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IRREGULAR DIVORCE; ATTACK BY FOREIGN JURISDICTION.—An extremely interesting question was presented for adjudication in the recent case of *Pemberton* v. *Hughes*, 1 Ch. 781 (1899), and was the subject of a very full discussion.

In 1884 the plaintiff and one Erwin, both being domiciled in Florida, were married in that State. In 1888 Erwin, both parties being still resident in Florida, applied for and obtained from a Florida court a decree of absolute divorce on the ground of his wife's violent and ungovernable temper, the plaintiff neither appearing nor opposing the proceedings. Subsequently the plaintiff married one Pem-

berton, and now, Pemberton having died, the plaintiff seeks to recover a rent charge which her husband, Pemberton, had created on certain English estates in her favor. The reversioners defended on the ground that the Florida divorce was irregular and invalid in that the subpœna to appear did not leave—as was required by the rules of the court—ten clear days between the date of the writ and the time fixed for the wife's appearance.

In arriving at its conclusion the court disregarded the fact that the decree of the Florida court was being collaterally attacked—upon which it might well have based its judgment—*Ousley* v. *Lehigh Val. Trust and S. D. Co.* 84 Fed. 602 (1897); *Anderson* v. *Chicago T. and Trust Co.* 77 N. W. R. 710 (1899); *Isaacs* v. *Price*, 2 Dill. 371 (1872)—and founds its ruling upon the broad ground that, under the rules of international comity, a judgment of a foreign court having jurisdiction of the parties and subject matter will not be inquired into; that "for international purposes the jurisdiction and competency of a court does not depend upon the exact observance of its own rules of procedure." *Donglioni* v. *Crispin*, L. R. 1 H. L. 301 (1866); *Vauquelin* v. *Bonard*, 15 C. B. N. S. 341 (1863); *Castrique* v. *Imrie*, L. R. 4 H. L. 414 (1870).

The contention in the case was that because of the irregularity in procedure the court did not acquire jurisdiction over the parties, hence the decree rendered was not one of a court of competent jurisdiction. This argument the court very properly overruled, for it is now well settled that jurisdiction for international purposes is clearly distinct from that for municipal purposes. In the former case jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit, the competency of the court being the sole test. Piggott on Foreign Judgments (2d ed.), p. 129 *et seq.*; Wharton's Conflict of Laws, §792 *et seq.*

In this country, as in England, a decree of divorce, in so far as it affects the status of the parties, is a judgment *in rem*, and consequently the same conclusion would be reached in our own courts. The general rule as to judgments *in rem* being that a final judgment pronounced by a court of competent jurisdiction will be accepted as absolutely conclusive as to the merits of the controversy which it settles, it follows that such a judgment will not be impeached for a mere error in procedure; *Townsend* v. *Van Buskirk* 48 N. Y. Supl. 260 (1897); *Kriess* v. *Faron*, 118 Cal. 142 (1897).

MORTGAGE; CLOG ON EQUITY OF REDEMPTION.—*Santley* v. *Wilde*, L. R. 1 Ch. 747 (1899). Ever since the Court of Chancery intervened on behalf of the mortgagor when his estate was lost to him at law from failure to redeem by the appointed time, and gave to him, as a means of retrieving his property, the so-called "equity of redemption," this creature of equity seems to have been one of its peculiar favorites. Adopted, as it seems, from the Roman law, it is held an inherent part in all mortgages: Jones on Mortgages, Vol.

II, 105, §1038; *Lee* v. *Evans*, 8 Cal., 424 (1857); *Wilmerding* v. *Mitchell*, 42 N. J. L. 476 (1880); *Benzein* v. *Lenoir*, 1 Dev. Eq. (16 N. Car.), 225 (1828), etc., etc. So jealously is it guarded that the mortgagor is not allowed by express agreement to divest himself of this right. No matter how clearly his intentions may be expressed, equity, with tender solicitude, as it were, lest he may have been impelled to such agreement by the hardship of circumstances, gives back to him what he has waived. In *East India Co.* v. *Atkyns*, Comyns 347, 349 (1791), it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far, as in Stisted's case, to take an oath that he will not redeem, yet he shall redeem. And see also 2 Story's Eq. Juris., §1019, and cases cited; *Willets* v. *Burgess*, 34 Ills. 494 (1864); *Baxter* v. *Child*, 39 Me. 110 (1855); *Henry* v. *Davis*, 7 Johns (N. Y.), Ch. 40 (1823), etc. So if there be an agreement to restrict this equity of redemption either as to time or persons, if the restriction is a *substantial* denial of the right to redeem it will be void. *Floyer* v. *Lavington*, 1 P. Wms. 269 (1714); *Newcomb* v. *Bonham*, 1 Vernon, 7 (1681), etc. But the right to redeem may be postponed for a *reasonable* time, but not so far as to become oppressive: *Talbot* v. *Braddill*, Vernon 183 (1683).

To the principles above stated Mr. Jones in the volume on "Mortgages," cited above, adds, §1044: "Neither is the mortgagee allowed to obtain a collateral advantage under the color of a mortgage, which does not strictly belong to the contract," and cites as illustrations of such stipulations the agreement that if interest is not paid at the end of the year it shall become part of the principal, an agreement for payment of a commission upon the rents collected by the mortgagee, etc. He closes his discussion of this point with a quotation from the case of *Jennings* v. *Ward*, 2 Vernon, 520 (1705): "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." This seemed for a while to be a fair embodiment of the law, as illustrated by the cases of *Broad* v. *Lelfe*, 11 W. R. 1036 (1863); *James* v. *Kerr*, 40 Ch. D. 449 (1889); *Field* v. *Hopkins*, 44 Ch. D. 524 (1890).

But in *Biggs* v. *Hoddinott*, L. R. 2 Ch. 307 (1898), we find a modification of the doctrine as above stated. In that case a mortgage of a hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquor sold on the premises. The deed also contained provisos for the continuance of the loan for five years. The mortgagors having ceased to purchase beer of the mortgagee, he now moved for an injunction to restrain the breach of this covenant; the mortgagors also claimed to be entitled to redeem before the expiration of five years. The injunction was granted and the redemption before the expiration of five years was refused as not being an unreasonable restriction, the court laying down the principle that a mortgagee *may* stipulate for a collateral advantage at the time and as a term of the advance, *provided* the equity of redemption is *not* thereby *fettered* and the bargain is a fair

and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing or undue influence.

Last year (1899) a case arose in the Chancery Division involving the same principles, but falling on the other side of the line, it being there held that the collateral agreement was a clog on the equity of redemption, unreasonable as practically a denial of the right to redeem, and therefore void. This was the case of *Santley* v. *Wilde*, L. R., 1 Ch. 747. Here the sub-lessee of a theatre executed a mortgage for a valuable consideration on the term and agreed thereby to pay £2000 (the amount advanced by mortgagee), together with interest thereon at 6 per cent, and *also* to pay to the mortgagee *one-third the clear net profit rental of the theatre.* The mortgage was for the whole of the term less one day, and was redeemable only on payment of £2000, with interest, *and all other moneys covenanted to be paid.* This latter clause practically rendered it impossible to redeem before the end of the term, because only with the passing of time could the amount of such moneys due be ascertained. It was held, therefore, by Mr. Justice Byrne, in line with the principles of *Biggs* v. *Hoddinott*, supra, that this agreement was void, not simply because a collateral advantage was sought by the mortgagee out of the mortgaged property, but because such collateral advantage was an illegal clog on the equity of redemption.

What was said in *Jennings* v. *Ward*, supra, seems therefore to require some alteration, and the principle deducible from the cases would require it to read: "'A man shall not have interest for his money, and a collateral advantage besides for the loan of it,' *if* such 'by-agreement clog the redemption.'"

The question, then, as to what collateral advantage may be taken is to be decided with reference to its effect upon the equity of redemption, and under the rule above leaves, to a large extent, each case upon its own peculiar footing, and gives a convenient discretion to the Chancellor as to what should or should not be considered an unreasonable fetter on the equity of redemption.