[HIGH COURT OF AUSTRALIA.]

JACKSON . . . . . APPELLANT;
DEFENDANT,

AND

GOLDSMITH . . . . . RESPONDENT.
THIRD PARTY,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 24, 26, 27.

BRISBANE, *June* 23.

Latham C.J., McTiernan, Williams, Webb and Fullagar JJ.

Tort—Third party—Contribution or indemnity—Action by plaintiff against defendant for damages for personal injury—Joinder of third party—Prior action in District Court arising out of same accident—Action by third party against defendant for damages for negligence—Contributory negligence—Judgment for third party—Res judicata—Issue estoppel—Practice—Law Reform (Miscellaneous Provisions) Act 1946 (*N.S.W.*) (*No.* 33 *of* 1946), *s.* 5 (1) (c).

W. brought an action in the Supreme Court of New South Wales against J. for damages for personal injury arising out of a collision between J.'s motor cycle, on which he was a passenger, and a car owned and driven by one G. Prior to this action G. had brought an action in the District Court against J. for damage to his car, alleging that the damage was caused by J.'s negligence, and recovered a verdict. In the Supreme Court proceedings, J. joined G. as a third party alleging that G. by negligence had materially contributed to the collision and claimed under the *Law Reform (Miscellaneous Provisions) Act* 1946 (N.S.W.) to be entitled to recover either contribution or a complete indemnity from him in respect of any verdict which W. might recover. In a plea, G. alleged, *inter alia*, that (i) the District Court found that he was not guilty of any contributory negligence and that J. was guilty of negligence which caused damage to him; and (ii) that the present cause of action was the same as that which he claimed against J. in the District Court and that the negligence alleged against him by J. was the same supposed negligence which J. alleged against him in the District Court. J. demurred to the plea.

Held, by *Latham* C.J., *McTiernan*, *Williams* and *Webb* JJ., that the proceedings in the District Court did not determine whether there was any

breach by G. of a duty which he owed to W., therefore the decision in that court did not estop J. from alleging that G. was guilty of a breach of duty which he owed to W.

Per Fullagar J. (dissenting): The plea should be taken to mean (1) that the proceedings in the District Court determined an issue of fact as between G. & J., viz., the issue whether G. had at the time and place in question exercised reasonable care in driving his motor car, (2) that that issue was raised again upon the third party claim by J. against G., and (3) that there was an estoppel as to that issue. This was a good plea. The fact that the causes of action in the two cases were not the same was irrelevant.

Res judicata and issue estoppel, discussed.

Decision of the Supreme Court of New South Wales (Full Court): *White* v. *Jackson*; *Goldsmith* (*Third Party*), (1949) 67 W.N. (N.S.W.) 49, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales Roger Bede Douglas White sued Alfred Albert Jackson for the sum of £3,000 as damages alleged to have been sustained by him by reason of the negligence of the defendant.

It was pleaded in the declaration that the defendant so negligently and unskilfully managed and controlled a motor cycle on which the plaintiff with the defendant's knowledge and consent was a passenger on a public highway that he caused it to collide with a motor vehicle then using that highway whereby the plaintiff was knocked down and injured and was for a long time unable to work and lost moneys he might otherwise have earned and was otherwise damnified.

The defendant pleaded not guilty and under s. 5 (1) (*c*) of the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946 (N.S.W.) joined Vernon Lance Goldsmith as third party. He alleged in his declaration that Goldsmith so negligently, carelessly and improperly drove and managed a motor car upon a public highway that it was forced and driven against and collided with a motor cycle then being driven by Jackson whereby White who was then being carried as a pillion passenger upon the motor cycle was thrown to the roadway and was wounded and injured and thereafter White as plaintiff in this action sued Jackson as defendant herein seeking to recover damages from him for the injuries suffered by White and for moneys lost by reason of being unable to work and expenses incurred, and Jackson as defendant aforesaid claimed in accordance with the statute in such case made and provided to be entitled to contribution or complete indemnity from Goldsmith as Third Party in respect of any sum which the plaintiff might

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recover in this action against him to the extent of such amount as might be found by the court to be just and equitable having regard to Goldsmith's responsibility for those damages.

To that declaration Goldsmith pleaded the general issue and also a second plea in the following terms:—" And for a second plea the Third Party says that the Defendant ought not to be admitted to say that the Defendant is entitled to contribution or complete indemnity from the Third Party in respect of any sum which the Plaintiff may recover in this action against him because he says that before this suit the now Third Party as Plaintiff in the District Court of the Metropolitan District holden at Sydney then being a Court duly constituted and holden under the statutes relating to District Courts and then having jurisdiction to hear and determine the plaint hereinafter mentioned levied a plaint against the now Defendant for recovery of damages from the said Defendant and gave particulars of his claim against the said Defendant as follows that is to say that before and at the time of the committing of the grievances hereinafter alleged and at all material times the Plaintiff was driving his motor vehicle upon a public highway whereupon the Defendant so negligently carelessly and unskilfully drove managed and controlled a motor bicycle upon the said highway whereby the motor vehicle of the Plaintiff was damaged &c. whereupon the now Defendant have notice of his intention to defend the action and such proceedings were thereupon had in the said Court that the Defendant denied the aforesaid negligence and said that the Plaintiff in the said proceedings was guilty of negligence and that the Plaintiff's negligence had materially contributed to the damage claimed by the Plaintiff whereupon it was afterwards considered and adjudged by the said Court in the matter of the said plaint that the Defendant was negligent and that such negligence did cause damage to the Plaintiff as claimed by the Plaintiff and further that the Plaintiff was not guilty of negligence which had materially contributed to the damage claimed by the Plaintiff and that the Plaintiff should recover damages from the Defendant in the matter of his plaint for the cause of action sued upon and the said judgment still remains in force and this the Third Party is ready to verify and the Third Party says that the said cause of action is the same cause of action which the now Defendant claims against him and that the negligence alleged against him by the now Defendant is the same supposed negligence which the said Defendant alleged against him in the aforesaid proceedings in the District Court and which was then considered and adjudged wherefore the Third Party prays judgment if the Defendant ought to be admitted against the said judgment

to allege that the Third Party is liable to the Defendant in respect of the cause of action herein sued upon."

The defendant joined issue on the Third Party's first plea; said, as to the second plea, that the judgment therein referred to was not in respect of the same cause or causes of action as those set out in the defendant's declaration of Third Party claim; and demurred to that second plea on, *inter alia*, the following grounds:—

1. That it confessed but did not avoid the declaration of Third Party claim to which it was pleaded.

2. That the judgment therein referred to was not in respect of the same cause or causes of action as those set out in the defendant's declaration of Third Party claim.

3. That the negligence charged by the defendant against the Third Party in the declaration of Third Party claim was not the same as that negligence which was alleged by the now defendant against the Third Party in the District Court proceedings mentioned in the said plea.

4. That the defendant could not have recovered and did not have the opportunity of recovering against the Third Party in such District Court proceedings that which he now sought to recover in his present claim against the Third Party.

5. That the defendant did not seek to recover from the Third Party in such District Court proceedings that which he now claimed in his declaration against the Third Party.

6. That the defendant did not defend such District Court proceedings in the same right as that in which he sued in his present claim against the Third Party.

The Full Court of the Supreme Court (*Street* and *Maxwell* JJ., *Herron* J. dissenting) held that judgment in demurrer should be entered on behalf of the Third Party: *White* v. *Jackson*; *Goldsmith* (*Third Party*) (1).

From that decision the defendant, by leave, appealed to the High Court.

G. Wallace K.C. (with him *C. Shannon*), for the appellant. The plea put on by the respondent as third party was a true plea of judgment recovered or *res judicata*. The cause of action was different. On a demurrer the Court is bound by the pleadings. There are marked differences between *res judicata* and issue estoppel: *Blair* v. *Curran* (2). The respondent did not in his pleadings set out a plea of issue estoppel. The court below decided against the respondent on the ground of *non res judicata* but wrongly treated

(1) (1949) 67 W.N. (N.S.W.) 49.

(2) (1939) 62 C.L.R. 464.

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it as a plea of issue estoppel. Judgment recovered and issue estoppel are dealt with in *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 402 et seq, under the general heading of "Estoppel by record." Judgment recovered is not true estoppel in the strict sense.

[FULLAGAR J. referred to the *Commissioner of Succession Duties (S.A.)* v. *Isbister* (1).]

In the event of the Court being against the appellant on the matter of estoppel further argument for him would be that contributory negligence is a misnomer. It is not negligence at all. The plaintiff did not owe any duty to the defendant; there was not any breach of duty. If that be wrong then the quantum of negligence necessary to establish contributory negligence is higher than the quantum of negligence necessary or sufficient in a passenger to establish against the other vehicle. There not being any such thing as negligence at large, but the cause of action being negligence causing plain damage, the issues between the parties in the District Court action were entirely different from the issue between the passenger and the plaintiff in the cause of action in the Supreme Court. In order to establish issue estoppel the issue or point decided in the earlier case must have been precisely the point relied upon in the second case. The allegation of negligence which was alleged to be the same could not possibly in law be the same, therefore the issue was demurrable. It was intended to be a plea of judgment recovered. Injury to the person and injury to property are two separate causes of action: *Brunsden* v. *Humphrey* (2). The District Court action only decided that as between the respondent and the appellant the defence of contributory negligence had not been sustained. The exact rights and liabilities of the various persons concerned were dealt with in *Nickels* v. *Parks* (3). The issues must be identical. There cannot be issue estoppel because (i) it was not negligence at large; (ii) it was negligence causing a particular damage; and (iii) it was not the same degree of negligence. Contributory negligence was discussed by Lord *Wright* in *Modern Law Review*, vol. 13, No. 1 (1950), pp. 3, 7, 9, 11 and 20, and reference was made to *Swadling* v. *Cooper* (4); *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* (5); *Grant* v. *Sun Shipping Co. Ltd.* (6) and *Davies* v. *Swan Motor Co. (Swansea) Ltd.*; *James (Third Party)* (7), where it was laid down that it was a question

(1) (1941) 64 C.L.R. 375.
(2) (1884) 14 Q.B.D. 141.
(3) (1948) 49 S.R. (N.S.W.) 124; 65 W.N. 273.
(4) (1931) A.C. 1.
(5) (1948) A.C. 140.
(6) (1948) A.C. 549.
(7) (1949) 2 K.B. 291.

of responsibility, and that the proper question was: Who substantially caused the accident? Examples are to be found in *O'Donel* v. *Commissioner for Transport and Tramways (N.S.W.)* (1); *Brunsden* v. *Humphrey* (2); *Nickels* v. *Parks* (3); *Commonwealth of Australia* v. *Temple* (4); *Marginson* v. *Blackburn Borough Council* (5); *Burton* v. *Karbowsky* (6); *Wagstaff* v. *Fitzpatrick* (7); *Loxton* v. *Moir* (8); and *Parker's Practice in Equity*, 2nd ed. (1949), p. 211. As a whole matter of pleading, the plea was a plea of judgment recovered and was clearly demurrable, therefore judgment should be entered for the appellant. The court would not allow any amendment. Assuming that it could be converted into a plea of issue estoppel, the pleading itself was still demurrable as a plea, because (i) the issue relied upon in the previous action must be precisely the same issue as arose in the second action, and (ii) in the present case the issues in the District Court were not the same as the issues in the present action. The issues in the District Court were: (a) was Jackson guilty of negligence causing damage to Goldsmith's car, and (b) if the answer was Yes, was Goldsmith, as plaintiff, guilty of contributory negligence. But the real issue before the Court is: Who substantially was the cause of the accident? (*Swadling* v. *Cooper* (9); *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* (10); *Sparks* v. *Edward Ash Ltd.* (11)). On the pleading there was not any issue estoppel. All that was alleged was that the plaintiff's negligence had materially contributed to the damages claimed by the plaintiff. The issues were not the same, the damage was different, and there was only one issue—negligence causing damage. Although the appellant may have failed to show that the respondent was guilty of negligence against him, it was still possible he was guilty of negligence to the passenger. There was not any slight degree of negligence which was sufficient to support a plea of contributory negligence. Any degree of negligence, however small, is sufficient to found a good cause of action by a passenger against another motor vehicle. There are varying degrees of responsibility: *Daniel* v. *Rickett, Cockerell & Co. Ltd. and Raymond* (12); *Grant* v. *Sun Shipping Co.*

(1) (1938) 59 C.L.R. 744.
(2) (1884) 14 Q.B.D. 141.
(3) (1948) 49 S.R. (N.S.W.), at pp. 127, 129; 65 W.N., at pp. 274, 276.
(4) (1949) 49 S.R. (N.S.W.) 373, at pp. 376-378; 66 W.N. 219, at pp. 222, 223.
(5) (1939) 2 K.B. 426.
(6) (1914) 14 S.R. (N.S.W.) 373; 31 W.N. 148.
(7) (1922) 39 W.N. (N.S.W.) 137.
(8) (1914) 18 C.L.R. 360, at pp. 379, 380.
(9) (1931) A.C., at pp. 9-11.
(10) (1948) A.C., at pp. 148, 149.
(11) (1943) K.B. 223, at pp. 237, 238.
(12) (1938) 2 K.B. 322, at pp. 327, 328.

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Ltd. (1). Even if the Court allowed the plea to be so interpreted there was not any issue estoppel because the identical point was not decided in the action in the District Court: *Johnson* v. *Cartledge and Matthews* (2). The doctrine of issue estoppel should not be applied except where it is clear beyond any doubt that the issues were identical: *Blair* v. *Curran* (3).

N. A. Jenkyn K.C. (with him *A. J. Goran*), for the respondent. The view expressed on behalf of the appellant of the application of the doctrine of issue estoppel to the point at issue is far too narrow. The mere fact that White was unrestrained by any estoppel and could, if he so desired, successfully show at this stage that the sole cause of the collision was Goldsmith, was not in point. The third party claim was nothing else but litigation between the appellant and the respondent. There was present matter which showed that the appellant was estopped from alleging by reason of the District Court proceedings and the evidence in those proceedings, that the respondent was guilty of the negligence alleged by the appellant in those third party proceedings. If the issue or issues were precisely the same it would be a case of *res judicata* and not of issue estoppel. There was on the face of the record a question, matter or issue which was common to the third party action. That having been proved the appellant cannot succeed in that action and which has been concluded against him in the District Court action, and the respondent is entitled to plead issue estoppel and then, provided there is set out in the pleadings sufficient to raise that matter, it established that the pleading was a good pleading and not demurrable. The proposition that answers both because it has been concluded against the appellant is that a collision had taken place between a motor car driven by the respondent and a motor bicycle driven by the appellant and that the respondent did not cause or contribute to that collision by any careless driving or any negligence. It was also established that the collision was caused solely by the negligent driving of the appellant. The vital claim was that something was done or omitted which resulted in a collision between the two vehicles at that particular place, and the question was: Who should bear the blame for the collision so having taken place? The doctrine of last opportunity is, if not completely discredited, at least so far discredited as to be unlikely to be effective in the future. Exactly the same degree of care must be exercised. The matter

(1) (1948) A.C., at p. 563.
(2) (1939) 3 All E.R. 654.
(3) (1939) 62 C.L.R. 464.

of negligence on the part of a plaintiff and a defendant materially contributing to the cause of the accident was discussed in *Pilloni* v. *Doyle* (1). The fundamental thing decided in the District Court was that, as a result of careless driving by the present appellant and without any careless driving by the present respondent, two vehicles collided, or, in other words that the latter was not to blame for the collision which took place. The groundwork of that decision appears from the pleading which was put on by the respondent in this case. The correctness and completeness of the statement so put on makes the pleading a good one. If in a subsequent action and every one of the matters involved in the District Court action became triable again between the same parties then resort would be made not to issue estoppel but to a plea of judgment recovered. The plea alleges that the matter was tried in the District Court and that the respondent was found not guilty of any negligence. In the third party proceedings the appellant was necessarily tendering contradictory evidence. Estoppel was actually pleaded in *Outram* v. *Morewood* (2) and *Flitters* v. *Allfrey* (3). Provided the plea does set out all relevant allegations necessary to support a proper plea of issue estoppel, it is not to the point that it contains also a superfluous statement. On its true interpretation the plea is a good plea of issue estoppel. In *Marginson* v. *Blackburn Borough Council* (4) it was clear, as in this case, that there was an action between the parties. That case was a direct authority against the appellant's approach to the issue estoppel problem; the court did not take the narrow view that one cannot divide up the question of negligence, duty or damage, which cannot be separated on issue estoppel. Estoppel there was clearly indicated. The distinction between issue estoppel and *res judicata* was clearly appreciated in *Outram* v. *Morewood* (2). The decision in *Johnson* v. *Cartledge and Matthews* (5) should not be followed; the difference between *res judicata* and issue estoppel was not put to the court, issue estoppel was not dealt with and it passed off on *res judicata*. If, however, the plea does not conform strictly to the requirements of a plea of issue estoppel in that it fails to include some material facts which can be alleged, then this Court, under its powers, should grant leave to the respondent to amend it. There is not any warrant whatever to preclude a party who is entitled to plead a plea of estoppel merely because there is a right under s. 161 to approach the Court by an alternative method if he so thought fit.

(1) (1948) 49 S.R. (N.S.W.) 13; 65 W.N. 239.
(2) (1803) 3 East 346 [102 E.R. 630].
(3) (1874) L.R. 10 C.P. 29.
(4) (1939) 2 K.B. 426.
(5) (1939) 3 All E.R., at p. 656.

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G. Wallace K.C., in reply. The issue in the District Court as alleged in these proceedings was damage or negligence causing damage to the respondent's car; *Salmond* on *Torts*, 9th ed. (1936); *Charlesworth* on *Negligence*, 2nd ed. (1947); *Everest and Strode* on the *Law of Estoppel*, 3rd ed. (1923), pp. 77, 78, and *Donoghue* v. *Stevenson* (1) show that there was not any such thing as negligence.

Cur. adv. vult.

June 23. The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of New South Wales upon a demurrer by a defendant A. A. Jackson to a plea by a third party V. L. Goldsmith. The Supreme Court gave judgment in demurrer for the third party, holding that the plea was good. The plea was a plea of estoppel. The estoppel was pleaded to a claim made by Jackson against Goldsmith for contribution or indemnity. In this action one R. B. D. White sued Jackson for damages for an injury suffered by him (White) alleged to be due to the negligence of Jackson in driving a motor cycle whereon White was a passenger. Jackson brought in Goldsmith as a third party under the *Law Reform (Miscellaneous Provisions) Act* 1946. Section 5 (1) of that Act provides, *inter alia*, that "Where any damage is suffered by any person as the result of a tort . . . (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise . . ." In his declaration in the third party proceedings Jackson alleged as against Goldsmith that Goldsmith so negligently drove a motor car that it came into collision with a motor cycle driven by Jackson whereby White, a pillion passenger on the motor cycle, was injured and that the plaintiff White was suing Jackson for damages for injuries thereby suffered. Jackson therefore claimed contribution or indemnity from Goldsmith in respect of any sum which the plaintiff White might recover against him, Jackson. The claim of Jackson so made against Goldsmith was that Goldsmith was, by reason of negligence of which he was guilty, a tort-feasor who, if he had been sued by White, would have been liable for the damage to White in respect of which White was suing Jackson.

The third party's second plea to this claim alleged that the defendant Jackson should not be admitted to say that he was entitled to such contribution or indemnity because in an action

(1) (1932) A.C. 562.

in the District Court Goldsmith claimed and obtained a judgment for damages against Jackson for negligence in respect of the same collision and that it was considered and adjudged by the said court " that the defendant (Jackson) was negligent and that such negligence did cause damage to the plaintiff (Goldsmith) as claimed by the plaintiff and further that the plaintiff (Goldsmith) was not guilty of negligence which had materially contributed to the damage claimed by the plaintiff." The defendant Jackson demurred to this plea.

The Full Court of the Supreme Court held that the plea was good. The ground of the decision was that it was decided in the District Court as between Jackson and Goldsmith that the latter was not a tort-feasor because it was conclusively determined that Goldsmith had not been guilty of contributory negligence.

The estoppel relied upon is not estoppel by judgment recovered. The causes of action in the two proceedings were not the same. The cause of action in the District Court was alleged negligence of Jackson causing damage to Goldsmith. In the present third party proceedings Jackson's claim is that negligence of Goldsmith caused damage to White. But Jackson relies upon the doctrine that a party is precluded from contending as against another person the contrary of any point which, having been once distinctly put in issue between them, has been solemnly found against him: *Outram* v. *Morewood* (1); *Hoysted* v. *Commissioner of Taxation* (2); *Blair* v. *Curran* (3). Goldsmith contends that in the District Court the issue was raised whether he had been guilty of contributory negligence, that that issue was found in his favour and that Jackson cannot now assert the contrary.

But an estoppel must be clear and unambiguous (*Low* v. *Bouverie* (4)). It must be " certain to every intent ": " if a thing be not directly and precisely alleged, it shall be no estoppel ": Co. Lit. 352b.

In the District Court the issue was whether Goldsmith had been guilty of contributory negligence, that is, had he contributed to the injury to Jackson by either—(1) carelessness with respect to his own safety; or (2) breach of a duty which he owed to Jackson to take care? What was decided was that Goldsmith was not guilty of contributory negligence. This decision therefore negated the following propositions:—(1) that Goldsmith contributed to his own injury by carelessness for his own safety; (2) that he

(1) (1803) 3 East 346 [102 E.R. 630].
(2) (1926) A.C. 155; (1925) 37 C.L.R. 290.
(3) (1939) 62 C.L.R. 464.
(4) (1891) 3 Ch. 82.

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contributed thereto by negligence consisting in a breach of a duty owed by him to Jackson to take care.

In the third party proceedings in the Supreme Court the question is whether Goldsmith is liable in respect of the injury done to White by reason of a breach of a duty to take care which he owed to White.

The proceedings in the District Court did not determine whether there was any breach by Goldsmith of a duty which he owed to White. Neither proposition (1) nor proposition (2) is a determination of the issue in the third party proceedings. Therefore the decision in the District Court does not estop Jackson from alleging that Goldsmith was guilty of a breach of a duty which he owed to White.

In my opinion the appeal should be allowed.

McTIERNAN J. In the declaration in which the appellant (the defendant) states his claim against the respondent (the third party), the appellant alleges that the respondent negligently drove his motor car against a motor cycle driven by the appellant, in which the plaintiff in the action was a passenger and thereby caused injury to the plaintiff. The appellant claims by the declaration that he is entitled to recover contribution from the respondent in respect of the damages which the plaintiff may recover in the action in accordance with s. 5 (1) (*c*) of the *Law Reform (Miscellaneous Provisions) Act* 1946. The appellant is entitled to recover contribution from the respondent if he is a tort-feasor who is or would if sued have been liable in respect of the injury suffered by the plaintiff in respect of which he claims damages from the appellant, the defendant in the action. That condition would be satisfied by proof of the above-mentioned allegation of negligence which is in the appellant's declaration.

A plea in estoppel has been filed by the respondent to which the appellant has demurred. The question is whether the plea is bad in substance.

In order to determine this question it is necessary, in the first place, to ascertain from the terms of the plea the allegation in the declaration from which the plea says that the appellant is precluded and then to determine whether the appellant is precluded in law by the matter of the estoppel stated in the plea.

The plea has the formal commencement and conclusion peculiar to a plea of estoppel. The allegation or matter to which the estoppel applies is to be found in these parts of a plea in estoppel: see *Stephen's Principles of Pleading*, 7th ed. (1866), p. 352.

The commencement of the present plea says that the estoppel applies to the appellant's allegation in the declaration that he is entitled to contribution in respect of the damages which the plaintiff may recover in the action from the appellant. The conclusion of the plea says that the estoppel relates to the allegation that the respondent is liable to the appellant "in respect of the cause of action herein sued upon." The matter or allegation to which the estoppel relates is not stated in the conclusion of the plea in the same terms as it is stated in the commencement. If the proper construction of the plea is that the commencement and conclusion apply to different matters or allegations, the plea may not be sufficiently certain to be good: *Stephen's Principles of Pleading*, 7th ed. (1866), p. 293. Taking the terms of the conclusion of the plea to apply to the same allegation as that to which the commencement of the plea applies, that is, the allegation that the appellant is entitled to contribution in accordance with s. 5 (1) (*c*), the judgment of the District Court which is pleaded as the matter of the estoppel could not preclude the appellant from that allegation, because the causes of action are plainly different.

The question upon which the argument centred was whether the judgment of the District Court precludes the appellant from alleging the fact upon which he founds this claim for contribution in accordance with s. 5 (1) (*c*). The fact, as alleged, in the declaration is that the respondent negligently drove his motor car into the motor cycle driven by the appellant in which the plaintiff was a passenger and thereby caused injury to the plaintiff.

The plea says that in the action in the District Court the respondent sued the appellant for damage to his motor car caused by the appellant's negligent driving of his motor cycle: that the appellant denied the alleged negligence and alleged that the respondent's negligence "had materially contributed" to the damage: that the court adjudged that the appellant was negligent and his negligence caused the damage to the motor car: and that the respondent was not guilty of negligence "which had materially contributed to the damage." The plea further says that "the said cause of action is the same cause of action which the now defendant claims against him and that the negligence alleged against him by the now defendant is the same supposed negligence which the said defendant alleged against him in the aforesaid proceedings." The finding that the respondent was not guilty of the contributory negligence alleged by the appellant in the action in the District Court is fundamental to the judgment of that court which is

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pleaded ; and the appellant is therefore precluded by the judgment from making any contrary allegation against the respondent in these proceedings.

It is not inconsistent with the finding for the appellant to allege that the respondent is a tort-feasor. The appellant did not allege in the action in the District Court that the respondent was a tort-feasor : the finding that the respondent was not guilty of contributory negligence is not necessarily equivalent to an acquittal of the tort of negligence.

The appellant is precluded from alleging that the respondent negligently drove his motor car against the appellant's motor cycle, if a finding that he did not do so is fundamental or necessary to the finding that the respondent was not guilty of contributory negligence.

The plea raises the controversial question of the meaning of contributory negligence. It is not necessary to attempt an exhaustive definition. It is sufficient for present purposes to say that the finding that the appellant was not guilty of contributory negligence is consistent with the hypothesis that the respondent did not drive his motor car so carelessly as to commit a breach of his duty to take due care for his own safety. The finding does not necessarily conclude the question whether the respondent drove so carelessly as to commit a breach of his duty to take due and reasonable care for the plaintiff's safety. This is the question which the appellant raises by the declaration to which estoppel is pleaded. The judgment of the District Court does not in my opinion preclude the appellant from putting that question in controversy in these proceedings.

If the plea is open to the construction that the District Court proceeded upon a wider basis, this consideration will not help to sustain the plea. It is open to the construction that a finding that the respondent drove with due care for his own safety is the finding upon which the District Court acquitted him of contributory negligence.

A rule applicable to a plea in estoppel is that it " must be certain in every particular." The meaning of the rule is that such a plea " must meet and remove by anticipation every possible answer of the adversary." Pleas of estoppel are subject to this rule because they " are regarded unfavourably by the courts, as having the effect of excluding the truth " : *Stephen's Principles of Pleading*, 7th ed. (1866), p. 293.

In my opinion the appeal should be allowed.

WILLIAMS J. This is an appeal by leave from an order of the Full Court of the Supreme Court of New South Wales that judgment on a demurrer by the defendant to the second plea of the third party be entered on behalf of the third party. The demurrer arose in an action brought in the Supreme Court by White as plaintiff against the appellant Jackson as defendant claiming damages for personal injuries resulting from a collision between a motor cycle driven by Jackson on which White was riding as a passenger on a pillion seat and a motor vehicle driven by the respondent Goldsmith. In this action Jackson joined Goldsmith as a third party under the provisions of the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946, and claimed to be entitled to contribution or complete indemnity in respect of any sum which the plaintiff might recover against him in the action. The second plea is in the following terms— " the Third Party says that the Defendant ought not to be admitted to say that the Defendant is entitled to contribution or complete indemnity from the Third Party in respect of any sum which the Plaintiff may recover in this action against him because he says that before this suit the now Third Party as Plaintiff in the District Court of the Metropolitan District holden at Sydney then being a Court duly constituted and holden under the Statutes relating to District Courts and then having jurisdiction to hear and determine the plaint hereinafter mentioned levied a plaint against the now Defendant for the recovery of damages from the said Defendant and gave particulars of his claim against the said Defendant as follows that is to say that before and at the time of the committing of the grievances hereinafter alleged and at all material times the Plaintiff was driving his motor vehicle upon a public highway whereupon the Defendant so negligently carelessly and unskilfully drove managed and controlled a motor bicycle upon the said highway whereby the motor vehicle of the Plaintiff was damaged &c. whereupon the now Defendant gave Notice of his intention to defend the action and such proceedings were thereupon had in the said Court that the Defendant denied the aforesaid negligence and said that the Plaintiff in the said proceedings was guilty of negligence and that the Plaintiff's negligence had materially contributed to the damage claimed by the plaintiff whereupon it was afterwards considered and adjudged by the said Court in the matter of the said plaint that the Defendant was negligent and that such negligence did cause damage to the Plaintiff as claimed by the Plaintiff and further that the Plaintiff was not guilty of negligence which had materially contributed to the damage claimed by the Plaintiff and that the Plaintiff should recover damages from the

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Defendant in the matter of his plaint for the cause of action sued upon and the said judgment still remains in force and this the Third Party is ready to verify and the Third Party says that the said cause of action is the same cause of action which the now Defendant claims against him and that the negligence alleged against him by the now Defendant is the same supposed negligence which the said Defendant alleged against him in the aforesaid proceedings in the District Court and which was then considered and adjudged wherefore the Third Party prays judgment if the Defendant ought to be admitted against the said judgment to allege that the Third Party is liable to the Defendant in respect of the cause of action herein sued upon."

The plea is a plea of estoppel by *res judicata* but combines two forms of such estoppel. The concluding portion of the plea is a plea of judgment recovered in the strict sense, but such a plea would only be good if the causes of action in the Supreme Court and in the District Court were precisely the same, and it is clear that they are not (*Ord* v. *Ord* (1)). Counsel for the respondent did not contend before us that this portion of the plea was sustainable, and the contest raged round the earlier portion of the plea which raises a form of estoppel by *res judicata* which is often referred to as issue estoppel and which can be pleaded in bar whenever in a proceeding of a court of competent jurisdiction between the same parties or their privies an issue has been once taken and found. Such an issue is then concluded between the parties taking it and their privies according to the finding thereof so as to estop the parties from again litigating that fact once so tried and found: *Everest and Strode* in the *Law of Estoppel*, 3rd ed. (1923), p. 52, "*Nemo debet bis vexari*." The earlier portion of the plea is in all substantial respects similar in form to the pleas adjudicated upon in *Outram* v. *Morewood* (2) and *Flitters* v. *Allfrey* (3).

The second plea of the third party therefore really combines two pleas but we are concerned with substance and not mere form and can consider the validity of the earlier portion of the plea. With respect to this portion the law is stated in *Halsbury's Laws of England*, 2nd ed., vol. 13, at pp. 409, 410, in a passage corresponding to the passage in *Everest and Strode* in the *Law of Estoppel*, 3rd ed. (1923), p. 52, already referred to, as follows:—"A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first and second

(1) (1923) 2 K.B. 432.
(2) (1803) 3 East 346 [102 E.R. 630].
(3) (1874) L.R. 10 C.P. 29.

actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties and their privies. And this principle applies, whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact, or one of law, or one of mixed law and fact." The principle is stated to have a similar effect by *Dixon* J. in *Blair* v. *Curran* (1). In *Remnant* v. *Savoy Estate Ltd.* (2), Sir *Raymond Evershed* M.R. remarked that " the question of *res judicata* . . . is, after all, a rule of evidence," and in *Flitters* v. *Allfrey* (3) it was pointed out that the fact stated in the plea when proved is, in the words of *De Grey* C.J. in the *Duchess of Kingston's Case* (4) : " evidence conclusive between the same parties upon the same matter directly in question in another Court."

As a result of the proceedings in the District Court it is now *res judicata* between Jackson and Goldsmith that the damage to Goldsmith's vehicle was caused by the negligence of Jackson and that Goldsmith was not guilty of contributory negligence, but the issue of fact whether any damage which the passenger White may have suffered in the accident was caused by the negligence of Jackson or Goldsmith or both has never been taken and found in any court. White is therefore free to sue either Jackson or Goldsmith severally, or to sue them jointly. He has chosen to sue Jackson severally. Part III of the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946 relates to contribution between tort-feasors and s. 5 (1) (*c*) provides, so far as material, that one tort-feasor who is made a defendant may recover contribution from any other tort-feasor who is or would if sued be liable in respect of the same damage, whether as a joint tort-feasor or otherwise. The right of the tort-feasor who is sued to recover contribution from another person therefore depends upon the proof that the other person is also a tort-feasor in respect of the plaintiff or, in other words, that the plaintiff would succeed in an action for damages against that other person. As a result of the accident Jackson had at one stage two possible causes of action. He might have sued Goldsmith for any damage to his person or property caused by the negligence of Goldsmith. He is now estopped by the judgment of the District Court from bringing this action. If sued by White he might have sued Goldsmith for contribution under the *Law Reform* (*Miscellaneous Provisions*) *Act*. He has now been sued by White and has taken

(1) (1939) 62 C.L.R., at pp. 531-533.
(2) (1949) Ch. 622, at p. 631.
(3) (1874) L.R. 10 C.P., at p. 41.
(4) (1776) *Smith's Leading Cases*, 13th ed. (1929), vol. 2, p. 645.

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proceedings against Goldsmith under this Act. "The proceedings by the defendant against the third party are independent of and separate from the proceedings by the plaintiff against the defendant, except that, when the defendant is made liable to the plaintiff, he then has his right open against the third party to establish, if he can, that he possesses a right to indemnity and contribution from that third party" (*Hordern-Richmond Ltd.* v. *Duncan* (1)). But, as I have said, the issue in these proceedings is whether any damage to White was caused by the negligence of Goldsmith. The proceedings in the Supreme Court are not therefore proceedings which, though different in form, raise the same issue of fact as that raised and found in the action in the District Court. The decision of *Cassels* J. in *Johnson* v. *Cartledge and Matthews*; *Matthews* (*Third Party*) (2), is precisely in point. It was contended for the respondent that this decision is inconsistent with the decision of the Court of Appeal in *Marginson* v. *Blackburn Borough Council* (3), and is wrong. With respect, I am of opinion that there is no such inconsistency and that the decision in *Johnson's Case* (2) is right. *Marginson's Case* (3) is, I think, clearly distinguishable. It was there held that Marginson as plaintiff was estopped by the previous proceedings in the County Court from bringing an action against the corporation as owners of the motor omnibus for the personal injuries which he had received in the accident. The accident resulted from a collision between a motor car driven by his wife as his agent and a motor omnibus driven by an agent of the corporation and in the County Court the issue had been taken and found that the drivers of the two vehicles were equally to blame for the collision. The issue in the new action was therefore the same issue as one of the issues already litigated in the County Court. The Court of Appeal, referring to this issue, said "This seems to us to be a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the County Court, in a claim by the defendants against the present plaintiff, that both were equally to blame."(4). In *The Queen* v. *Hartington Middle Quarter* (5), a case recently applied by the Court of Appeal in *In re Koenigsberg* (6), *Coleridge* J. pointed out (7) that the question is "Whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually

(1) (1947) 1 K.B. 545, at p. 552.
(2) (1939) 3 All E.R. 654.
(3) (1939) 2 K.B. 436.
(4) (1939) 2 K.B., at p. 438.
(5) (1855) 4 El. & Bl. 780 [119 E.R. 288].
(6) (1949) 1 Ch. 348.
(7) (1855) 4 El. & Bl., at p. 794 [119 E.R., at p. 290].

decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent." The liability of Goldsmith to White for any damage that White may have suffered was not in any sense the groundwork of the decision in the District Court. It was not the same but a different damage which was then in issue. Although the decision of *Knight Bruce* V.C. in *Barrs* v. *Jackson* (1), was reversed on appeal, there is a passage in his judgment which has been cited repeatedly in subsequent cases, *Ord* v. *Ord* (2)—" It is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object " (3). No doubt the facts which will be litigated between Jackson and Goldsmith in the Supreme Court will be substantially the same facts as those litigated in the District Court but they will be litigated for a different purpose, and to prove or disprove a different issue.

For these reasons I would allow the appeal, set aside the order of the Supreme Court and enter judgment on the demurrer for the defendant in the action.

WEBB J. I would allow the appeal, for the reasons given by the Chief Justice.

The judgment of the District Court in the proceedings by Goldsmith, the car-owner against Jackson, the motor cyclist, and to which White, who was on the pillion seat of the motor cycle, was not a party, did not determine the question whether Goldsmith was liable to contribute some part of the damages for any injury done to White as the result of negligence on the part of Goldsmith which contributed to White's injuries. That issue was not raised in the District Court. It cannot be affirmed that the District Court found that Goldsmith was not guilty of any negligence in relation to White. He was not exonerated in respect of any person but Jackson. As regards Jackson he was absolved from blame; but nothing was found as to his conduct in relation to White.

(1) (1842) 1 Y. & C.C.C. 585 [62 E.R. 1028].
(2) (1923) 2 K.B. 432.
(3) (1842) 1 Y. & C.C.C., at pp. 597, 598 [62 E.R., at p. 1033].

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FULLAGAR J. A collison took place between a motor car driven by Goldsmith and a motor cycle driven by Jackson upon which White was travelling as a pillion passenger. White, who was injured in the collision, sued Jackson for damages, alleging that the collision was caused by Jackson's negligent driving of a motor cycle. Jackson pleaded the general issue and also delivered to Goldsmith, under the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1946, a declaration of third party claim alleging that the collision was caused by the negligent driving of his motor car by Goldsmith, and claiming contribution or indemnity in respect of any sum which White might recover in his action. To this declaration Goldsmith pleaded the general issue and also a second plea which is the subject matter of this appeal. This second plea is, on any view, bad in form and defective in draftsmanship. It is necessary, I think, to set it out in full, but for the sake of clarity I will substitute the names of the parties for the terms "plaintiff," "defendant" and "third party" respectively, those terms being used in the most confusing way in the plea:—"And for a second plea Goldsmith says that Jackson ought not to be admitted to say that Jackson is entitled to contribution or complete indemnity from Goldsmith in respect of any sum which White may recover in this action against him because he says that before this suit Goldsmith in the District Court of the Metropolitan District holden at Sydney then being a Court duly constituted and holden under the statutes relating to District Courts and then having jurisdiction to hear and determine the plaint hereinafter mentioned levied a plaint against Jackson for the recovery of damages from Jackson and gave particulars of his claim against Jackson as follows that is to say that before and at the time of the committing of the grievances hereinafter alleged and all material times Goldsmith was driving his motor vehicle upon a public highway whereupon Jackson so negligently carelessly and unskilfully drove managed and controlled a motor bicycle upon the said highway whereby the motor vehicle of Goldsmith was damaged &c. whereupon Jackson gave notice of his intention to defend the action and such proceedings were thereupon had in the said Court that Jackson denied the aforesaid negligence and said that Goldsmith was guilty of negligence and that Goldsmith's negligence had materially contributed to the damage claimed by Goldsmith whereupon it was afterwards considered and adjudged by the said Court in the matter of the said plaint that Jackson was negligent and that such negligence did cause damage to Goldsmith as claimed by Goldsmith and further that Goldsmith was not guilty of negligence

which had materially contributed to the damage claimed by Goldsmith and that Goldsmith should recover damages from Jackson in the matter of his plaint for the cause of action sued upon and the said judgment still remains in force and this Goldsmith is ready to verify and Goldsmith says that the said cause of action is the same cause of action which Jackson claims against him and that the negligence alleged against him by Jackson is the same supposed negligence which Jackson alleged against him in the aforesaid proceedings in the District Court and which was then considered and adjudged wherefore Goldsmith prays judgment if Jackson ought to be admitted against the said judgment to allege that Goldsmith is liable to Jackson in respect of the cause of action herein sued upon."

To this plea Jackson delivered a replication that the judgment therein referred to was not in respect of the same cause or causes of action as those set out in Goldsmith's declaration of third party claim. He also demurred to the plea on the following grounds :—

(1) That it confesses but does not avoid the declaration of third party claim to which it is pleaded.

(2) That the judgment therein referred to was not in respect of the same cause or causes of action as those set out in the declaration of third party claim.

(3) That the negligence charged by the defendant against the third party in the declaration of third party claim is not the same as that negligence which was alleged by the defendant against the third party in the District Court proceedings in the said plea mentioned.

(4) That the defendant could not have recovered and did not have the opportunity of recovering against the third party in such District Court proceedings aforesaid that which he now seeks to recover in his present claim against the third party.

(5) That the defendant did not seek to recover from the third party in such District Court proceedings aforesaid that which he now claims in his declaration therein against the third party.

(6) That the defendant did not defend such District Court proceedings aforesaid in the same right as that in which he sues in his present claim against the third party.

The demurrer coming on to be argued before the Full Court, judgment in demurrer was entered for Goldsmith. This judgment represented the view of the majority of the court, *Street* J. (as he then was) and *Maxwell* J. *Herron* J. dissented. From the judgment of the Full Court Jackson appeals by leave to this Court.

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Before examining the nature and effect of the plea thus in question it is necessary to consider for a moment the rules of law involved. Those rules are not, I think, in doubt, and they are not likely often to give rise to serious difficulty so long as it is recognized that there are two quite distinct and different principles. The distinction has been sometimes obscured by the absence of a generally accepted terminology. But it was clearly understood and appreciated by all the learned judges of the Full Court in the present case. On the whole I think myself that the two best terms to use are "*res judicata*" and "issue estoppel." The latter term seems to have been first used by *Higgins* J. in *Hoysted* v. *Federal Commissioner of Taxation* (1). It has often been used since, and it was adopted by *Dixon* J. in *Blair* v. *Curran* (2). It has the great advantage of being quite unambiguous. The term "estoppel by record" is an alternative to "issue estoppel" and it is a term which has been in use for a very long time. But while it is not open to any prima-facie objection, it has become *ancipitis usus*, being used sometimes as equivalent to issue estoppel, sometimes as equivalent to *res judicata* and sometimes as describing a supposed common principle from which both the rule as to *res judicata* and the rule as to issue estoppel are derived.

The rule as to *res judicata* can be stated sufficiently for present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro eadem causa.*"

The rule as to issue estoppel is generally stated in the words of Lord *Ellenborough* in *Outram* v. *Morewood* (3). His Lordship said that parties and privies are "precluded from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them . . . has been, on such issue joined, solemnly found against them." This is, I think, a true case of estoppel, analogous to estoppel by deed and estoppel by representation. The same rule was concisely stated by *Dixon* J. in *Blair* v. *Curran* (4) where his Honour said:—"A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies."

(1) (1921) 29 C.L.R., at p. 561.
(2) (1939) 62 C.L.R., at pp. 531, 532.
(3) (1803) 3 East, at p. 355 [102 E.R., at p. 633].
(4) (1939) 62 C.L.R., at p. 531.

It is unnecessary here to discuss these two principles further beyond noting two points.

In the first place, if A sues B to judgment and in subsequent proceedings between them a plea of *res judicata* is raised, the primary question will be whether the cause of action in the later proceedings is the same as that which was litigated in the former proceedings. This was the question which arose in the well-known case of *Brunsden* v. *Humphrey* (1). It was held there that the causes of action were not the same. The *injuria* was the same but the *damnum* was different, and, since damage was " of the gist " of the particular action, the causes of action were not the same. The plea therefore failed. On the other hand, if A sues B to judgment and in subsequent proceedings between them a plea of issue estoppel is raised, the plea may succeed although the causes of action in the two cases are entirely different. The question will be whether an issue of fact or law which is raised in the later proceedings was an issue of fact or law which was also raised in the earlier proceedings and therein determined.

In the second place, it follows from the very nature of the difference between the plea of *res judicata* and the plea of issue estoppel that different materials are relevant in each case. Where the plea is of *res judicata*, only the actual record is relevant. Where the plea is of issue estoppel, any material may be looked at which will show what issues were raised and decided. Reasons given for the judgment pronounced are likely to be particularly important for this purpose: see *Ord* v. *Ord* (2) and *Marginson* v. *Blackburn Borough Council* (3). Both those cases were cases of issue estoppel and were clearly treated as such, though I think, with great respect, that both illustrate the unfortunate absence of a clear legal terminology, to which I have already referred.

It should perhaps be added that, as *Dixon* J. pointed out in *Blair* v. *Curran* (4), the estoppel, so far is it applies to facts, is confined to ultimate facts. It does not extend to mere evidentiary facts.

The only difficulty of the present case seems to me to lie in determining whether the plea in question is to be regarded as a plea of *res judicata* or as a plea of issue estoppel. If it is a plea of *res judicata*, it seems obvious that it cannot stand. It is plain from the face of the pleadings that such a plea is wholly inappropriate. Even if it had been Jackson who had sued Goldsmith and Jackson had recovered damages from Goldsmith for negligent driving

(1) (1884) 14 Q.B.D. 141.
(2) (1923) 2 K.B., at p. 440.
(3) (1939) 2 K.B., at p. 437.
(4) (1939) 62 C.L.R., at p. 532.

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causing the collision, a plea of *res judicata* must fail because the causes of action involved in the two proceedings are entirely different. In the case of the proceedings between Jackson and Goldsmith, Jackson would have asserted a common law right. As defendant in White's action he is asserting a special statutory right to contribution or indemnity.

On the other hand, Jackson, in his declaration of third party claim, alleges that Goldsmith "so negligently drove and managed his motor car upon a public highway that the same collided with a motor cycle driven by Jackson." This allegation, of course, states by no means the whole of Jackson's alleged cause of action against Goldsmith. But it states something which Jackson must allege and prove in order to succeed in his claim to contribution or indemnity. On that allegation issue has been joined between Jackson and Goldsmith. If in former proceedings between Jackson and Goldsmith that very issue was determined in Goldsmith's favour as between him and Jackson, then Jackson is now precluded from alleging the contrary against Goldsmith. And a plea that that very issue was so determined in those former proceedings will be a good plea of issue estoppel. The word "negligently" in the plea should be taken as meaning "without exercising reasonable care."

No serious question of law, therefore, seems to me to arise in this case. The only real question is whether the plea on its proper construction does fairly raise such an issue estoppel. Undoubtedly the plea takes the general form of a plea of *res judicata*. It says, *inter alia*, that the two causes of action in the two proceedings were the same. This is an allegation entirely irrelevant to a plea of issue estoppel, and it is obvious, as I have pointed out, that the two causes of action are not the same. And the embarrassing nature of the plea as drawn is reflected in the grounds of the demurrer. Grounds 1, 2, 4, 5 and 6 are appropriate to a plea of *res judicata*, and, if the plea is to be treated as a plea of *res judicata*, are plainly good grounds for a demurrer. Ground 3, on the other hand, is appropriate to a plea of issue estoppel. But, if the plea were a properly drawn plea of issue estoppel, ground 3 could not be substantiated as a ground of demurrer. This is clearly pointed out by *Maxwell* J.

Street J. and *Maxwell* J. were clearly of opinion, as I am, that, regarded as a plea of *res judicata*, the plea could not stand. They were also clearly of opinion, as I am, that a plea that the issue joined on the allegation of negligence in the declaration of third party claim had been determined in Goldsmith's favour in prior proceedings between Jackson and Goldsmith would be a good plea

of issue estoppel. Whether the plea could ever be substantiated is, of course, beside the point. Their view was that the plea, though containing much surplusage, should stand as amounting to such a plea. Under the *Judicature Act* system of pleading I think that the proper course would be to strike out the plea as embarrassing and give leave to amend so as to raise clearly an allegation of issue estoppel. But, the proceedings being by way of demurrer, I am not prepared to say that the decision of the Full Court was wrong. The plea does seem to contain what is essential to a plea of issue estoppel in the particular case, and it is so clear that a plea of *res judicata* is out of the question that the rest of the plea may fairly, I think, be regarded as surplusage. In my opinion this appeal should be dismissed.

Appeal allowed with costs. Order of the Supreme Court set aside. Judgment on demurrer for defendant in the action.

Solicitors for the appellant, *McGrath, Morgan & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.