1931

Collateral Attack Upon Foreign Judgments -- The Doctrine of Pemberton v. Hughes

Fowler Vincent Harper
Indiana University School of Law

MICHIGAN
LAW REVIEW

Vol. XXIX APRIL, 1931 No. 6

COLLATERAL ATTACK UPON FOREIGN JUDGMENTS THE DOCTRINE OF PEMBERTON V. HUGHES

By FOWLER VINCENT HARPER*

PEMBERTON V. HUGHES

IN *Pemberton v. Hughes*,[1] the action was brought in England, by one Sarah E. Pemberton claiming to be the widow of Francis Alexander Pemberton, for certain property rights incident to widowhood. Whether plaintiff was the widow of Pemberton depended upon the validity of their alleged marriage, which in turn depended upon the validity of a Florida divorce of the lady from a former husband. In the divorce action in question, service of summons had been made upon the present plaintiff one day less than the statutory period before appearance. Under the law of Florida, such a defective service rendered the decree void and subject to collateral attack. Nevertheless it was held that no collateral attack could be maintained in England.

The American Law Institute has incorporated the doctrine of *Pemberton v. Hughes* into its Restatement of the Conflict of Laws. Section 474 of the Tentative Restatement provides as follows:

"A valid foreign judgment will not be denied recognition because the procedural law of the state where the judgment was rendered was violated in the proceedings before judgment."

This is the black-letter type of the Restatement and it is supposed to formulate the doctrine of *Pemberton v. Hughes*, supra.[2] The comment to section 474 is as follows:

*Professor of Law, Indiana University.

[1] [1899] 1 Ch. 781.

[2] See Explanatory Notes, Conflict of Laws Restatement, sec. 474.

"The statement in this section is applicable though the procedural defect would have led the court of the state where it was rendered, dealing collaterally with its validity, to treat it as void; though in such a case recognition is not required by the full faith and credit clause of the Constitution of the United States."

The example presented in the Restatement to illustrate both the black-letter rule and the comment is as follows:

"A suit for divorce in state X is entered in court one day earlier than the local procedural law permitted. Judgment is given, divorcing A from B. This judgment would have been regarded as null if introduced collaterally in X. A proper exemplification of the judgment is introduced in a suit in state Y between the same parties. The court will recognize it as valid judgment."

The Logic of the Situation

The logic of the result in *Pemberton v. Hughes,* as articulated in the orthodox formulae of the law, presents a hopeless tangle. A judgment is "invalid" at home but "valid" abroad. It is subject to collateral attack where rendered, but immune from such attack elsewhere. Courts in Florida will refuse to accord it any legal effect whatever but courts in every other common law jurisdiction will accord it complete and conclusive effect. There is no judgment at all in Florida, but as soon as the state line is crossed, there is a valid subsisting and binding obligation which is not open to impeachment.

Let us assume a hypothetical case to put the doctrine to the extreme test of common sense. Indiana has the identical rule with respect to insufficient lapse of time between the service and the decree in divorce proceedings, the only difference being that in Indiana sixty days are required instead of ten days.[3] A decree rendered short of sixty days is by statute declared null and void. Now suppose the *Pemberton v. Hughes* problem arose in an Indiana court instead of in an English tribunal. The Restatement, following the English decision, advises us that the Indiana court will recognize the Florida decree. If such a decree had been rendered in Indiana, it would not be recognized in that state. The decree in question is not recognized in Florida where it was rendered. But the Florida

[3]Burns, Indiana Statutes, 1926, sec. 1104.

decree is valid and conclusive in Indiana and, by the same rule, a similar divorce rendered in Indiana where it is void will be recognized in Florida.

Again, suppose the same parties who were divorced in Florida under the defective service are subsequently divorced in Indiana under a similarly defective service. Suppose thereafter the husband dies, leaving property both in Indiana and in Florida. The wife could claim no property interest in Indiana incident to widowhood—not because of the Indiana divorce which is null, but by reason of the Florida divorce which is null in Florida for a similar reason. She could not claim such rights in the Florida property—not because of the local decree which is null, but by reason of the Indiana divorce which is null in Indiana. The mere recital of such anomalous results demonstrates the extraordinary character of the rule. A situation so odd certainly requires close scrutiny from every point of view before it is accepted as sound law. While the role of mathematical logic is frequently unimportant as a final test of the soundness of legal rules, it is always a convenient instrument for first analysis. To be sure, the last and final standard to which legal rules must conform is that of social utility and desirability. It is not to be forgotten, however, that the logical coherence of a body of legal rules, consistent with the ordinary dictates of common sense, has an important bearing upon social utility. This is particularly true in the conflict of laws where it not infrequently happens that accurate predictability and certainty are of first importance.[4]

Social Policy Involved

It can not be argued with much force that any great principle of social policy is violated in looking behind the formal certification or authentication of a sister state judgment by that state's "official" representatives. There is nothing added to the binding effect of a foreign judgment by the fact of authentication by the proper officials of the sister state. The Act of Congress requires that such foreign records and proceedings shall be "proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that

[4]See Cardozo, Paradoxes of Legal Science, p. 67.

the said attestation is in due form."[5] Accordingly, the clerk certifies that the papers constitute "a true copy," or "a true and perfect copy of the record," or some similar phrase, and the judge certifies that the attestation is in due form of law, and, frequently, that the clerk was duly authorized to act as clerk. This is uniformly held to be a sufficient authentication of the foreign proceedings. The added certificate of the Secretary of State or similar officer that the clerk and judge were duly elected or duly authorized officers adds nothing more to the legal or logical effect of the transcript. Such authentication, at best, is merely evidence, albeit conclusive, that such a record *exists* in the foreign state. It is not conclusive evidence that such judgment or decree is "valid" or "binding" on the parties, or that it has any legal consequences whatever. It raises only the usual rebuttable presumption.

The conflict of laws serves a tremendous social interest in the development of dogmas designed to make uniform legal relationships and their attendant rights and duties.[6] It is highly inconvenient to countenance conditions which result in legal relationships varying with geography. Consequently when a judgment is rendered in one common law jurisdiction, it is only for compelling reasons that judgment will not be accorded the same effect as creating the right to have the judgment obeyed in other jurisdictions. The full faith and credit clause is significant testimony to the importance of this social interest. The same interest, of course, is involved in according more effect in other jurisdictions than is accorded a judgment where it is rendered. Consequently when a judgment is rendered by a court of one state under circumstances that make that judgment subject to attack whenever and however it is relied upon as a determination of the rights of the parties, the primary function of the conflict of laws requires the same result in every sister state. Otherwise the substantial rights of the parties vary with state lines.

The policy which prompts legal rules, such as that in Florida governing a failure to observe the statutory period between the service of summons and the decree, deserves some mention. It is submitted that that policy is entitled to some consideration for it has

[5]U. S. C. A., tit. 28, sec. 687.

[6]See Goodrich, "Public Policy and the Conflict of Laws," 36 W. VA. L. Q. 156 (1930).

behind it deep-seated moral convictions which it can hardly be said are foreign to or opposed to the general and prevailing view in other common law jurisdictions. That moral conviction, whether wise or not, is the belief that divorce is an evil and that it should be discouraged, and that when one or both spouses have decided to terminate the marital relation, a given period of time should be required before the decision can be carried into effect. That time may result in a reconciliation of the two or repentance by the one or the other that will avoid the divorce. Indiana believes that it is desirable to require sixty days to elapse before a decree can be rendered. A decree rendered within the period is declared by the legislature to be "null and void." Thus while it is doubtless true that most errors in "procedure" do not render the court incompetent to "hear and determine," it is not an unreasonable exception to regard the length of time between the summons and a divorce decree as jurisdictional, and the policy behind such exception is easily comprehensible.[7]

As to the expediency, convenience, or propriety of a court in which a foreign judgment is introduced going behind the record to see what effect the law of the state where it was rendered attaches to it, it is submitted that there is nothing surprising in the practice whatever. Such investigation is a regular incident of common law technique. In the fraud cases, courts do not hesitate to look into the rulings and decisions of the state where the judgment in question was rendered to determine whether such a judgment may be collaterally attacked for the fraud.[8] If it appears that such an attack might be made in the state where the judgment was rendered, as revealed by the cases in that state, such an attack will be sustained at the forum.[9] So also as to the effect in a foreign state of a judgment barring recovery under the statute of limitations;[10] or the effect of a foreign decree against a corporation upon stockholders not parties to the action;[11] or the question of what matters are

[7]It is to be noted that the public policy of England did not in any way forbid the recognition of the defect in the Florida proceedings. The English court, therefore, defeated the effects desired by Florida public policy with no compensatory promotion of local policy.

[8]Ball v. Warrington, 108 Fed. 472 (1901).

[9]3 FREEMAN ON JUDGMENTS 5th ed., sec. 1401.

[10]Brand v. Brand, 116 Ky. 785, 76 S.W. 868.

[11]Calloway v. Glenn, 105 Ky. 648, 49 S.W. 440.

barred under the doctrine of res judicata by a foreign judgment.[12] There is, therefore, nothing surprising in expecting a court where a foreign divorce decree is introduced to look to the law of the state where such decree was rendered to discover what effect will be accorded to any alleged defects in the proceedings before judgment.

What Actually Happens—Basis for Prediction

The ordinary set-up of a foreign judgment problem seems to be somewhat as follows: A secures a judgment in state X against B. This gives A a legal right in state X to have the judgment obeyed by B and imposes a duty upon B to obey it.[13] If A subsequently brings an action against B in state Y, the court is said to "recognize" A's "right" to have the judgment performed and B's "duty" to perform it.[14] Aside from the constitutional compulsion, this is the ordinary common law rule.[15] It is none the less true because A could not have obtained the judgment originally in Y. What actually happens is that A is now given a legal right by the law of Y to have certain acts done and a legal duty is imposed by the law of Y upon B to perform those acts. The acts are the same that the law of X required of B when it required him to perform the X judgment. These same acts are now required in Y, although the law of Y would not have required such acts of B had the litigation originally been tried in Y. Why does Y now require the performance of such acts? The reason that induces the Y courts to require B to perform the acts in question is that an additional fact is presented in the case that could not have existed had the case arisen originally in Y. That important fact is the X judgment.[16] A variety of considerations, as everyone knows, conspire to make the X

[12]Union Planters Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712 (1903); Bank v. Covington, 129 Fed. 792 (1903); Brown v. Fletcher, 182 Fed. 963 (1910), cer. denied, 220 U. S. 611, 55 L. ed. 609. See 3 Freeman on Judgments 5th ed., sec. 1386.

[13]See 1 Freeman on Judgments 5th ed., sec. 5.

[14]Restatement, sec. 471.

[15]The conceptions "right" and "duty" are, of course, merely used to indicate in convenient, conventional language, prophesies of what courts will in fact do. See Cook, "Logical and Legal Basis of the Conflict of Laws," 33 Yale L. J. 457 (1924).

[16]See Cook, "Recognition of Massachusetts Rights by New York Courts," 28 Yale L. J. 67 (1918). See also Goodrich, Conflict of Laws, sec. 6.

judgment a material, operative fact. Respect for foreign tribunals, the desirability of limiting the adjudication on its merits to one litigation and the desirability of uniform legal relationships, are all pressing interests involved. The result is the conflict of laws dogma that a foreign judgment rendered by a court of competent jurisdiction over the subject of the action and with the parties legally before the court, will be "recognized" as "conclusive" in every other common law jurisdiction. This aside from any constitutional compulsion with respect to sister state judgments.

In the present problem, A obtains what purports to be a judgment in X. After the rendition of such an apparent judgment, it is discovered that certain facts exist in the situation which courts in X will regard in the future as peculiarly operative facts, namely, such facts will induce all courts in X to disregard the apparent judgment however and whenever it is brought before the courts and will induce all X courts to regard it as creating no "right" whatever in A to have the alleged judgment obeyed and no "duty" whatever upon B to obey it. At the same time, the Restatement tells us that the peculiar operative fact which produced this result in state X and the legal consequences resulting therefrom in X will be completely ignored in state Y, and will not be regarded as significant there; with the result that courts in Y will compel B to perform the "duty" supposed to have been imposed upon him by the X judgment and will afford A legal process for compelling the performance of such "duty" within the limits of common law machinery.

This result seems to be at variance with what ordinarily happens in analogous situations. In the normal case where a foreign judgment is involved, the court at the forum recognizes it only if it is valid where rendered.[17] This produces the desired uniformity. It is the fact of *validity* of the judgment where rendered that is the important, operative fact. But what law should determine the original validity? Obviously the law of the forum where the foreign judgment is introduced.[18] The court at such forum is the only court, by hypothesis, that *could* determine its validity and the "law" that it makes is necessarily local law. But that court in forming its judg-

[17]See Restatement, sec. 471.

[18]Because "recognition" or "enforcement" now depends upon what such court will do.

ment will be governed by what it conceives a court would do in the state where the judgment was first rendered. Since that court will now repudiate the alleged judgment, the court at the forum will be expected to repudiate it.

Much the same thing occurs when an X contract is introduced in Y which, had it been made in Y would not be valid. The Y court is induced to take certain action requiring B to perform certain acts. Thus we are led to say that the law of Y imposes a contract duty upon B and creates a contract right in A.[19] Why does the Y court take such action? Because of the existence of the following peculiar facts: (1) the transactions in question occurred in X, and (2) the X law will recognize them as constituting a valid contract. The effect accorded these facts by Y courts, we describe as the Y conflict of laws rule.[20] The analogy here is that the "legal" reason (not the actual reason, of course) that Y courts create contract rights in such a case is because there is a "valid" contract in X. So also, the "reason" that Y courts will create a judgment obligation where the right claimed is based upon an X judgment instead of an X contract as in the preceding illustration, is because the judgment is "valid" in X.[21]

The same analogy is available, of course, where Y courts create a Y right arising out of an X tort. In every case, it is the "validity" of the X contract claim, tort claim or judgment claim that induces Y courts to create similar or identical rights in Y and compel the performance of the respective obligations.

If we say that the validity of the foreign judgment is to be tested by general common law principles of jurisdiction as understood and applied at the forum, we are in no different position. Those general principles are fairly well understood and are summarized in the Restatement as follows:[22]

---

[19]Cf. Cook, "Logical and Legal Basis of the Conflict of Laws," 33 YALE L. J. 457 (1924).

[20]GOODRICH, CONFLICT OF LAWS, sec. 103.

[21]The text writers on Judgments are in accord. The law of the state where the judgment was rendered determines its effect and operation as a judgment. See BLACK ON JUDGMENTS, 2d ed., sec. 860; 3 FREEMAN ON JUDGMENTS, 5th ed., sec. 1387.

[22]Sec. 470.

"For the purpose of this chapter a judgment is valid if it has the following qualities:

(a) The state in which it was rendered has jurisdiction to act judicially in the case.

(b) The court which rendered it was competent by the law of its state to exercise jurisdiction.

(c) It is the formal determination by an impartial court of a claim made by a party on which reasonable notice and an opportunity to be heard were given to all persons to be bound by the judgment."

In the *Pemberton v. Hughes* type of case, paragraph (b), supra, is offended in that the court which rendered the decision was not competent by the law of its state to adjudicate the matter in controversy. To be sure the law in most states is to the effect that "a mere error in procedure" does not affect the competency of a court to render judgment. But in *Pemberton v. Hughes* the law of Florida *made* such an "error in procedure" a matter which rendered the Florida court incompetent to exercise judicial power in the controversy. This is necessarily so. By hypothesis in the common law, an "invalid" judgment is one which was rendered by a court which did not have jurisdiction to render it. By declaring the divorce involved in *Pemberton v. Hughes* "invalid," the law of Florida prescribed ten clear days notice as a condition precedent to the rendition of a valid judgment, and such a condition, by definition, became by Florida law a "jurisdictional" matter.

Authority and Principle—"Jurisdictional" Defects

So far as can be discovered, a "jurisdictional" defect within common law meaning, is such a defect as will induce a common law court to regard the ensuing or subsequent action of the court as "non-judicial" and consequently not binding as an adjudication. To say that a judgment is "invalid" is merely another way of saying that it was rendered by a body that was incapable of acting judicially in the premises. Both propositions merely describe certain consequences to be attached to the action of the court. And what are those consequences? Merely these: other common law courts (and, presumably, the same court) upon discovery of the "invalidating" fact or the fact which renders the first court "incompetent" will

act in a certain definite way, viz., they will disregard the "judgment" as operative to determine legal relations. This is the sole meaning in common law parlance of an "invalid" judgment. Another way of stating the same thing is to say that the action of the former court may be "collaterally" attacked, whenever and however it may be relied upon as the determination of legal relations.

It is, of course, only a trick of language or of Aristotelian thought to state the foregoing propositions in the form of a syllogism. It may be said that the judgment of a court which is not "competent" to act in the premises is "invalid" *because* of the incompetency and it is subject to collateral attack *because* it is "invalid." Getting at the result of "collateral attack" in this manner does not alter the proposition at all, for the result was, of course, necessarily implied in the premise; otherwise the result would be a *non sequitur*.[23] But are "invalid judgments" the only ones that are subject to collateral attack? May not "valid" judgments, rendered by courts that are "competent" also sometimes be subject to collateral attack? It is submitted that they are not, at common law. No case has been discovered that sustains a collateral attack upon any grounds other than the ground that the judgment was "invalid" in the sense that it had been rendered by a court which was not competent to act judicially in the matter. An apparent exception to this rule under modern statutes is the situation which allows an equitable defense to an action on a judgment. Such a case might arise in two ways, an "equitable defense" might be interposed in a suit upon a judgment in the state where it was rendered or it might be so interposed in a foreign state. If it has become a legal defense under the so-called equitable defense statute,[24] the result is merely to establish another jurisdictional requirement and permit an attack upon the judgment on the grounds that the court rendering it was not competent to render the particular judgment in question.

The court, in *Levin v. Gladstone*,[25] and similar cases,[26] has adopted the modern, pragmatic view of equity decrees that they consti-

[23]Cf. Dewey, "Logical Theory in Law," 10 CORN. L. Q. 17, 23 (1925).

[24]See Hinton, "Equitable Defenses Under Modern Codes," 19 MICH. L. REV. 717 (1920).

[25]142 N. C. 482, 55 S.E. 371 (1906).

[26]See Shary v. Eszlinger, 45 N. D. 133, 176 N.W. 938 (1920) and cases cited.

tute judicial action in the same sense as do judgments at law.[27] Such decisions simply attribute to a rule of equity-law the same force that is attributed to a rule of common law. Since equity will enjoin the enforcement of the "judgment," the result should be either in equity or law, if the question can be got before the court under the procedural apparatus available, that the judgment is without force as an adjudication of legal relations. The defect which would induce an equity court to refuse efficacy to the "judgment," is now sufficient to produce substantially the same result in a court of law. To be sure, this can all be explained by the historical conception of the nature of "equity." But the result is equally intelligible, and more in accord with the facts, by regarding the "defect," once cognizable only by equity but now an operative fact at common law, as a "jurisdictional defect." We are thus enabled to recognize the identity of the ideas incorporated in the various formulae "collateral attack," "incompetency" of the court, and "invalidity" of the judgment.

Now the cases disclose that there are several rather common categories of defects which will render a court "incompetent" and its judgment therefore "non-judicial" (invalid). These may be briefly referred to as follows:

(1) If the judgment is a personal judgment, the parties must be before the court. A party is not legally before the court if there is a failure of either of the following conditions precedent: (a) reasonable notice and (b) a reasonable opportunity to be heard. For purposes of the present discussion it is not necessary to elaborate this requirement.

(2) If the state did not have jurisdiction, in the international sense, to act upon the subject matter of the action.[28] For purposes of the present discussion it is not necessary to detail the principles which govern jurisdiction in the international sense.

(3) Even if the state did have jurisdiction to act, in the international sense, and the parties were legally before the court, there is a jurisdictional defect if the authority which created the court (either constitutional or legislative) limited its competency to certain

[27]See Cook, "Powers of Courts of Equity," 15 COL. L. REV. 37, 106, 228 (1915).

[28]See GOODRICH, CONFLICT OF LAWS, sec. 65 and authorities cited.

types of cases, and the court renders a judgment beyond the limitations imposed. The court can act judicially in only those types of cases.[29] The limitation may be by specific legislative restriction or it may be imposed by the meaning ascribed to general terms by common law usage. An example of the specific restriction is a provision creating tribunals for special purposes only such as workmen's compensation boards, industrial commissions, etc. An example of the general limitation is to be found in the creation of courts of "general jurisdiction," or "common law" courts, or courts with "jurisdiction at common law and equity." The measure of the power of such courts is to be found in the general competency of common law courts and chancery courts of England to determine certain types of controversies.[30]

(4) If there is a specific statutory limitation upon certain classes of judgments, going to the amount, nature or extent of the judgment or decree, then the court is competent to render a judgment or decree only within the limitations thus imposed.[31] An example of this type of limitation is the jurisdictional amounts of claims brought in the federal courts or in justice courts or muncipal courts.

(5) If the legislature prescribes any further conditions precedent to a court acting judicially in a particular controversy, then such conditions are necessary to the competency of the court to render the particular judgment or decree.

The situation in question falls within the fifth classification. What requirements laid down by the legislature are actually conditions precedent to a court acting judicially are, of course, matters of interpretation. Each state may determine for itself what conditions precedent shall exist as requirements of the competency of its courts. Each state may determine for itself what special jurisdic-

---

[29]See Restatement, sec. 470, Comment and Special Note to clause (b).

[30]See McQuigan v. Delaware etc. R. Co., 129 N. Y. 50, 29 N.E. 235 (1891).

[31]See Armstrong v. Obucino, 300 Ill. 140, 133 N.E. 58 (1921): "The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and to judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it." See also Smayne, J., in Ex Parte Reed, 100 U. S. 13, 23 (1879).

tional requirements are imposed upon its courts by its legislature. Many conditions prescribed by the legislature are construed as not necessarily conditions precedent to the courts' competency. They are "merely procedural" or "mere rules of decision." "Procedure" or "substance" as used in this sense, is to be distinguished from "jurisdictional." A statute "merely procedural" is a statute that is "not substantive" and "not jurisdictional." The loose term "procedure" is employed to denote certain other characteristics, but in the present problem courts clearly employ the term to refer to a requirement that is not fatal to the power of the court to act judicially. Accordingly, the black-letter type of the Restatement is quite consistent with this distinction. A "procedural error" is necessarily one that will not invalidate the ensuing judgment. But the comment and illustration which follow the black-letter type is inconsistent with the distinction for the obvious reason that the very fact that the Florida court will treat the divorce decree involved in *Pemberton v. Hughes* as void, demonstrates that the Florida courts construe the statute as not a "mere procedural direction," but as a rule of jurisdiction, one that establishes a condition to the competency of courts to decree divorces.

Certainly the English court in *Pemberton v. Hughes* would not claim the right (power) to determine what is and what is not a jurisdictional defect in Florida so long as the state had jurisdiction in the international sense. And yet to hold the Florida divorce a "valid" decree, when the Florida courts hold otherwise, constitutes that a very presumptuous claim. The Florida legislature has enacted a statute requiring a given period between service and decree. The Florida courts construe that statute as one that must be obeyed before a court can render a binding decree. The English court holds that it need not be so obeyed. An ensuing decree is "valid" without compliance with the statute. This is not what ordinarily happens when a Florida statute is construed. If the question is whether a Florida statute of limitations is a limitation only upon the remedy (procedural) or a restriction upon the right (substantive), that construction will be binding everywhere.[32] If the question is whether a Florida statute of frauds is a procedural or a substantive enactment, that construction will prevail in all common law jurisdictions.[33]

[32]See Restatement, sec. 633.

[33]See Restatement, sec. 630, Comment (a), with which cf. Restatement, sec. 355, Comment (b).

So also should be Florida's construction of a local statute that it is neither "procedural" nor "substantive," but is a limitation upon the power of its courts to act judicially in a given case.

The mistake made by the English court in *Pemberton v. Hughes* was in the significance to be attached to the common law jurisdiction of Florida (i.e. jurisdiction in the international sense). The English judges argued that if Florida had such jurisdiction, the judgment should be recognized in England and English courts would not inquire how Florida "exercised" such jurisdiction. This completely begs the question. The question is whether Florida *has exercised* such jurisdiction. According to the law of Florida, no judicial power has been exercised at all. This should determine the case for English courts. The proposition which should have been laid down in *Pemberton v. Hughes* is that *if Florida had common law jurisdiction (i.e. jurisdiction in the international sense) Florida law would be conclusive as to when such jurisdiction had been exercised, and English courts would not inquire into the propriety or wisdom of any conditions precedent to the exercise thereof by its courts.*

There is light on the doctrine of *Pemberton v. Hughes* in the case of *Thompson v. Whitman.*[84] In this case a New Jersey sheriff was sued in New York for seizing plaintiff's sloop. The defendant pleaded a forfeiture after a hearing and judgment by a New Jersey court under a New Jersey statute providing for the forfeiture of a vessel employed in raking clams in the waters of the state after a hearing before the justices of the county in which the seizure was made. The defendant produced a record of the New Jersey proceeding certifying that the offense had been committed and the seizure made within the county of Monmouth. The New York jury found specially (1) that the seizure was made within the state of New Jersey; (2) that it was not made in the county of Monmouth. Judgment was rendered for the plaintiff. The Supreme Court of the United States affirmed this judgment, holding that the jurisdiction of the New Jersey court could be attacked on the grounds that the judgment was not rendered by the justices of the county in which the sloop had been seized. It is clear here that the New Jersey justices under the statute had jurisdiction only to declare a

[84] 18 Wall. 457, 21 L. ed. 897 (1873).

forfeiture of vessels seized within their respective counties. Consequently, plaintiff's vessel, having been seized in one county and forfeited by a proceeding in another, had been sold under a void judgment that could be attacked collaterally in New Jersey and elsewhere. There is no fundamental difference between the kind of defect which invalidated this New Jersey judgment and the defective divorce decree involved in *Pemberton v. Hughes*. The Florida courts were empowered by Florida statutes to render divorce decrees. The New Jersey justices were empowered to declare the forfeiture of vessels seized while raking clams. In both states, however, statutes prescribed certain conditions precedent to the courts' power to act in a particular case. The condition precedent in the Florida situation was the ten clear days notice. The condition precedent in the New Jersey case was the seizure of the vessel within the county. If either condition was not complied with, the court had no power to render a decree in a particular case.

It will not do to argue that the limitations upon the courts' power to act in these respective states are distinguishable. Such an argument could be made only by injecting an ambiguity into the phrase "type of case." This is accomplished, of course, by arguing that the Florida courts had authority under the Florida law to act in the "type of case" involved, since the category of cases involved is the general one—divorce cases; while the New Jersey justices did not have power under the New Jersey law to act in the "type of case" there involved,—namely forfeiture of sloops seized outside the county. Both courts were courts of special and limited jurisdiction. Each court was empowered to act in such cases only as the statutes authorized. The New Jersey statute was interpreted to limit the power of the New Jersey justices to act judicially only with respect to sloops seized within their county. The Florida statute limited the power of the Florida divorce courts to act judicially only with respect to divorce actions preceded by the ten clear days notice. Statutes in both states were regarded in their respective states as jurisdictional and judgments rendered contrary thereto as void. The conflict of laws requires that such judgments be regarded in the same manner in every other common law jurisdiction.

Another possible but dubious distinction might be based upon the fact that the requirement in Florida for the ten clear days notice

is found in a separate section of the statutes whereas the limitations upon the power of the New Jersey justices is to be found in the statute which prohibits the raking of clams and confers jurisdiction upon the justices to declare a forfeiture. But the Florida requirement is found in the section on "divorces" where the power of the court to decree divorces is found and it would seem to be a flimsy distinction to hold that if such requirement for ten clear days had been included as a subsection or subordinate clause of a previous section of the same chapter, it would constitute a "jurisdictional" requirement, but when included in a separate section of the chapter, it is not "jurisdictional." Such a *ratio decidendi* accords too much significance to the accident of legislature draftsmanship and certainly too subtle a process of thinking to the legislator.

To be sure, the Supreme Court in *Thompson v. Whitman* decided only that New York was not required by the Constitution to recognize the New Jersey judgment. But the reasoning of the court proceeds from its assumption that the requirement imposed by the New Jersey statute and violated in the decree of forfeiture was a jurisdictional requirement. There is no ground whatever for assuming that the New York court would have been permitted to recognize such a defective foreign decree. Indeed, as pointed out later, the cases seem to indicate clearly that there would have been a violation of the full faith and credit rule had New York recognized such a decree—and perhaps of the due process clause as well. In any event, the New York decision, from which the appeal was taken, is, if the cases are similar as contended here, an application of a conflict of laws rule contrary to that of *Pemberton v. Hughes.*

In Indiana, a statute makes the lapse of time between service and decree a condition precedent to the power of a court to render the divorce.[35] It provides: "The trial of no cause for absolute or limited divorce shall be had or heard by any court until after the expiration of sixty days from the date of the issue of such summons as shall have been duly served on the defendant spouse or from the date of publication of the first notice of a nonresident defendant. Any trial had or decree rendered in any such case in less than sixty days shall be null and void." This statute was clearly intended to

[35]Burns Ind. Stat., 1926, sec. 1104.

be a limitation upon the power of a court to render a decree and is thus properly a "jurisdictional statute." It is difficult to see how a decree rendered by an Indiana court in defiance of this limitation could be regarded as a "valid" decree in any common law jurisdiction. And yet the construction placed upon the Florida statute by the Florida courts produces the same result as if the statutes were identical.

Similar situations arise under workmen's compensation statutes requiring a bona fide attempt on the part of the injured employee and his employer to come to an agreement as to compensation. In some states, the provision for an attempt at agreement is construed as jurisdictional and a condition precedent, not to the plaintiff's right of action, but to the power of the Industrial Board to hear and determine the controversy.[36] So also, under the Illinois statute, the provision that the injured employee must claim compensation within six months is construed as a condition precedent to the jurisdiction of the Board. In *Bushwell v. Industrial Board,*[37] the court said: "The making of a claim for compensation is jurisdictional and a condition precedent to the right to maintain such action, and the burden of proof was upon the claimant to establish such fact as a proof of his case in chief, and in the absence of such proof the committee of arbitration and the Industrial Board were without jurisdiction to proceed in the matter." No one would argue that an award, in violation of such a requirement, though it were void at home, would be recognized as valid in any other state. Such a construction was precisely the one placed upon the Florida statute in the problem at hand.

So far as the proposition that the law (rule) of the state which rendered the judgment determines, as a matter of conflict of laws, what effect, if any, is to be accorded the judgment, there are American cases in point. While the number of such cases is not large, the judges seem to have little difficulty with the problem. They regard it too clear to be seriously questioned. Thus in *Wood v. Watkinson,*[38] in which the Connecticut court held that the New York

[36]Re Moore, 79 Ind. App. 470, 138 N.E. 783 (1923).

[37]276 Ill. 262, 114 N.E. 492. See also Re Levangie, 228 Mass. 213, 117 N.E. 200 (1917).

[38]17 Conn. 500, 44 Am. Dec. 562, 565 (1846).

rule should control the effect of a New York judgment against joint debtors, it was said: "* * * it is well settled, that no greater effect is to be given to it than it would have in the state where it was rendered. It has no higher dignity in any other state than in the one where it was pronounced; and hence, if in the courts of the state where the judgment was rendered, it is inconclusive, or if it is inquirable into there, during a particular period, or on certain conditions, it will be open to investigation, to the same extent everywhere else; * * *. A judgment creates a debt, on the ground that a liability is ascertained and established, by the decision of a tribunal, which might rightfully adjudicate upon it; and such adjudication derives its whole force and effect from the laws of the state under whose authority it is made."

Again in *Sugdam v. Barber*[39] it was held that a Missouri judgment against one of two joint debtors was not a bar to liability on the part of the other in New York because the effect of the Missouri judgment in that state did not merge the cause of action upon which it was founded, although such a merger would be effected by a New York judgment. The court observed that "the consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them, and that they are not re-examinable on the merits of the controversy determined by them."[40]

That any other rule than that the effect accorded the judgment where rendered should control, appears out of the question to the court is clearly noted in other language employed: "No case can be found where a greater effect is given to the judgment of any state in the courts of another than belongs to it in the state where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the Constitution and laws of the United States on the subject, but against and irreconcilable with all policy, and with the plainest and fundamental principles of justice."[41]

---

[39] 18 N. Y. 468, 75 Am. Dec. 254 (1858).

[40] 18 N. Y. 468, 471.

[41] 18 N. Y. 468, 472. See also Calloway v. Glenn, 105 Ky. 648, 49 S.W. 440.

CONSTITUTIONAL IMPLICATIONS INVOLVED

The situation presented by incorporating the doctrine of *Pemberton v. Hughes* into American law raises some nice constitutional problems. The Restatement, while asserting the Florida divorce decree to be "valid" in all sister states, declares that the full faith and credit clause of the Constitution does not require such recognition. This is unusual. Ie seems clear that ordinarily a judgment rendered by a competent court, that is, a court which had jurisdiction in every sense, is within the full faith and credit clause protection. It can not be collaterally attacked in a sister state. This is because it can not be collaterally attacked at home. Apparently the implication which has been read into the full faith and credit clause is that it merely establishes a minimum of "credit" to be attached to foreign judgments—they are entitled, not to the same credit but "at least to the same" credit as where rendered. The implication is that the Constitution does not forbid more credit to a judgment than it is entitled to in the state where rendered.[42]

This is a possible construction, but it is submitted that there are no cases to support the implication. Professor Beale has succeeded in demolishing the one situation which tended to support such a construction of the full faith and credit clause. That situation was the one created by the *Haddock* decision.[43] In that case, it will be remembered, the Supreme Court held it unnecessary for New York to recognize a Connecticut divorce decree rendered in favor of a resident of Connecticut and against a resident of New York, New York being the matrimonial domicil of the parties. It was supposed, after this decision, that here was a situation in which one state could, but need not, recognize the judgment of a sister state, although the sister state had jurisdiction to render the judgment.[44] The Constitution did not *require* recognition of the judgment in sister states, although it would not *prevent* such a recognition if the sister state, under its conflict of laws rule, saw fit to recognize it. This view is still supported by eminent authority.[45] It is not now the view of

[42]Or that sometimes a state may employ its discretion as to recognition of a foreign judgment.

[43]201 U. S. 562, 50 L. ed. 867 (1906).

[44]See Beale, "Constitutional Protection of Decrees of Divorce," 19 HARV. L. REV. 586 (1906).

[45]GOODRICH, CONFLICT OF LAWS, p. 295.

Professor Beale, however. He argued that the reason New York was not required to recognize the Connecticut decree was because Connecticut had no jurisdiction to render the decree, and therefore the decree was invalid, even in Connecticut.[46] This is an attractive explanation of the *Haddock* case and, although it required a certain defiance of the dicta of that case, it has, it seems, run afoul of no actual decisions. This view has been adopted in the Restatement.[47]

It is believed that the doctrine, as thus worked out, is a thoroughly sound one and that it is in accord with the cases. But it shatters the construction of the full faith and credit clause that is necessary to support the doctrine of *Pemberton v. Hughes* in the United States. So far as the divorce cases are concerned, there is no support for the proposition that one state may accord more faith and credit to a sister state judgment than it receives in any other state, or that there may be situations in which a court may, but need not, recognize a sister state judgment.

On the other hand, there is some authority to the effect that the Constitution and the Act of Congress require *exactly the same effect* to a sister state judgment as such judgments receive at home—no less effect, and no more. The statute provides that sister state judgments "shall have *such* faith and credit given to them in every court within the United States as they have *by law or usage* in the courts of the State from which they are taken."[48] It might be supposed that "such" faith and credit would imply the "same" faith and credit, thus precluding a sister state from according more effect thereto.

Certainly this was the view of Chief Justice Marshall. In *Hampton v. M'Connel*[49] he said that "the judgment of a state court shall have the same credit validity and effect in every other court in the United States, which it had in the state where it was pronounced, and *whatever pleas would be good to a suit thereon in such state* and none other, could be pleaded in any other court in the United States."[50]

[46]Beale, "Haddock Revisited," 39 HARV. L. REV. 417 (1926).

[47]Restatement, sec. 118.

[48]U. S. C. A., tit. 28, sec. 687.

[49]3 Wheat. 234, 235 (1818).

[50]A sister state judgment is "open to the same attacks and subject to the same defenses which may be made in the state of its rendition." 3 FREEMAN ON JUDGMENTS, 5th ed., sec. 1386. See Gundlock v. Park, 140 Minn. 78, 165 N.W. 969; Shary v. Eszlinger, 45 N. D. 133, 176 N.W. 938 (1920).

While the point actually decided in *Hampton v. M'Connel* was not whether a state might accord greater effect to a judgment of a sister state than it receives at home, the opinion of the Chief Justice clearly was that such effect could not be given. There are, however, cases which actually so hold, construing the full faith and credit clause rule to prescribe a maximum as well as a minimum effect to a sister state judgment. *Board of Public Works v. Columbia College*[51] was an appeal from the supreme court of the District of Columbia. It was a suit in equity to reach property belonging to the estate of a deceased debtor, particularly funds distributed to legatees, including Columbia College. The question arose whether, to establish grounds for the interposition of equity, complainant had proceeded far enough at law to establish an undisputed debt. A decree had been rendered in complainant's favor in Virginia, but the court of appeals of that state had characterized the decree as interlocutory and not final. Said Mr. Justice Field:

"At any rate, the complainant, relying upon the decree of the court (Virginia decree) as evidence of his demand against Withers (the deceased), invoking for it full faith and credit under the clause of the Constitution, can not object to the character which the highest court of Virginia has given to it, or insist that it is entitled to any other weight or consideration. No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on the subject."

It is to be noticed that this case was not an appeal from a state decision, in which case it would merely be authority for the proposition that the state need not accord conclusive effect to the Virginia decree. Being an appeal from a federal court, on the merits of the decree, as an equity decree, it might be argued that, although it involves an interpretation of the full faith and credit clause and the Act of Congress, it does so only as a conflict of laws rule for federal courts. It is not a very plausible suggestion, however, that the Constitution and statute prescribe one conflict of laws rule, and a different constitutional rule with respect to sister state judgments. The case therefore stands as a decision forbidding a state to lend

[51] 17 Wall. 521 (1873).

more force to a sister state judgment than it is accorded in the state where rendered.

In *Bruce v. Ackroyd,*[52] it was held that a record not entitled to recognition in New York as a judgment of that state, was not entitled to such recognition in Connecticut. The court said:

"There can be no doubt but that any state may determine for itself what are the essentials of a judgment of record in its own courts. If the record discloses such essentials as to entitle it to recognition as a judgment in a domestic court it is, under the United States Constitution and the statute, entitled to the same recognition in the courts of other states. [Citing cases.] Conversely, it must follow that if the domestic courts would not recognize the record as establishing a judgment, it can not be given that effect in any other state. The law of the state in which the judgment is rendered governs, and not the law of the other state in which the record is sought to be used to establish the fact of a judgment in the original jurisdiction."

But there is still another angle to the constitutional problem, the one created by the Fourteenth Amendment. It is usually said that when a state exercises power over a person or his property when it had no jurisdiction there is taking of liberty or property without due process of law. This rule has been generalized in the Restatement to include all cases where a state exercises power when it wanted jurisdiction.[53] If the contention made here is sound, namely that the Florida court did not have jurisdiction to render the divorce decree involved in *Pemberton v. Hughes,* a serious question is raised as to whether the Fourteenth Amendment will not prevent a foreign state from recognizing the decree. Upon this, no opinion is ventured, but a possible knotty problem is involved. It may be that the failure of jurisdiction that will invoke the protection of the due process clause must be jurisdiction in the international sense alone and that the Constitution would not touch a failure of the state to properly exercise that jurisdiction through a properly authorized tribunal. Again, the due process clause might afford protection only in the

[52]95 Conn. 167, 110 Atl. 835 (1920). See also Sugdam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254 (1858). 3 FREEMAN ON JUDGMENTS 5th ed., sec. 1387. See STORY ON THE CONSTITUTION, 5th ed., sec. 1313.

[53]Restatement, sec. 44.

state which wanted jurisdiction in the international sense, and not in other states when no question of jurisdiction there is involved.[54] For example, the due process clause might have protected Mrs. Haddock in Connecticut against the Connecticut divorce decree, but still not operate to prevent New York from recognizing the Connecticut decree if it saw fit to do so.[55]

As to the first doubt, while it seems unnecessary to press the point, so far as the present problem is concerned, in view of the disposition of the case under the full faith and credit clause rule, nevertheless it is significant that many times the Supreme Court has used language that clearly indicates that the failure of jurisdiction of a court, in the internal sense, renders such a judgment void under the due process clause even though the state had jurisdiction of the person and subject matter, in the international sense,[56] and there are several lower court cases that have directly so held.[57]

Conclusions

In attempting to demonstrate the invalidity of the *Pemberton v. Hughes* doctrine, as incorporated in the Restatement, the conception of "jurisdiction" is used in its broadest sense. Some circumstances incident to the judicial process are such as to induce all common law courts to recognize the first court's action as a "valid" judgment. Other circumstances are such as to induce all common law courts to ignore the first court's action and treat it as void. In the first instance, the result may be described by saying that the court had "jurisdiction"; in the second instance, it did not have "juris-

[54]See Restatement 44, Comment (c) (tentative draft).

[55]It is believed that the full faith and credit clause would prevent New York from recognizing the Connecticut decree, if the foregoing analysis is sound and if section 118 of the Restatement is sound.

[56]See Gray, J., in Scott v. McNeal, 154 U. S. 34, 46: "* * * and a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist." And see Field, J., in Pennoyer v. Neff, 95 U. S. 714, 733: "To give such proceedings (i.e. legal proceedings) any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit * * *." See also Harlan, J., in Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 15 (1907).

[57]Re Kelly, 46 Fed. 643 (1890) (habeas corpus, where one convicted by justice for an offense not committed within the county); Re Monroe, 46 Fed. 52 (1891) (habeas corpus, where one sentenced by police magistrate in excess of authority conferred by statute.)

diction." Thus any particular defect in the judicial process that will induce other common law courts to ignore the first court's action is a "jurisdictional defect." This principle, together with orthodox results and analogies in the conflict of laws leads to a repudiation of the doctrine of the English decision.

It is submitted, therefore, that the doctrine of *Pemberton v. Hughes* is not the law in America, if we mean by stating that a given doctrine "is the law" that the probabilities are reasonably persuasive that courts, when the occasion arises, will decide cases in a way that is consistent with the doctrine in question. The probabilities seem to suggest strongly that courts in this country will decide cases exactly contrary to *Pemberton v. Hughes,* in so far as prediction may rest upon authority, logic, and utility of result.

The generalization that "mere errors in procedure" prior to judgment does not render a judgment subject to attack in a sister state, contained in the black-letter type of the Restatement, is thoroughly sound. But the explanatory comment and illustration, including the *Pemberton v. Hughes* case, is incorrect. If such illustration is supposed to interpret the black-letter type (which it does not), it renders the entire section erroneous. If it does not explain or illustrate the black-letter type (which seems to be the case) it should be withdrawn. In any event, whatever portion of the Restatement that is supposed to incorporate the English decision, it is submitted with deference to the eminent scholars who have drafted the work, is an erroneous statement of the law of this country.

From the conclusions here arrived at, it would seem that the comment and illustration of the Restatement might properly be replaced by some such proposition as follows:

The state where the judgment was rendered determines what are "mere procedural errors" and what errors render its courts incompetent to act judicially in a particular case or class of cases.