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THE HARRIS V. TAYLOR PHOENIX

*Bradford A. Caffrey**

One of the most remarkable aspects of *Harris v. Taylor*,[1] a decision which has been described as "revolting to common sense"[2] and, somewhat more diplomatically, as "unfortunate"[3] is the fact that it has taken sixty-four years for the question raised therein to come before the Court of Appeal again. In the intervening years, it has suffered, somewhat unjustly, critical attacks resulting from misapprehension as to what happened and what was decided in that case.

Harris v. Taylor is a classic example of a case properly decided but for the wrong reasons. The plaintiff, domiciled in the Isle of Man, brought an action there against the defendant, an Englishman, domiciled in England, for loss of consortium of his wife and for ciminal conversation with her, occurring both in the Isle of Man and in England. The defendant, through his advocate, made a limited appearance for the purposes of setting aside the writ of summons served upon him in England and to set aside the order which had allowed service outside the territorial jurisdiction of the Isle of Man. The defendant moved for dismissal on the grounds that: (1) the rules of the Isle of Man High Court of Justice did not authorize service out of territorial jurisdiction; (2) no cause of action arose or existed within the jurisdiction of the Isle of Man; and (3) the defendant had been and still was at all material times domiciled in England and never had a domicile in the Isle of Man.[4] The court dismissed defendant's motion and thereafter, defendant took no part in the Manx proceedings. Plaintiff obtained first an interlocutory judgment and then a final judgment against the defendant. Both the interlocutory judgment and the final judgment issued by the Manx court contained recitals that have caused unnecessary confusion which is the subject of

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1. [1915] 2 K.B. 580.
2. A. Dicey & J. Morris, The Conflict of Laws 996 (9th ed. 1973).
3. M. Wolff, Private International Law 259 (2d ed. 1950).
4. Harris v. Taylor, [1915] 2 K.B. 580, 581.

this brief comment. The interlocutory judgment recited, inter alia, ". . . and the defendant . . . having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him: and upon consideration had thereof, it is ordered that the defendant . . . do pay to the plaintiff damages . . . ."[5] The final judgment which assessed damages of £800 recited, inter alia, "the defendant who is resident out of the jurisdiction but upon whom a writ of summons in the action has been duly served not having filed or delivered any defence nor appearing to the action . . ."[6]

Following these decisions the plaintiff sought to enforce his judgment in England via a common law action. Judge Bray rendered judgment for the plaintiff on the ground that since the defendant had conditionally appeared before the Manx court he had voluntarily submitted to the court's jurisdiction. Defendant appealed and again lost on the jurisdiction issue.[7]

It is unfortunate that Judge Bray, faced with the somewhat idiosyncratic procedural rules of the Isle of Man and "having found the evidence of the Isle of Man law unsatisfactory on this point . . .,"[8] proceeded to "compound the error by testing the position

5. *Id.*

6. *Id.*

7. It has been suggested that the Court of Appeal did not deal satisfactorily with the jurisdictional statements made by the Manx courts in the two Isle of Man judgments. However, the more reasonable explanation is that under the local law of the Isle of Man when a party makes a conditional appearance and his motion is dismissed, the action in chief then proceeds *ab initio*. In *Harris v. Taylor* this meant that plaintiff having obtained a default judgment, could then seek to enforce the judgment against defendant in England. It is submitted contrary to Collins' suggestion in *Harris v. Taylor Revived*, 92 L.Q.R. 268 (1976), that "even by Isle of Man law the defendant had not submitted to the jurisdiction . . ." that Lord Justice Buckley recognized the procedural peculiarities and that the admittedly curious recitals in both judgments did not necessarily equate to non-submission. In other words, the defendant having failed in his motion to set aside the writ and the order, the case in chief proceeded under Manx procedural rules and it was then encumbent upon the defendant to enter a formal appearance to the action in chief. The defendant having failed to do so, the court entered the interlocutory judgment against defendant in default of appearance and defendant further failing to enter or deliver any defense to that interlocutory judgment as required by the Isle of Man rules, the court entered judgment against him in default of defense.

8. Collins, *Harris v. Taylor Revived*, 92 L.Q.R. 268, 273 (1976).

according to the domestic rules of procedure in England . . . ."[9] It was unnecessary to become entangled in the question of whether the local law of the Isle of Man considered such an appearance a voluntary submission.

The ultimate decision in *Harris v. Taylor* was in view of the facts a correct result. Unfortunately, the wrong reasons were assigned and some rather specious logic was employed. Both English judges must have become confused regarding the true question before them. Perhaps because of the unsatisfactory nature of the evidence of Isle of Man law, they were applying the presumption that Isle of Man law should be deemed to be the same as English law.[10] The judges somewhat capriciously decided that a conditional appearance to challenge a court's jurisdiction which is decided adversely to the applicant amounts to a submission to that jurisdiction. Such a notion is indeed "revolting to common sense"[11] and even conflicts logically with Lord Justice Buckley's admission that had the defendant "done nothing . . . the judgment could not have been enforced against him . . . ."[12] It is difficult to see, "how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction."[13] Justice Denning, many years later had no difficulty in supplying the proper answer to what should have been "the true question . . ."[14] before Judge Bray and Lord Justice Buckley. Denning found that "the defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him . . . ."[15] As Denning noted, "What difference in principle does it make, if he (defendant) does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction?"[16]

It would have been less confusing for the Court of Appeal in *Harris v. Taylor* to have acknowledged that the defendant had, by his motion that no tort had been committed in the Manx juris-

9. *Id.*
10. *Id.*
11. A. Dicey & J. Morris, The Conflict of Laws 996 (9th ed. 1973).
12. Harris v. Taylor, [1915] 2 K.B. at 587.
13. Dulles v. Vidler, [1951] 1 Ch. 842, 850.
14. Collins, *supra* note 8, at 273.
15. Dulles v. Vidler, [1951] 1 Ch. at 851.
16. *Id.* at 850.

diction, asked for affirmative relief and thus had put the merits of his case in issue. Applying this logic the ultimate decision would have been on much firmer grounds because a party cannot "be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable."[17]

Such an approach might have prevented Judge Roskill in *Henry v. Geoprosco International Ltd.*[18] from reading into the *Harris* decision a rather doubtful distinction between the *existence* and *exercise* of jurisdiction,[19] a distinction that neither Judge Bray nor the Court of Appeal even mentioned.

In *Henry v. Geoprosco International Ltd.* the defendants, a limited company registered in Jersey with its head office in London, entered into a contract with plaintiff, who at all material times lived in Calgary, Alberta. A contract, entered into in Canada, provided that plaintiff was to work for defendants in the Trucial States. The contract contained an arbitration clause, but no place of arbitration was named. In default of agreement to choose an arbitrator, the President of the Institute of Arbitrators (understood to be the London Institute) was to choose the arbitrator. The contract further provided that the law of England was to govern the contract. The plaintiff took up his apointment, went to the Trucial States and was dismissed four months later. Plaintiff brought an action in Canada against defendants for wrongful dismissal and served defendants with the statement of claim in Jersey with leave of court. Defendant then served notice of motion seeking an order setting aside the service of the statement of claim and alternatively for a stay of proceedings by reason of the arbitration clause. Defendants contended that the plaintiff's affidavit seeking leave to serve out of the jurisdiction was defective, and that the Supreme Court of Alberta was not the *forum conveniens*. Defendant's motion was denied. He appealed and his appeal was dismissed. Thereafter, defendant took no part in the proceedings and plaintiff recovered judgment. Plaintiff then sought to enforce that judgment in England via a common law action. Defendants resisted on two grounds: (1) that the Canadian judgment was a default judgment; and (2) that they had protested jurisdiction but had not submitted to the jurisdiction of

17. *Id.*
18. [1976] 1 Q.B. 726.
19. *Id.* at 738, 748.

the Canadian courts. The trial court, Judge Willis, gave judgment for the defendants and the plaintiff appealed.

The Court of Appeal, Justices Roskill, Cairns and Brown reversed the decision of Judge Willis and gave judgment for plaintiff. The Court felt that the *Harris v. Taylor* decision ". . . binds this court for what, as we think it so clearly decides."[20] Their opinion was fortified by the concession made by defendants' counsel that the case "was not a case of a party sought to be brought before a foreign court protesting that that court had no jurisdiction to entertain the claim against him"[21] and that the "defendants by reason of the second and third grounds of their notice of motion had invited the Supreme Court of Alberta to divest itself of the jurisdiction which they accepted that that court possessed under the law of Alberta . . . ."[22] In its reversal the Court proceeded to draw an illogical distinction between the exercise of jurisdiction and the existence of jurisdiction. That distinction finds no place in the earlier authorities,[23] and was not raised in the *Harris v. Taylor*[24] case.

In *Geoprosco,* Judge Roskill summarized the law as he thought it stood in three propositions of which only the first and second conform to well-established principles. His first proposition is well established:

> [t]he English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him.[25]

Roskill's second proposition that "English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court,"[26] is also too well established, albeit by dicta, to warrant

20. *Id.* at 746.
21. *Id.* at 734.
22. *Id.*
23. Collins, *supra* note 8, at 285.
24. The question of whether the Manx court had discretionary power to exercise jurisdiction *vel non* was never raised in *Harris v. Taylor.*
25. Henry v. Geoprosco Int'l Ltd., [1976] 1 Q.B. at 746.
26. *Id.* at 746-47.

further comment. However, Roskill's third proposition that

> [t]he English courts will enforce the judgment of a foreign court against a defendant over whom the court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law[27]

besides being founded on the unrealistic and illogical distinction between the existence and exercise of jurisdiction gives rise to two untenable notions.

First, such a notion makes what should be settled legal principles into a game of roulette. As Roskill states, "[T]he defendant need not appear there . . . ."[28] In other words, he can escape liability by doing nothing at all. If he "prefers to take his chance upon a decision in his favour"[29] he must first inquire whether the jurisdiction of the foreign court is discretionary or not. If it is discretionary, the defendant must be certain to make it clear that he challenges that jurisdiction, in exercise and existence, solely and that he is not asking the court to exercise any discretionary powers.

Second, in finding it unnecessary to decide "whether where a defendant appears in a foreign court solely to protest against the jurisdiction of that court (whether or not by its own local law that court possesses such jurisdiction) and such protest fails . . . ., such appearance under protest amounts to a voluntary submission . . . ."[30] Roskill suggests that the solution to the question of whether there has been a voluntary submission or not depends on the success of defendant's motion. This is not a realistic solution to the question because it loses sight of the fundamental legal question that the court should, in such circumstances, consider.

Whether or not a defendant has voluntarily submitted to the jurisdiction of a foreign court by an application which challenges that court's jurisdiction should be decided not on the vagaries or idiosyncracies of the foreign court's local law but rather on the "rules of private international law relating to international juris-

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27. *Id.* at 747.
28. *Id.* at 748.
29. *Id.*
30. *Id.* at 747.

diction of courts."[31] In other words, was there a voluntary submission in the international sense? This should depend on whether the defendant by his application—call it conditional appearance, qualified appearance or whatever—put into issue the *merits* as opposed to a procedural question.

Roskill was correct when he said that the dividing line between what constitutes a voluntary submission to jurisdiction and what does not is a difficult line to draw satisfactorily and that "it must depend in each case upon what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court."[32] Nonetheless the question remains as to whether Roskill drew that line satisfactorily in *Henry v. Geoprosco International Ltd.* In view of his suggestion that "an appearance solely to protest against the jurisdiction of a foreign court . . ."[33] would not be a submission, he must obviously have felt that defendants did in fact do more than *solely* protest against jurisdiction—this feeling being no doubt aided by the defendants' concession in that respect.

Following *Geoprosco* one can only hope that the "Phoenix" will be resurrected again before the lapse of another sixty years and that when it is, the court will properly reconcile the confusion created and bequeathed by *Harris v. Taylor* and *Henry v. Geoprosco International Ltd.* Until that happens it is submitted that perhaps the only safe course for a defendant who has no assets in the foreign country and no desire to have assets there in the future is to ignore the foreign proceedings altogether.[34] However, this suggestion is, from a practical standpoint, hazardous and should be approached with caution especially in the world of commerce. Whereas a private individual may do well to follow such a solution, a merchant who has regular or occasional business transactions with commercial houses within that foreign country could never afford to take the risk of having an unsatisfied judgment lying in wait for him in that foreign jurisdiction.

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31. Collins, *supra* note 8, at 268, 273.
32. Henry v. Geoprosco Int'l Ltd., [1976] 1 Q.B. at 748-49.
33. *Id.* at 747.
34. Collins, *supra* note 8, at 287.