath* [1932] 2 K.B. 362, 380, 386, 390.

[18] *Broken Hill Proprietary Co. Ltd v. Broken Hill Municipal Council* [1926] A.C. 94; *Commissioners of Inland Revenue v. Sneath* [1932] 2 K.B. 362; *Patrick v. Lloyd* (1944) 171 L.T. 340; *Regina v. Hutchings* (1880) 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope* [1960] A.C. 551.

[19] (1920) 29 C.L.R. 537, 552.

[20] Both thought the rule was as stated by Lord Ellenborough in *Outram v. Morewood* (1803) 3 East 346, 355.

[21] (1920) 29 C.L.R. 537, 560-563.

challenged every year. A body of competent jurisdiction should have sufficient jurisdiction to settle permanently questions of law and fact between the parties themselves, subject only to the normal rights of appeal.

D. J. BEATTIE

SYKES v. DIRECTOR OF PUBLIC PROSECUTIONS[1]

Criminal law—Misprision of felony—Existence and essence of the offence

Firearms were stolen from an Air Force camp by persons hoping to sell them to the Irish Republican Army. Sykes was charged with four others as being an accessory after the fact to the felony of receiving. Sykes was alleged to have introduced a member of the Army to these other four accused. All five were committed for trial. In preparing the indictment, the charge of misprision of felony (in that, knowing that others had received stolen firearms, he unlawfully concealed the commission of the offence) was substituted for that of being an accessory. Sykes was convicted and sentenced to five years imprisonment. He applied for leave to appeal against both conviction and sentence. The Court of Criminal Appeal refused him leave to appeal against conviction, but granted leave to appeal against sentence. When this appeal was heard, it was found that he did not need leave to appeal against conviction, since he had a right of appeal on a point of law. The Court of Criminal Appeal therefore treated his application for leave as a final appeal against conviction which had been dismissed, and gave him leave to appeal to the House of Lords on two points:

(i) Whether there is such an offence as misprision of felony.

(ii) Whether active concealment of the knowledge is an essential ingredient of the offence.[2]

The sentence was reduced by the Court of Criminal Appeal to such a period as would enable Sykes to be released the next day. The later appeal to the House of Lords was dismissed.

The case is the culmination of a series of cases in the last twenty years, in which a charge of misprision of felony has been included in the indictment. In 1866 Lord Westbury said that the charge of misprision of felony had 'passed into desuetude',[3] but in the post-War period the charge has been revived. In England, charges of misprision were included in *Rex v. Aberg*[4] and in *Regina v. Wilde*.[5] In Australia, *The Queen v. Crimmins*[6] and *The Queen v. Hosking*[7] were cases in which the sole charge was misprision of felony. In these cases some doubts were expressed as to

[1] [1961] 3 W.L.R. 371; [1961] 3 All E.R. 33. House of Lords; Lord Denning, Lord Goddard, Lord Morton of Henryton, Lord Morris of Borth-y-Gest and Lord Guest.

[2] [1961] 3 W.L.R. 371, 376.

[3] (1866) L.R. 1 H.L. 200, 220.

[4] [1948] 2 K.B. 173; [1948] 1 All E.R. 601.

[5] Noted in [1960] *Criminal Law Review* 116; see also other cases cited by Lord Denning [1961] 3 W.L.R. 371, 383.

[6] [1959] V.R. 270; noted: [1959] 2 *M.U.L.R.* 261.

[7] Noted in [1955] *Criminal Law Review* 291; a decision of Stephen J. in the Court of Quarter Sessions of New South Wales.