CASE AND COMMENT

WILL—DEBT TO CARRY INTEREST—LEGACY OF SAME AMOUNT AS PRINCIPAL—SATISFACTION.—It is a well settled presumption of law that if a debtor leaves by will to his creditor a legacy of an equal or greater amount than the debt, the legacy when paid must be taken to have been given in satisfaction of the debt.[1] The presumption has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention that it has been considered of small practical importance.[2] A legacy of a smaller sum than the debt is no satisfaction of the debt.[3]

In *Fitzgerald* v. *National Bank, Limited*[4] a person, who borrowed £100 carrying interest at 5 per cent. per annum, by his will left a legacy of £100 free of duty to his creditor. At the date of the debtor's death there were due and unpaid the principal and interest. Talbot, J., notwithstanding that at the death of the testator the amount of the debt exceeded £100, held, in the absence of any authority on the point, that the legacy operated as a satisfaction of the debt.

S. E. S.

* * *

CONTRACT—RAILWAY—ISSUE OF TICKET SUBJECT TO SPECIAL CONDITION.—The Court of Appeal in *Thompson* v. *London, Midland and Scottish Railway*,[1] in deciding that the defendants were not liable for the negligence of their servants which caused personal injuries to the plaintiff, invoked the principle enunciated by Swift, J., in *Nunan* v. *Southern Railway*:[2] "Where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders, and if the form is accepted without objection by the person to whom it is tendered

[1] See *Talbot* v. *Shrewsbury* (1714), Prec. Ch. 394; *Fowler* v. *Fowler* (1735), 3 P.W. 353; *Atkinson* v. *Littlewood* (1874), L.R. 18 Eq. 595; *Ellard* v. *Phelan*, [1914] 1 Ir. 76.

[2] See *Clark* v. *Sewell* (1744), 3 Atk. 96 at p. 97; Theobald on Wills, 8th ed, pp. 855-6.

[3] *Atkinson* v. *Webb* (1704), 2 Vern. 478; *Eastwood* v. *Vinke* (1731), 2 P.W. 614.

[4] [1929] 1 K.B. 394.

[1] [1930] 1 K.B. 41; 98 L.J.K.B. 615.

[2] [1923] 2 K.B. 703 at p. 707.

this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him."[3]

In *Richardson, Spence and Co.* v. *Rowntree*[4] the House of Lords approved of the following questions to be answered by the jury in ticket cases: (1) Did the plaintiff know that there was writing or printing on the ticket?; (2) Did he know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?; (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?

The defendants in the *Thompson* case relied upon the conditions of the contract under which they undertook to carry the plaintiff as a passenger. On the ticket issued to the plaintiff's agent there was a statement in plain terms that it was an excursion ticket and that it was issued subject to conditions which would be found on the back, and on the back there was a plain statement indicating that the conditions would be found in the company's time tables and notices. In the time table there was printed a statement to the effect that holders of excursion tickets should not have any right of action against the company in respect of injury, loss, damage or delay however caused.

It should be noted that the condition by which the company limited their liability was not to be found in the ticket. Swift, J., in the passage quoted above, said that the person accepting the document without objection was bound by the conditions contained in it. It does not appear from the facts that the plaintiff or her agent actually knew that there were conditions on the ticket or elsewhere concerning the contract of carriage. As to the question of notice, the members of the Court of Appeal were of the opinion that the giving of the ticket, which in plain terms indicated that there were conditions, was a clear indication that the offer was made upon those conditions only, and that any answer that the conditions had not been brought sufficiently to the notice of the person accepting the offer must be set aside as perverse.

There was evidence that there was only one copy of the time table in the booking office and that one had to pay 6d to get a copy. But the Court of Appeal held that the company had done all that was reasonably sufficient to give the plaintiff notice of

[3] See also Stephen, J., in *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178 at p. 188.

[4] [1894] A.C. 217 at p. 219.

the condition. Hanworth, M.R., said: "Obviously, persons who are minded to go for a day's journey do not take the trouble to make an examination of all the conditions."[5] It does seem proper to ask, is it reasonable to expect that a traveller buying a ticket in a long queue, as there usually is on excursion days, shall examine the ticket and cross-examine the ticket seller and then buy a time table and search for any conditions which may affect the contract of carriage? Does the mere taking of the ticket without objection indicate an objective assent on the part of the traveller to any terms which are contained in it, or referred to in it but to be found elsewhere?

The decision of the Court of Appeal adds weight to the remark of Idington, J., in *Sherlock* v. *The Grand Trunk Railway Co.*:[6] "I am almost tempted to suggest that contract as a basis for such dealings is fast becoming a fiction of law."

S. E. S.

* * *

CONFLICT OF LAWS—FOREIGN JUDGMENT AS DEFENCE—FOREIGN COURT FRAUDULENTLY MISLED BY PERJURY — LIMITATION ON RETRIAL OF MERITS.—A recent Nova Scotia case raises problems of no little difficulty, final solution of which must be achieved in the course of the development of what is now a relatively unsettled phase of the law. In *Manolopoulos* v. *Pnaiffe*,[1] an essential question presented for decision was: when and how can an otherwise valid judgment *in personam* of a foreign court, which had jurisdiction in the international sense, be subsequently impeached in a court of another legal unit on the ground that it was obtained by fraudulently misleading the foreign court by perjury, in a phrase, what sort of evidence is required and what admissible to invalidate a foreign judgment for fraud?

The plaintiff in the Nova Scotia action had previously sued the same defendant in a Rhode Island Court, for work and labour done, where the action was tried by a judge with a jury and dismissed on the merits. The plaintiff relied on the same grounds in Nova Scotia as in the previous action and the defendant pleaded *res judicata*, relying on the Rhode Island judgment. The plaintiff then alleged that the dismissal in the foreign court was obtained by the defend-

[5] [1930] 1 K.B. 41 at p. 46; 98 L.J.K.B. 615 at p. 618.
[6] (1921), 62 Can. S.C.R. 328 at p. 333.

[1] Judgment of trial judge: [1929] 4 D.L.R. 48; judgments of Nova Scotia Supreme Court *en banc* reversing the decision at the trial, unreported.

ant's having fraudulently misled that court by perjury. Relying on *Aboulouff* v. *Oppenheimer*[2] *and Vadala* v. *Lawes*,[3] Chisholm, J., heard all of the evidence relevant to the merits of the issues. It took the same course before him as in Rhode Island, "the evidence of the plaintiff and his principal witness on the one hand, and that of the defendant on the other, being in sharp conflict on vital points."[4] Chisholm, J., concludes his judgment in the following language:

> In the foreign court the determination of the issues depended upon the credibility of the witnesses. In the present action the result depends upon the credibility of the same witnesses, testifying in the same way as they did in the foreign court. If there was fraud in the foreign litigation, the same fraud prevails in the trial here. It may seem strange to put the decision of the foreign court wholly aside; one would think it was entitled to some weight. In the contest between the parties the foreign court whose judgment the plaintiff seeks to impeach is the court whose aid he himself invoked to establish his claim. It might appear as if he ought to be estopped by that decision.
>
> A consideration of the cases cited however, leads me to the conclusion that I am now free to consider the issue of fraud before me, completely unfettered by what has taken place in the foreign court, in short, to deal with the case at bar, as if it were the first contest in court between the parties touching the claim set up by the plaintiff. So dealing with it I have come to the conclusion that the plaintiff is entitled to succeed.[6]

The general rule now seems to be settled that a judgment on the merits of a cause, by a foreign court which had jurisdiction *in personam* in the international sense, will be regarded as conclusive as to the facts upon which that judgment was pronounced.[8] This is consistent with the fundamental doctrine *Res judicata pro veritate accipitur* and the considerations of public policy on which it is founded: *Interest reipublicae ut sit finis litium*, and *Nemo debet bis vexari pro eadam causa*.[7] Such a judgment can be impeached successfully in the court of another legal unit on the ground that the foreign court which rendered it was misled by the fraud of the party

[2] (1882), 10 Q.B.D. 295.

[3] (1890), 25 Q.B.D. 310.

[4] [1929] 4 D.L.R. at p. 50.

[6] [1929] 4 D.L.R. at p. 52.

[8] *Martin* v. *Nicholls* (1830), 3 Simons 458; *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717; and especially *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139. Several early cases treated foreign judgments as mere *prima facie* evidence of the facts on which they were based, *e.g.*, *Hall* v. *Obder* (1809), 11 East 118; *Houlditch* v. *Donegal* (1834), 8 Bligh N.S. 301 at pp. 337-340.

[7] In *Hilton* v. *Guyot*, 159 U.S. 113 at p. 229, Fuller, C.J., said: "The fundamental principle concerning judgments is that disputes are finally determined by them . . ." See Moschzisker, *Res Judicata*, (1929), 38 Yale L.J. 299.

later relying on it in an action in the other court.[8] This qualification finds juristic consonance in the general principle that no person can rely on his own fraudulent act for a legal advantage.[9]

Although there is general acceptance of the rule that a foreign judgment can be impeached for fraud, there is no such accord as to what kind of fraud is sufficient to vitiate a foreign judgment. Must it be only fraud which has not been in issue or adjudicated upon by the court which gave the judgment? Must the court in the subsequent action where fraudulent misleading of the foreign court is alleged refrain from going so far in its search for such fraud as to retry the merits of the original action? Certainly the unqualified language used by Lord Coleridge, C.J., in his *dictum*[10] in *Abouloff* v. *Oppenheimer*,[11] as understood and applied by Lindley, L.J., in *Vadalla* v. *Lawes*[12] and Chisholm, J., in *Manolopoulis* v. *Pnaiffe*,[13] and by other judges[14] and text writers,[15] answers these questions in the negative. This wide generality in favour of the vitiating effect of fraud to the utter disregard of the *res judicata* doctrine certainly departs from the usual caution with which the courts proceed when dealing with a subject, the law of which is still in the making.[16] Duff, J., in his strong dissenting judgment in *MacDonald* v. *Pier*,[17] said: "In the very nature of things, as Lord Coleridge, C.J., said in *Abouloff* v. *Oppenheimer* at p. 302, the question whether the court was misled in pronouncing judgment never could have been submitted to them, never could have been in issue before them and

[8] *William* v. *Jones* (1845), 13 M. & W. 628, Parke, B., at p. 633; *Oschenbein* v. *Papelier* (1873), L.R. 8 Ch. 695; *Ellerman Lines Ltd.* v. *Read*, [1928] 2 K.B. 144. Cf. *Robinson* v. *Fenner*, [1913] 3 K.B. 835.

[9] Duchess of Kingston's case (1776), 20 Howell's State Trials 355 at p. 544; 2 Smith Leading Cases 754 at p. 794.

[10] Cf. *Woodruff* v. *McLellan* (1887), 14 O.A.R. 242, Patterson, J.A., at pp. 250, 251; *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496, Garrow, J.A., at p. 503; and *Vadalla* v. *Lawes*, *supra cit.*, Lindley, L.J., at p. 316.

[11] *Supra cit.*

[12] *Supra cit.*

[13] *Supra cit.*

[14] *E.g.* Gray, J., in *Hilton* v. *Guyot*, *supra cit.*

[15] Dicey, The Conflict of Laws, at p. 438 *et seq.* (4th ed.); Westlake, Private International Law, at p. 412 (7th ed.); Foote, Private International Law, at p. 605 (5th ed.).

[16] See Sutherland, J., in *Karnuth* v. *U. S.* (1929), 279 U.S. 231; 49 S. Ct. 274.

[17] [1923] S.C.R. 107 at p. 121. When this case was before the Alberta Court of Appeal, Stuart, J.A., distinguishing domestic from foreign judgments in order to avoid the implications of *Abouloff* v. *Oppenheimer* and *Vadalla* v. *Lawes*, said that, "In the case (of foreign judgments) there can be no case for the application of the maxim, *interest reipublicae ut sit finis litium*, because the foreign litigation has not hurt or bothered our *reipublica* at all." (1922), 63 D.L.R. 577 at p. 591. This, however, seems to be inconsistent with the rule that a valid foreign judgment will be recognized by our courts as *res judicata*.

therefore never could have been decided by them." That is true, broadly speaking, but it is also axiomatic that the question of credibility of witnesses, whether they are misleading the court by false testimony, has to be determined by the tribunal in every trial as an essential issue, decision of which is a prerequisite to the decision of the main issue upon the merits. A judgment on the merits, therefore, necessarily involves a *res judicata* of the credibility of witnesses insofar as the evidence which was before the tribunal is concerned.[18] Thus, when the allegation is made that a foreign judgment is vitiated because the court was fraudulently misled by *perjury,* and issue is taken with that allegation and heard,[19] if the only evidence available to substantiate it is that which was used in the foreign court the result will be a re-trial of the merits. It is hard to believe that by his *dictum* Lord Coleridge ever intended, despite the abhorrence with which the Common Law regards fraud, to revert to the discredited doctrine that a foreign judgment is only *prima facie* evidence of a debt and may be re-examined on the merits, to the absolute disregard of any limitation that might reasonably be imposed by the customary adherence to the *res judicata* doctrine. That there is a limitation which prevents simply relitigating "the issues disposed of in the foreign suit"[20] is the basis of the decision of Harris, C.J., who refers to Ontario authorities not cited at the trial,[21] and of Carroll, J., with whose reasons the majority of the Nova Scotia Supreme Court *en banc* concur in reversing the decision of Chisholm, J. The reasoning of Harris, C.J., and Carroll, J., leads them to a conclusion which accords, in effect, with that of Duff, J., where he says: " . . . One is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it is has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an

[18] See Duchess of Kingston's case, *supra cit.*

[19] In *Abouloff* v. *Oppenheimer* no such issue was taken; the party alleged to have fraudulently misled the foreign court by false evidence admitted the allegation by his demurrer. The fact so admitted to be true was a material one, additional to the facts which were proved and adjudicated upon in the foreign court and was extrinsic to them. See cases cited in note (10) *supra.*

[20] *Cf.* 6 C.E.D. (Ont.) at pp. 471-472, where the limitation is suggested.

[21] *Woodruff* v. *McLellan, supra cit., Hollender* v. *Ffoulkes* (1894), 26 O.R. 61, *Jacobs* v. *Beaver, supra cit.* Re setting aside a municipal judgment by another court on ground that it was obtained by perjury, see *MacDonald* v. *Pier, supra cit.,* especially Stuart, J.A., at pp. 578, 579, 63 D.L.R.

issue which *transivit in rem judicatam*, under the guise of impugning a judgment as procured by fraud. Therefore the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial."[23]

Another limitation on a re-trial of the merits also suggests itself. As the fraud material to its impeachment is that of the party relying on a foreign judgment only,[24] it follows that his own alleged perjury or that of other witnesses with his connivance or concurrence forms the issue when the question of fraudulently misleading by perjury is raised in the second action. Evidence concerning perjury by witnesses who are strangers to such a conspiracy is irrelevant and should not be admitted in the later action, *e.g.* suppose A sues B in Rhode Island. C a witness for the defence perjures himself on a question material to the merits without the consent or concurrence, express or implied, of B, thereby inducing the court to dismiss the action. Later A sues B in Nova Scotia, as in *Manolopoulis* v. *Pnaiffe*, basing his action there on the same grounds as in the Rhode Island suit. The Rhode Island judgment would constitute a good defence to A's action in Nova Scotia; it could not be impeached because of C's fraud and evidence tending to establish C's perjury should therefore neither be admitted nor considered.[25]

In his judgment in *Manolopoulis* v. *Pnaiffe*, Mellish, J., draws a distinction which leads him to the opposite extreme from Lord Coleridge, C.J., and apparently results in the complete sacrifice of the policy against fraud on the altar of *res judicata*. He decides that although a foreign judgment when sued on by a plaintiff may possibly be questioned on the ground that it was obtained by fraudulently misleading the foreign court by perjury, "that a judgment for defendant rendered by a competent tribunal, foreign or domestic, having jurisdiction over the parties who appear before it is a conclusive bar to a suit afterward brought by the plaintiff upon the same cause of action in our court *'ut finis litium,"* and that such a judgment in favour of the defendant cannot be impeached by the plaintiff on the ground that it "was obtained by the false evidence of the defendant on the trial." He concludes as follows:

[23] *MacDonald* v. *Pier supra cit.* at pp. 120, 121.

[24] *Abouloff* v. *Oppenheimer, supra cit.* at p. 307.

[25] This conclusion is to some extent borne out by *Martin* v. *Nichols, supra cit.*, a case disapproved in *Houlditch* v. *Donegal, supra cit.*, at p. 477, but later re-established by *Godard* v. *Gray, supra cit.* Cf. Foote, Private International Law, at p. 605 (5th ed.).

The rule allowing a defendant when sued upon a foreign judgment to set up that the judgment has been obtained by fraud, seems to be sometimes taken as justifying the conclusion that, reasoning by analogy, a plaintiff is a suit like the present can set up fraud as an answer to the plea in bar. Such an analogy I venture to suggest does not exist. When a foreign judgment is set up by a plaintiff who is seeking to reap its fruits in this Court by obtaining another judgment, it is put forward to prove an obligation on the part of the defendant—whether arising by virtue of the judgment itself or otherwise need not for this purpose be considered. When, however, it is pleaded in bar by the defendant it is put forward not as evidence of the existence or non-existence of any obligation but as shewing that the plaintiff's claim has already been litigated and decided on in a court of competent jurisdiction. There is in my opinion no sound reason on principle why a judgment should not be perfectly useless for one purpose and yet perfectly good for a different purpose.

Notwithstanding the cases referred to in the judgment appealed from, I express no dissent from the conclusions reached by the learned Chief Justice, but prefer to rest my opinion upon the broader ground above indicated.

Mellish, J., relies on the language of Martin, B., who delivered the judgment of the Court of Exchequer in the case of *Cammell* v. *Sewell*,[29] language which, it is submitted, is materially weakened by the judgment of the majority of the Court of Common Pleas when the case later came before it on a writ of error.[30] The distinction taken by Mellish, J., finds authority also in several early cases; to quote Sir John Romilly, M.R., in *Reimers* v. *Druce*:[31]

In the numerous authorities that bear on this subject, a distinction is also taken, between the cases where the foreign judgment is brought before the cognizance of an English Court, upon an application by the successful party to enforce and obtain the fruits of it against the defendant, and those cases where the defendant here sets up the foreign judgment, as a bar to the proceedings instituted by the person who has failed against the defendant, with reference to the same subject-matter. Lord Chief Justice Eyre in *Phillips and Hunter*,[32] considered that distinction to rest upon this principle: that as, in the former case, the judgment is submitted voluntarily to the Court, the question arises, whether it is sufficient as a consideration to raise a promise, and that, thereupon, it must be examined as all other considerations for promises are examined, and that evidence of the foreign law is admissible to shew that the judgment was or was not warranted; but that it is otherwise in the case of the defence: that the party living abroad is not entitled to sue the successful defendant again in another country, for the same subject-matter, but that the protection of a foreign judgment is complete everywhere, as well as in the place where it was pronounced. This distinction has certainly not beeen carried out to the extent laid down by Lord Chief Justice Eyre, still it is a distinction which has so much authority to support it, that it must be

[29] (1858), 3 H. & N. 617 at pp. 646, 647.
[30] (1860), 5 H. & N. 728, especially at p. 742.
[31] (1857), 23 Beav. 145 *dictum* at pp. 149, 150.
[32] (1795), 2 Hen. Bl. 402.

regarded at least, to some extent, in considering the value of a foreign judgment here. . . .

Cammell v. *Sewell* and the cases referred to in *Reimers* v. *Druce* were decided at a time when foreign judgments when sued upon in our courts were regarded as merely *prima facie* evidence of the facts on which they were based. Today foreign judgments advanced as the basis of a plaintiff's claim are on a plane of equality as constituting *res judicata* in this respect with foreign judgments pleaded as a defence at the time when *Cammell* v. *Sewell* and the cases referred to by Sir John Romilly, M.R., were before the courts.[33] The basis of the distinction made in those cases would thus now seem to have disappeared.[34] The question in a case like *Manolopoulis* v. *Pnaiffe* is: Is there a valid foreign judgment? If it was obtained by fraudulently misleading the court, an alleged judgment is thereby vitiated; no judgment exists for the party guilty of the fraud to rely upon for any purpose. Why should the use to which such judgment is desired to be put determine the effect of the fraud of the party relying upon it for such use?

In view of the paucity of modern authority upon the point, it is submitted with deference that the solution most consistent with fundamental legal principles of the problem under discussion lies in the direction indicated in the decisions of Harris, C.J., and Carroll, J.[35]

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RIGHTS OF PREFERENCE SHAREHOLDERS IN VOLUNTARY WINDING UP FOR ARREARS OF DIVIDENDS—MEANING OF "DUE THEREON."—The case of *In re Roberts and Cooper Ltd.*[1] concerns a company organized under the Companies (Consolidation) Act, 1908. The memorandum contained provisions for A and B preference shares

[33] See note (6) *supra.*

[34] This distinction has received no modern recognition in England. Westlake's statement (Private International Law, sec. 335, 6th ed.), that "a foreign judgment pleaded by the defendant will be subject to question with regard to the competence of the court or otherwise, on the same grounds, so far as applicable, on which a foreign judgment sued on by the plaintiff may be questioned," does not seem to rest upon a false analogy, although, as Mellish, J, shows, the case which Westlake cites (*Henderson* v. *Henderson*, 3 Ha. 117), is of doubtful authority for his statement.

[35] In a department of law as yet undetermined every decision must be tested with much care by accepted first principles: 13 Harvard Law Review at p. 678.

[1] [1929] 2 Ch. 383.

with fixed cumulative preference dividends of 4 per cent. per annum. Clause 6, sub-clause 2 of the memorandum provided that in the event of winding up, the holders of the preference shares shall be entitled "to receive in full out of the assets of the company the amounts paid up or credited as paid up on such A and B preference shares together with any arrears of dividend *due thereon* at the date of the winding up." Article 138 provided that in winding up, the available assets were to be applied in paying to the holders of the said preference shares in accordance with their priorities the arrears of dividends and capital to which they are entitled.

The company did not declare or pay any dividends from 1920 until 1925 as it showed a loss in each year. The liquidator in the voluntary winding up of the company took out a summons in order to ascertain whether he should pay the preference shareholders their arrears of dividends in addition to the principal sum. There were reserves which could be made available for the payment of the arrears.

Eve, J., in holding that they were not entitled to arrears of dividends, said: "If the company had declared the dividends they would have been 'due.' No dividends having been declared none had become 'due.' I think this case is distinguishable from those cited[2] by the presence of the word 'due.'"

The word "due" is not contained in article 138 which refers merely to arrears of dividends to which the shareholders are entitled. If the intention here was to make the payment of these dividends depend on their declaration by the directors it is submitted that the intention should have been more clearly expressed.

In *In re W. J. Hall & Co. Ltd.* (*supra*) the words used are "in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding up." Swinfen Eady, J., in holding in that case that the shareholders were entitled to their arrears of dividends out of the profits, said: "It is inconceivable that the preference shareholders' right to these is to depend on the directors holding a meeting in contemplation of the winding up and declaring a dividend to that date. Reading the memorandum and articles together, I hold that the preference shareholders are entitled to the arrears of their 5 per cent. dividends whether declared or not . . . ."[3] Indeed Eve, J., in *In re Dominion Tar*

[2] *In re W. J. Hall & Co. Ltd.*, [1909] 1 Ch. 521; *In re New Chinese Antimony Co. Ltd.*, [1916] 2 Ch. 115; *In re Springbok Agricultural Estates Ltd.*, [1920] 1 Ch. 563.

[3] [1909] 1 Ch. 521 at p. 527.

and Chemical Co. Ltd.,[4] held that the preference shareholders were entitled to collect arrears in dividends where the resolution providing for the creation of the preference shares in question declared that in winding up they were entitled to all arrears of the dividend whether earned or not down to the beginning of the winding up.

It is submitted that when fixed cumulative dividends are in arrears there is already existing a valid obligation, and a declaration by the directors only fixes the date of payment. Further it seems illogical to speak of dividends being "in arrears" if we say with Eve, J., that they are not "due" until declared. How can they be "cumulative" if nothing is ever due? It would appear that a "fixed cumulative dividend" becomes due, at the latest, when a company is being wound up because the time of payment has arrived (if the existing obligation is ever to be paid).

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SURROGATE COURTS—JURISDICTION.—Cases have appeared in the reports from time to time regarding the nature, jurisdiction and status of surrogate courts, and in discussing the problems involved it has been necessary to place a construction upon the relevant sections of the B.N.A. Act. These are as follows:

92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:

14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

96. The Governor General shall appoint the judges of the superior, district and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

A list of the courts in existence at confederation, with their respective powers and jurisdictions, was given by Mr. Lefroy in an annotation to *Re Small Debts Recovery Act*.[1] It is there shown that at that date there were superior courts in the different provinces, county courts in Upper Canada and New Brunswick, and district courts in Upper and Lower Canada. The District Courts in Upper Canada exercised, within the provisional judicial districts in unor-

[4] [1929] 2 Ch. 387.
[1] (1917), 37 D.L.R. 170 at p. 183.

ganized territory, a jurisdiction similar to that exercised in counties by the county courts. In Lower Canada the term "district" was an alternative to "circuit."

Under The Surrogate Courts Act of Saskatchewan,[2] the surrogate courts of that province have the same jurisdiction in relation to matters and causes testamentary and the granting or revoking of wills and letters of administraton, as well as in relation to all matters arising out of or connected therewith, as was formerly possessed by the Supreme Court of the North-West Territories. Originally there was a provision in the Surrogate Courts Act that the judge of each district court was to be judge of the surrogate court of the same district, but this was altered to provide that "The judge of the surrogate court shall be appointed by the Lieutenant Governor in Council."

In this state of the law it was contended in *Rex ex rel. Rimmer* v. *Hannon*,[3] that the amendment was *ultra vires* and that the appointment of surrogate judges belong to the Governor General. The Court of Appeal, however, held, following a well known line of cases, *Ganong* v. *Bayley*,[4] *Reg.* v. *Bush*,[5] *In re Small Debts Courts*,[6] and *In re Small Debts Recovery Act*,[7] that the constitution of provincial courts assigned to the provinces by the B.N.A. Act, included the appointment of their judges, subject to the exceptions contained in section 96; that the surrogate courts were neither superior, district nor county courts within the meaning of that section; and that, consequently, the appointment of surrogate judges was within the competency of the provincial authorities.

In re McElhinney Estate, Standard Trusts Co. v. *McElhinney*,[8] makes clear the limits of surrogate jurisdiction. The administrator with the will annexed applied to have his accounts passed. The judge found that there had been negligence in taking insufficient security for the price of an interest in two race horses which had been sold, with a consequent loss to the estate, and he directed a reference to the clerk who was to inquire and report upon any monies or assets "which the administrator ought to have received." The order of the surrogate judge was approved by a judge of the King's Bench, but on appeal to the Court of Appeal it was declared invalid in so far as it went upon the footing of wilful default.

[2] R.S.S. c. 41.
[3] (1918), 14 S.L.R. 387.
[4] (1877), 17 N.B.R. 324.
[5] (1888), 15 O.R. 398.
[6] (1896), 5 B.C.R. 246.
[7] *Supra.*
[8] [1929] 3 W.W.R. 664.

Turgeon, J., in delivering the judgment of the Court, held that such an issue could only be entertained by the Court of King's Bench. He pointed out that the Court of Probate in England prior to the passing of The Judicature Act, 1873, and the Probate, Divorce and Admiralty Division since that date, have exercised power to compel an administrator to exhibit an inventory and account, but that an accounting on the footing of wilful default or breach of trust was never within their jurisdiction. Proceedings of that nature are at present specially assigned to the Chancery Division. Our surrogate courts, he held, have no further powers than the old Court of Probate had in England, or than the Probate, Divorce and Admiralty Division has now.

A similar question arose in the Ontario case, *Re Russell*,[9] which is referred to by Turgeon, J., and it was there held that a full inquiry and accounting of the kind asked for could be had only in the high court of the province.

Another recent and interesting case in connection with these courts is *In re MacDonald Estate, In re Surrogate Courts Act*.[10] The facts, as stated in the head note, are as follows: "On the application by the daughter and sole heir of an intestate for a grant of administration, the Surrogate Court Judge offered to grant temporary administration to a trust company. The applicant refused to accept this offer, and applied to the Court of King's Bench for a mandamus requiring the Surrogate Court to issue letters of administration in the terms of her petition. No material was produced at the hearing of this application contradicting the statements in the affidavit filed in support of the application, or showing that there was any lack of qualification or capacity in the applicant, or that there was in fact any opposition to her petition or that anyone else had any interest in the estate."

It was held by Donovan, J., that an order directing the judge of the Surrogate Court and the clerk thereof to issue letters of administration to the applicant should be granted. The Surrogate Court, he held, was a court of inferior jurisdiction and therefore subject to control by mandamus.

R. W. SHANNON.

Regina, Sask.

[9] (1904), 8 O.L.R. 481.
[10] [1929] 3 W.W.R. 693.

TORT—ACTION AGAINST HUSBAND AND WIFE FOR WIFE'S TORT—MARRIED WOMEN'S PROPERTY ACT—The wisdom in Benjamin Disraeli's epigram that "Every woman should marry—and no man" is forcibly brought home by the judgment in the recent case of *Herczeg* v. *Barsey*,[1] in which it was held that a husband is jointly liable with his wife, for her "naked" torts committed during coverture. This judgment of McEvoy, J., should prove an interesting contribution to the controversy, which has been waged for many years, concerning the nature and extent of the liability of a husband for his wife's torts.[2]

Herczeg v. *Barsey* was an action against a married woman and her husband for a slander uttered by the wife. There was no evidence whatever to connect, in any way, the defendant husband with the slander. As the judge said, with unconscious humour, "His only offence was, and is, his being the husband of the actual slanderer. . . ."

In his judgment McEvoy, J., stated:

> It is beyond controversy that at common law a husband not only might, but of necessity, "for conformity," must, if the wife is to be sued at all, be sued jointly with his wife for his wife's torts committed during coverture, and sued to judgment during the life of the wife.

Then with reference to the Married Women's Property Act:

> It seems now to have been finally determined that the Married Women's Property Act, where it says (sec. 3) that "a married woman shall be capable of . . suing and being sued, either in contract or in tort or otherwise, as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or legal proceeding brought by or taken against her . . . " is an enabling Act passed for the benefit of married women, and not an Act passed for the relief of husbands, relieving them from being sued jointly with their wives for the wife's torts during the coverture. It enables a married woman to sue and be sued alone, but it does not take away the right of a third party to sue jointly the husband and wife for the wife's "naked torts," if that third party sees fit to do so, and to sue him jointly with his wife to judgment, provided the wife is alive until judgment is reached.

McEvoy, J., then entered judgment against the husband and wife jointly, saying:

> The matter has not been without marked differences of judicial opinion, both in this Province and in England, where the Act is substantially the same. The pronouncement of the House of Lords, however, in *Edwards* v. *Porter*, has settled the matter until legislation intervenes further.

[1] (1929), 37 O.W.N. 177; 64 O.L.R. 529.

[2] See article: (1929), 7 C. B. Rev. 500.

In the noted English case of *Edwards* v. *Porter*,[3] a married woman, by fraudulently misrepresenting that her husband wanted money to pay rates and do repairs to his house property, induced certain persons to advance a sum of money, which she spent for her own purposes. The husband never authorized his wife to borrow the money or make the representation on his behalf. Action was brought by the lenders against the husband and wife jointly for the fraud of the wife. On appeal before the House of Lords, all the Lords agreed that at common law a husband was, in effect, responsible for the post-nuptial torts of his wife. There was, however, a marked cleavage of opinion as to the effect of the Married Women's Property Act of 1882 on the common law rule. It was held by the majority of the Lords, Viscount Finlay, Lord Atkinson and Lord Sumner, following *Seroka* v. *Kattenburg*[4] and *Earle* v. *Kingscote*,[5] that sub-section 2 of section 1 of the Married Women's Property Act was an enabling provision in favour of the wife and did not relieve the husband of his common law liability for his wife's post-nuptial torts. To quote from Lord Sumner's singularly lucid judgment:

> On the bare language I think the words "and her husband need not be joined" merely relieve the plaintiff . . . from the necessity of joining the husband, without interfering with the existing right to do so, such as it was. It is a procedural provision, not an alteration of substantive rights against the husband.

Lord Birkenhead and Viscount Cave, the two dissenting Lords, in *Edwards* v. *Porter*, were of the opinion that the Married Women's Property Act of 1882 had abrogated the common law rule which held a husband liable for his wife's post-nuptial torts. Lord Birkenhead expressly agreed with the reasoning of Fletcher Moulton, L.J., in *Cuenod* v. *Leslie*.[6] In that case Fletcher Moulton, L.J., dealing with the law before the Married Women's Property Act, said:

> But, although in a strict legal sense a husband was not liable for torts committed by a wife, it is evident that practically a liability for such torts could be imposed upon him by obtaining judgment in an action brought against the wife in which he must be joined for conformity. This mode of imposing a liability upon him could only be defeated by the death of one of the parties or a dissolution of the marriage before judgment, so that in practice a husband could in the great majority of cases be made to bear the consequences of a wife's tort. It became, therefore, customary to speak of a husband as being liable for his wife's torts, but this phrase, though con-

[3] [1925] A.C. 1; 94 L.J.K.B. 65.
[4] (1886), 17 Q.B.D. 177.
[5] [1900] 2 Ch. 585.
[6] [1909] 1 K.B. 880.

venient and frequently to be found in reports of cases, was never used in any sense inconsistent with that to which I have referred, and its use does not in any way imply that at any time our Courts considered that there was any personal liability in the husband until after judgment.

Then with regard to the effect of the Married Women's Property Act, Viscount Cave stated:

> It is evident that this enactment removes the sole ground on which it had been held necessary and proper in an action against a married woman for a wrong committed by her during the coverture to join her husband as a co-defendant. He was joined as a defendant only by reason of the "universal rule" that a wife could not be sued alone; but this "universal rule" has now been abrogated, for it has been enacted that she can be sued alone "as if she were a feme sole." The whole reason and justification for joining a husband in an action against his wife for her post-nuptial tort has therefore disappeared; and it would seem to follow, upon the principle *"cessante ratione cessat lex,"* that he is no longer a necessary or proper party to such an action.

In *Edwards* v. *Porter,* therefore, we have two sets of diametrically opposed opinions. Viscount Finlay, Lord Atkinson and Lord Sumner, the majority of the Lords, holding that the common law liability of a husband to be sued jointly with his wife, for her torts committed during coverture, was a substantive right, flowing from the unity of man and wife in the eyes of the law, and that the Married Women's Property Act, by allowing a married woman to sue or be sued "as if she were a feme sole" did not relieve a husband of his liability. On the other hand, we have the opinion of Lord Birkenhead and Viscount Cave, that the husband's common law liability was just a matter of procedure, flowing from the inability of a married woman to sue or be sued alone, and that now this inability has been removed by the Married Women's Property Act, the joint liability of the husband has disappeared.

It is important to note, however, with regard to *Edwards* v. *Porter,* that while the Lords were divided in their opinion as to the effect of the Married Women's Property Act, they all nevertheless reached the same result. The majority of the Lords found that the husband was not liable because the tort of his wife was directly connected with a contract, in that the wife impliedly warranted that she had her husband's authority to borrow the money, and it is well established that if the tort of the wife is directly connected with a contract with her, and is the means of enforcing that contract, the husband is not liable.[7] The dissenting

[7] See *Liverpool Adelphi* v. *Fairhurst* (1854), 9 Ex. 422, and *McNeall* v. *Hawes,* [1923] 1 K.B. 273.

Lords held that since the Married Women's Property Act, a husband is not even liable for his wife's "naked" torts, that is, torts like libel and assault, which are unconnected with a contract.

The wife's tort in *Edwards* v. *Porter* was not a "naked" tort. It is submitted, therefore, that the statements of the majority of the Lords, regarding the liability of a husband for his wife's "naked" torts, are, in the strict legal sense, *obiter dicta*. In view of the fact that they ultimately found that the tort with which they were concerned was connected with a contract, and it is beyond dispute that a husband is not liable for such a tort, those parts of their judgments which dealt with "naked" torts were not directly relevant to the case before them. However, it seems to be accepted that this case has set the matter at rest, at least as far as the courts of Great Britain are concerned. It is interesting to note that in Australia, the High Court, in 1909, construing a statute almost identical with the English statute of 1882, held that the husband was not answerable,[8] despite the decisions of the English Court of Appeal. The Appellate Division of the Supreme Court of Alberta, in the case of *Quinn* v. *Beales*,[9] held likewise.

The question is gravely complicated in Ontario by the fact that the legislation is in a state of great uncertainty. Until 1926, the law on the matter was governed by the provisions of section 18 of the Married Women's Property Act,[10] by which the husband was liable for his wife's post-nuptial torts only to the extent of the property which he had acquired, or become entitled to, from or through his wife. That section was repealed in 1926[11] and so is not included in the revised statutes of 1927.[12] Whether the new Act will operate as new law, or is sufficient to preserve the law as it was before 1926, has yet to be decided.

In *Herczeg* v. *Barsey*, McEvoy, J., considering that the pronouncement of the House of Lords in *Edwards* v. *Porter* was final, held the husband liable for his wife's "naked" tort. It is to be hoped that, despite the strong *obiter dicta* of the House of Lords, so approved by the Supreme Court of Ontario, the matter is not yet closed, and that legislation or judicial decision will intervene to bring Ontario law into accord with the more reasonable views of Lord Birkenhead and Viscount Cave in *Edwards* v. *Porter*, so that being a husband in Ontario will no longer "be an offence."

[8] *Brown* v. *Holloway* (1909), 10 Aust. C.L.R. 89.
[9] [1924] 4 D.L.R. 635; [1924] 3 W.W.R. 337 at p. 349.
[10] R.S.O. 1914, c. 149.
[11] 16 Geo. V., c. 44, s. 16.
[12] R.S.O. 1927, c. 182.

The husband's liability under the present law, it is submitted, in view of the respective rights and obligations flowing from the relation of man and wife under modern legislation, is on an anomalous basis.

BRIAN DOHERTY.

Toronto.

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WILL—HOLOGRAPH—LETTERS AS—WHETHER WILL CONDITIONAL. —Of the making of wills in odd ways there is no end. Alberta has furnished us, in the case of *In re Sword's Estate*,[1] with an excellent example of the holograph will with all that is involved in the way of unskilled, unattested and ambiguous expression. It does not shake the writer's faith in the convenience of holograph wills, and the jutsice of permitting a literate man to dodge a draftsman's fee. But it does settle that a string of letters, though practically unsigned, can be read together to form a will. This case also gives us a ruling that, when a man debated in his will his chances of dying under an imminent operation, the fact that he does not die under that operation may still leave the will good.

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[1] [1929] 2 W.W.R. 245.