1974 CarswellNat 375
Supreme Court of Canada

Angle v. Minister of National Revenue

1974 CarswellNat 375F, 1974 CarswellNat 375, [1974] S.C.J. No. 95,
[1975] 2 S.C.R. 248, 28 D.T.C. 6278, 2 N.R. 397, 47 D.L.R. (3d) 544

Ethel Annabelle Angle, Appellant and Minister of National Revenue, Respondent

Martland, Judson, Spence, Laskin and Dickson JJ.

Heard: November 7, 1973
Judgment: May 27, 1974

Proceedings: On appeal from the Exchequer Court of Canada

Counsel: *C.C. Sturrock*, for the appellant.
N.A. Chalmers, Q.C., and *G.O. Eggertson*, for the respondent.

Subject: Income Tax (Federal); Insolvency; Family

Headnote

Income tax --- Administration and enforcement — Practice and procedure on appeals — Res judicata
Income tax --- Administration and enforcement of Act — Offences
Issue estoppel — Minister of National Revenue levying writ of extent against appellant alleging latter's indebtedness to a corporation in turn indebted to taxpayer in arrears in payment of taxes owing to Minister — Appellant moving to set aside writ on ground that question of her indebtedness to corporation decided in earlier decision of Exchequer Court and hence res judicata — Exchequer Court's judgment limited to finding that corporation conferred taxable benefit on appellant — Finding not incompatible with and making no reference to appellant's alleged indebtedness to corporation — Minister accordingly not estopped by doctrine of res judicata from putting appellant's indebtedness in issue — Appellant's motion dismissed.

The judgment of Martland, Judson and Dickson JJ. was delivered by *Dickson J.*:

1 In early 1966 Mrs. Angle caused Transworld Explorations Limited, a company of which she was president and controlling shareholder, to construct at the expense of the company, an indoor swimming pool, sauna bath, mineral bath, barbecue, bar, fireplace, sitting room and office at the rear of property owned by her on Stevens Drive in West Vancouver, British Columbia. The then s. 8(1) (*c*) of the *Income Tax Act* provided that where a benefit or advantage was conferred on a shareholder by a corporation the amount or value would be included in computing the income of the shareholder and, acting under the section, the taxing authorities added to Mrs. Angle's income for the years 1966 and 1967 a total of $52,243.58 for benefits from construction of the pool house and $5,995.82 for furniture and fixtures. Mrs. Angle appealed the assessment. The appeal was heard by Sheppard D.J. in the Exchequer Court of Canada [1] and judgment was delivered on November 17, 1969. The judge defined what he referred to as the basic issues in these words:

> That the pool house (i) was received by the appellant as lessor not as "shareholder" within Section 8(1)(c), (ii) was paid for by the appellant and therefore was not "a benefit or advantage" (iii) or in any event was a benefit received only on expiration of a lease, therefore not in 1966 or 1967 but in 1968.

The short facts and the manner in which the judge disposed of each of the issues follow:

> (i) On November 1, 1966, six months after the foundations of the pool house were built and after receiving advice that the value of the pool house might be added to her income, Mrs. Angle purported to lease to Transworld the whole of her lot on

Stevens Drive for a term of five years at a rental of one dollar per year. A year later, on November 27, 1967, after the pool house had been constructed, a second lease was entered into whereby she purported to lease the property to Transworld for a term of one year at a rental of $6,000 payable $500 per month. The judge held that the pool house was not received by Mrs. Angle as lessor because it was let into the soil: that is, construction was begun before there was any lease; the leases did not operate to divest Mrs. Angle of the pool house vested in her as owner of the freehold and accordingly the benefit was not received by her as lessor but as owner.

(ii) The scheme by which it was sought to create the impression that Mrs. Angle had paid for the pool house took this form. Her husband arranged for the Toronto-Dominion Bank to loan her $50,000 on December 27, 1967. The proceeds of the loan were deposited to the credit of Transworld but, as the money was assigned to the bank as security for the loan, it could not be withdrawn by Transworld until the loan was paid. In February 1968 Mr. Angle gave Mrs. Angle a cheque for $50,000 drawn on the Transworld account and signed by him as agent for the company with which she repaid the bank loan. The judge rightly concluded that this trumpery did not amount to payment for the pool house.

(iii) The judge rejected Mrs. Angle's contention that no benefit would vest in her until the expiration of the lease, holding that the benefit vested not by virtue of an assignment or conveyance by the lessee, but by virtue of Mrs. Angle being the owner of the freehold on which the building was erected. In the result the judge dismissed the appeal and confirmed the assessment except as to furniture and fixtures.

2 Some time after the proceedings in the Exchequer Court, the Minister of National Revenue sought to collect arrears of taxes amounting to $40,266.71 from a company, Kansas City Traders Ltd., and obtained a Writ of Extent ordering the sheriff of the County of Vancouver to extend and seize the assets of that company in the amount of the arrears. There being small prospect of collecting directly from Kansas City Traders, the Minister obtained *ex parte* an order for the issuance of a Writ of Extent in the Second Degree against Transworld in the amount of $40,266.71, Transworld being indebted to Kansas City Traders; a Writ in the Third Degree against Mrs. Angle in the amount of $34,612.33, on the allegation that Mrs. Angle was indebted to Transworld in this sum; a Writ of Extent in the Fourth Degree against Mr. and Mrs. Adolf Franz Bauer, purchasers in 1968 of the Stevens Drive property from Mrs. Angle; and a Writ of Extent in the Fifth Degree against the legal firm which acted for Mrs. Angle on the sale. A motion was brought before Sheppard D.J. to set aside the writs issued against Mrs. Angle, against Mr. and Mrs. Bauer and against the legal firm. As a result, the writs against Mr. and Mrs. Bauer and against the legal firm were set aside but the writ against Mrs. Angle allowed to stand. An appeal has now been taken to this Court on behalf of Mrs. Angle, the main ground being that the judgment of the Exchequer Court rendered the matter of Mrs. Angle's alleged indebtedness to Transworld *res judicata*.

3 In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [2], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(*c*) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [3], at p. 561:

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 estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [4], at p. 935, defined the requirements of issue estoppel as:

> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies....

Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case* [5], quoted by Lord Selborne L.J. in *R. v. Hutchings* [6], at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope* [7]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *per* Lord Shaw in *Hoystead v. Commissioner of Taxation* [8]. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.* [9], at p. 301, set forth in these words the nature of the enquiry which must be made:

> ...whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.

4 The claim in the present proceedings that Mrs. Angle is indebted to Transworld in the amount of $34,612.33 is founded upon a sworn statement of Mrs. Angle, during her examination for discovery in the tax proceedings, that she owed Transworld a balance of $34,000, being $50,000 less a credit for shares transferred by her to Transworld. The Transworld balance sheet as at January 31, 1969 confirmed her evidence. It showed $34,612.33 to be "Due from shareholder".

5 In my opinion the question to be decided in these proceedings is not the same question as was decided in the earlier proceedings. The primary question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment and in order to determine that issue it was necessary to consider several subsidiary issues raised by Mrs. Angle in support of her appeal. I have quoted the judge's statement of those issues and in effect they were (i) that the pool house was received by her as a lessor and not as a shareholder or (ii) alternatively, that she had paid for the pool house through the $50,000 bank loan. A submission that she was still indebted for the pool house would have been impossible to reconcile with her contention that the pool house had been paid for.

6 A finding of no liability by Mrs. Angle to Transworld was not legally indispensable to the judgment on the income tax appeal or a necessary finding to support that judgment. A tax assessment in respect of a benefit or advantage received is not inconsistent with an obligation to pay for the benefit or advantage where, for example, there is no apparent intention to honour the obligation. The decision that a taxable benefit has been received can stand in an appropriate case with an alleged obligation to pay for that benefit. See *Curlett v. Minister of National Revenue* [10]; and *R.* v. *Poynton* [11]. In these proceedings the Minister is claiming from Mrs. Angle payment of indebtedness to Transworld. If Transworld or its shareholders were suing Mrs. Angle for recovery of corporate funds expended on the construction of the pool house, the s. 8(1)(*c*) proceedings in the Exchequer Court would afford her no defence. It is true that one of the leases contained a clause whereby Transworld purported to surrender to Mrs. Angle all its interest in the improvements for $49,768.51 and when the lease was struck down this clause suffered a similar fate. But that was not, and was not tantamount to, a finding that Mrs. Angle was not indebted to Transworld. Transworld was not a party to the proceedings and the Exchequer Court did not have jurisdiction to make such a finding.

7 As long ago as 1893, Lord Hobhouse said in the Privy Council in *Attorney General for Trinidad and Tobago v. Eriché* [12], at p. 522:

> It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case*, Sm. L.C. vol. ii. p. 642, which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally

into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive.

The question not being *eadem questio*, I am of the opinion that this is not a case for application of the principle of issue estoppel.

8 Two collateral points were taken on behalf of Mrs. Angle. First, that there was no evidence upon the *ex parte* application for the issuance of the writs of extent as to how the alleged debt from Transworld to Kansas City Traders Ltd. arose or, if there was a debt, that it was payable. No objection was taken in the Court below to the writs of extent issued against Kansas City Traders Ltd. or against Transworld. Transworld has not challenged the writ against it, and it is not open to Mrs. Angle to do so at this time. Second, that even if Mrs. Angle was indebted to Transworld, there was no evidence she was indebted after January 31, 1969 and more particularly at the time of the application for the writs of extent, October 30, 1970. On discovery October 6, 1969 Mrs. Angle said she was indebted to Transworld. The books of account and records of Transworld were taken out of the country by Mrs. Angle and her husband on leaving Canada in 1968 to reside in Las Vegas, Nevada and Mrs. Angle has since refused to produce those books and records. It is not alleged and there is no evidence to suggest that since October 6, 1969 she paid Transworld the amount of her debt to that company. There is an affidavit of a Las Vegas chartered accountant stating that the decision of the Exchequer Court eliminated the character of the indebteness of $34,612.33 as a debt or loan, and a similar affidavit of a Vancouver solicitor, but as I have indicated, I am of the opinion that the decision of the Exchequer Court did not have any such effect.

9 I would accordingly dismiss the appeal with costs.

The judgment of Spence and Laskin JJ. was delivered by *Laskin J.* (*dissenting*):

10 This appeal concerns the propriety of a writ of extent in the third degree issued against the appellant at the instance of the respondent Minister. On the motion to set aside the writ, the sufficiency of the material upon which the *ex parte* application for the writ was made was challenged. Beyond that, it was contended that the basic foundation for the writ, an alleged debt owing to the second degree debtor who in turn was indebted to the first degree debtor from whom the Minister claimed unpaid income taxes, could not be asserted by the Minister because of the preclusive effect of *res judicata*. I am of the opinion that the more appropriate preclusive principle in this case is issue estoppel and that the appellant is entitled to succeed on that ground. I find it unnecessary therefore to deal with the alleged deficiency of supporting material for the issue of the writ of extent against the appellant.

11 On October 3, 1968, a writ of extent was issued against Kansas City Traders Ltd. for the recovery out of its assets of $103,395.03 for unpaid taxes. By October, 1970, the amount of its indebtedness had been reduced to $40,266.71. On October 30, 1970, a successful application was made by the Minister for the issue of writs of extent in the second, third, fourth and fifth degrees against, respectively, Transworld Exploration Ltd., in the amount of $40,266.71 as being indebted to Kansas City in the amount of $44,707.70; the appellant, in the amount of $34,612.33, as being the amount of a debt owing by her to Transworld; and a firm of lawyers who acted for the appellant and were assignees of an agreement of sale of her house and the purchasers of the house under the agreement for sale, also in the amount of $34,612.33. On motion to set aside the writs of extent in the third, fourth and fifth degrees, the motion succeeded as to the firm of lawyers and as to the purchasers of the house, but was dismissed as to the appellant.

12 The *ex parte* application for the writs of extent herein and the motion to set them aside were heard by Deputy Judge F.A. Sheppard of the Exchequer Court. He had also presided at the appeal of the appellant herein against a tax assessment which involved adding to her taxable income for the years 1966 and 1967 the value of a "benefit", being a pool house constructed at the rear of her residence by Transworld. At that time the appellant was the principal shareholder and president of Transworld; and, despite her central contention that she was indebted to Transworld for the cost of the pool house, she was unable to persuade Sheppard J. that the Minister was wrong in assessing her for it as a benefit under the then s. 8(1)(*c*) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended. Judgment against the appellant was given in reasons delivered on November 17, 1969, long before the application for a writ of extent against her: see *Angle v. Minister of National Revenue* [13] . It is under this judgment that issue estoppel arises.

13 On the motion to set aside the writs of extent, Sheppard J. refused to consider his reasons for judgment in the appellant's tax appeal, speaking on this point as follows:

> There was no proof of the reasons for judgment nor that the alleged benefit or advantage within the reasons was the alleged indebtedness of Mrs. Angle to Transworld. For Mrs. Angle, it was contended that as the same judge was hearing the motion who had determined the judgment ... therefore judicial notice could be taken of the judgment. The judgment is not a fact of which judicial notice may be taken.

There are occasions when insistence on excessive technicality (especially when the Crown or a Minister of the Crown in his official capacity is involved) gives credence to Mr. Bumble's well-known remonstrance in Dickens' "*Oliver Twist*." In this Court, leave was given to refer to the reasons in the tax judgment and, that done, counsel for the appellant and for the Minister agreed to the obvious, namely, that the pool house which gave rise to the "benefit" was also the foundation of the debt allegedly owing by the appellant to Transworld. I turn, therefore, to consider what was determined in the tax appeal and why it gives rise to issue estoppel in the present proceeding.

14 In adding $51,482.26 to the appellant's income for 1966 and another $4,912.94 for 1967, as benefits from the construction of the pool house by Transworld, the Minister invoked s. 8(1)(*c*). His position was upheld by Sheppard J., save for the deduction of $4,151.62 from the additional reassessment for 1966, representing the value of some furniture and fixtures. It is desirable to set out s. 8(1) and (2) in whole, and those provisions are as follows:

> *8.* (1) Where, in a taxation year,
>
> (a) a payment has been made by a corporation to a shareholder otherwise than pursuant to a bona fide business transaction,
>
> (b) funds or property of a corporation having been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or
>
> (c) a benefit or advantage has been conferred on a shareholder by a corporation,
>
> otherwise than
>
> (i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,
>
> (ii) by payment of a stock dividend, or
>
> (iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein
>
> the amount or value thereof shall be included in computing the income of the shareholder for the year.
>
> *8.* (2) Where a corporation has, in a taxation year, made a loan to a shareholder, the amount thereof shall be deemed to have been received by the shareholder as a dividend in the year unless
>
> (a) the loan was made
>
> (i) in the ordinary course of its business and the lending of money was part of its ordinary business,
>
> (ii) to an officer or servant of the corporation to enable or assist him to purchase or erect a dwelling house for his own occupation,

(iii) to an officer or servant of the corporation to enable or assist him to purchase from the corporation fully paid shares of the corporation to be held by him for his own benefit, or

(iv) to an officer or servant of the corporation to enable or assist him to purchase an automobile to be used by him in the performance of the duties of his office or employment,

and bona fide arrangements were made at the time the loan was made for repayment thereof within a reasonable time, or

(b) the loan was repaid within one year from the end of the taxation year of the corporation in which it was made and it is established, by subsequent events or otherwise, that the repayment was not made as part of a series of loans and repayments.

15 Appellant contested the reassessment of her income on the ground that she did not obtain the pool house as a shareholder but as a lessor, that she was genuinely indebted to Transworld for it and that if there was any benefit it was received at the expiry of an alleged lease in 1968. None of these contentions was made out, and appellant's counsel said in this Court that it could be taken that Mrs. Angle did not expect to have to pay for the pool house. Although her attempted evasion of tax liability through a leasing scheme was exposed as a sham this does not make her contention in the present proceeding unsupportable. It is the Minister and not Mrs. Angle who is taking an inconsistent position in the light of what was decided in the tax appeal.

16 The appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, it is not *res judicata* in its cause of action sense upon which the appellant can rely. Issue estoppel is what she must stand on and, as a principle, it is nothing new either in this Court or in the Courts of sister jurisdictions like the United Kingdom, Australia and the United States: see *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (*No. 2*) [14] ; *Thoday v. Thoday* [15] ; *Blair v. Curran* [16] ; Note, *Collateral Estoppel by Judgment*, (1952), 52 Col. L. Rev. 647.

17 There is no mystery as to what was decided in the tax appeal, *Angle v. Minister of National Revenue, supra*. An alleged lease to Transworld of the appelant's residential property (including the pool house) and an associated loan arrangement relating to a release by Transworld of its interest in the pool house for the sum of approximately $50,000 were both held to be ineffective. The associated loan was a circular arrangement which resulted in Transworld paying off the loan to itself; and for good measure Sheppard J. held that there could be no obligation of the appellant to pay the $50,000 because it was conditional upon the surrender by Transworld of its rights in the pool house and it had none because title had already vested in the appellant as owner of the freehold. Thus, it was that the value of the pool house was taxable as a "benefit" under s. 8(1)(*c*).

18 On what basis then does the Minister contend that there is a debt owing to Transworld by the appellant for the pool house in the sum of $34,612.33? This sum represents the balance after a credit of $15,000 allowed against the total cost as being the value of certain shares in another company transferred by the appellant to Transworld. However, the appellant, in the same tax appeal in which the value of the pool house was assessed against her as a benefit, was also charged with a profit of $12,750 on the transfer of the shares. Transworld's balance sheet as of January 31, 1969 shows $34,612.33 as due from the appellant, with a note that "[it] represents a forced debit balance by the Vancouver District Taxation Office, by it escrowing cash on sale of [appellant's] house...". Notwithstanding Sheppard J.'s characterization of the value of the pool house on the tax appeal as a s. 8(1)(*c*) benefit, the Minister now says that he can still urge the $34,612.33 to be a debt because (1) the appellant admitted it to be a debt on her examination for discovery in the tax appeal proceedings; and (2) it is still owing as between Transworld and the appellant; and (3), in any event the value of the pool house can be at the same time both a benefit and a debt or a loan.

19 Appellant's assertion on her examination for discovery that the cost of construction of the pool house was a debt owing by her to Transworld was part of her case against the Minister's reassessment which was based by him on s. 8(1)(*c*). Sheppard J. rejected this construction of the pool house transaction and affirmed the Minister's position. For the Minister now to insist on the existence and validity of the debt, as if the assertion on discovery was a disembodied proposition, is unacceptable reprobation and

approbation. Nor is his position any better in alleging that there is an outstanding debt as between the appellant and Transworld and that he is entitled to act on that fact in the writ of extent proceedings despite the determination made by Sheppard J. in the tax appeal. I propose to deal with this contention in the light of the authorities and of principle in respect of issue estoppel.

20 The Minister's position in law is founded on *res judicata* in its traditional cause of action sense. In tax matters, this was a position which rejected *res judicata* as an answer to tax liability for a particular year although the taxpayer had successfully challenged liability on the same ground in a previous year: see *Caffoor v. Income Tax Commissioner* [17] . Long before this case, the High Court of Australia had recognized that there may be issue estoppel where *res judicata* in its cause of action or subject matter sense would not be open: See *Hoysted* (*or Hoystead*) *v. Commissioner of Taxation* [18] . Both the majority and dissenting opinions appreciated the distinction, and the reversal of the majority judgment by the Privy Council did not disavow it: see [1926] A.C. 155. Indeed, the Judicial Committee expressly approved the dissenting reasons of Higgins J. who had held that the tax commissioners were estopped by reason of a previous judgment of the High Court of Australia between the same parties relating to an earlier assessment, a judgment which, the Privy Council said (at p. 171) "was not merely incidental or collateral to the question [in issue, but] was fundamental to it". However, the Privy Council, at about the same time, but constituted differently as to the entire Board, took the *res judicata* subject matter approach in *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council* [19] ; and it was this case, and a later one in the House of Lords, *Society of Medical Officers of Health v. Hope* [20] , that the Privy Council followed in *Caffoor*.

21 It acknowledged that the *Hoystead* case was not consistent with the authorities relied on in *Caffoor* and explained it as not having been argued on the principle of the *Broken Hill* case, namely, that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year. Rather, said Lord Radcliffe, referring in *Caffoor* at p. 601, to the *Hoystead* case:

> ...the attention of the Board was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel *per rem judicatam* in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Assuming, as is indicated in *Caffoor*, that the principles applied in the tax assessment cases "form a somewhat anomalous branch of the general law of estoppel *per rem judicatam* and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered" (see [1961] A.C. at pp. 599-600), the present case does not involve successive tax assessments against the appellant and hence cannot rest on the indicated anomaly. Moreover, so far as English cases are concerned, it seems to me that what was said on issue estoppel in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (No. 2) [21] , makes it unlikely that any anomalous rule, such as that upon which *Caffoor* appeared to be based, retains any survival value. At any rate, I would reject the introduction of such an anomaly into the law of Canada.

22 I cannot fail to note that none of the Law Lords in the *Carl Zeiss* case examined either *Caffoor* or *Broken Hill*, and only Lord Reid mentioned *Hoystead* and then only on the question whether issue estoppel applies equally to a point of assumption or admission as to a point fully litigated. In the present case, there was full litigation, to finality, of the issue and characterization of the value of the pool house, and hence the doubtful point in issue estoppel arising from what was said in the *Hoystead* case does not arise here.

23 The basis of issue estoppel as well as a cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.* [22] , at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (*Carl Zeiss* case, per Lord Upjohm at p. 946, per Lord Guest at p. 933); that is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and ... the right of the individual to be protected from vexatious multiplication of suits and prosecutions ..." (Spencer-Bower and Turner, *Res Judicata*, (2nd ed. 1969), p. 10). Although, as Lord Reid said in the *Carl Zeiss* case, at p. 913, "issue estoppel may be a comparatively new phrase" (and is also known, especially

in American decisions and writings, as collateral estoppel or issue proclusion), as a principle it goes back almost two hundred years in English case law to the *Duchess of Kingston's* Case[23]. It has been recognized as well in Canadian case law as the following statement by Middleton J.A. in *McIntosh v. Parent*[24], at p. 555, attests:

> When a question is litigated the judgment of the Court is a final determination between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or as an answer to a claim set up cannot be retried in a subsequent suit between the same parties or their privies though for a different cause of action. The right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains ...

24 Issue estoppel has been recognized in this country and in this Court in criminal cases (see, for example, *Wright, McDermott and Feeley v. The Queen*[25], and it is no less applicable in civil matters. Nor is the application of that principle in any way affected because it is directed against a Minister of the Crown: see *Fonseca v. Attorney General of Canada*[26], at p. 619. I see no reason to introduce any anomalies or exceptions to its general application if the facts call for it. The remaining question here then is whether the facts as between the appellant and the Minister bring issue estoppel into play.

25 The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant. There are two related points here which call for comment. First, the Minister founded his claim against the appellant upon s. 8(1)(*c*) and not upon s. 8(1)(*a*) or (*b*) or s. 8(2). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by Sheppard J. as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot, in my view, be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice. There were, arguably, "funds or property" within s. 8(1)(*b*) or "a benefit or advantage" within s. 8(1)(*c*) conferred upon the appellant by Transworld, and the Minister chose to make his case under s. 8(1)(*c*). The logic of his present position would equally warrant him in claiming that a debt exists under s. 8(1)(*b*) which could be the subject of a writ of extent. If the Minister had succeeded in making his case in the tax appeal under s. 8(2), it would have been on the basis that there had been a loan which did not come within any of the exceptions to taxability. That, however, was not how the Minister chose to characterize the value of the pool house, and, clearly, on the facts there was no basis for contending that there had been a loan, giving rise in that aspect to a debt.

26 Even on the assumption that as between Transworld and the appellant a debt had arisen at the time, I do not think that the Minister can urge this against the appellant in the present case. There are two affidavits in the record of this case, by a chartered accountant and by a solicitor respectively, which state and explain why the sum of $34,612.33 was written off as an indebtedness as of January 31, 1970. It is immaterial whether these affidavits, upon which there was no cross-examination, be taken at face value. At worst, they underline the position taken by the Minister against the appellant in the tax appeal. Where issue estoppel is concerned I do not think that there is any warrant for invoking a *jus tertii*. Moreover, to do so in the present case would be to rely, in another form, on the same rejected view of the transaction that the Minister has asserted with respect to the appellant's admission on her examination for discovery in the tax appeal. The matter in issue is one between parties or their privies, and here this means only the Minister and the appellant.

27 I would, accordingly, allow the appeal and vary the order of Sheppard J. by directing that the writ of extent in the third degree against the appellant be set aside. She is entitled to her costs in this Court and also in the Exchequer Court in respect of the writ of extent against her.

Appeal dismissed with costs, Spence and Laskin JJ. dissenting.

Solicitors of record:
Solicitor for the appellant: *C.C. Sturrock*, Vancouver.
Solicitor for the respondent: *N.D. Mullins*, Vancouver.

Footnotes

1 [1969] C.T.C. 624.

2 [1964] P. 181.

3 (1921), 29 C.L.R. 537.

4 [1967] 1 A.C. 853.

5 (1776), 20 St. Tr. 355, 538n.

6 (1881), 6 Q.B.D. 300.

7 [1960] A.C. 551.

8 [1926] .C. 155.

9 [1970] 3 All. E.R. 295.

10 [1961] Ex. C.R. 427, affd. 62 D.T.C. 1320.

11 [1972] 3 O.R. 727.

12 [1893] A.C. 518.

13 [1969] C.T.C. 624.

14 [1967] 1 A.C. 853.

15 [1964] P. 181.

16 (1939), 62 C.L.R. 464.

17 [1961] A.C. 584.

18 (1921), 29 C.L.R. 537.

19 [1926] A.C. 94.

20 [1960] A.C. 551.

21 [1967] 1 A.C. 853.

22 [1939] A.C. 1.

23 (1776), 20 St. Tr. 355.

24 (1924), 55 O.L.R. 552.

25 [1963] S.C.R. 539.

26 (1889), 17 S.C.R. 612.

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