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# Specific Performance--Service by Publication

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# NOTES

## SPECIFIC PERFORMANCE—SERVICE BY PUBLICATION

Under the early practice a decree of a court of equity could operate only *in personam*, the legal right was affected only by what was done under the decree.<sup>1</sup> The plaintiff in a suit for specific performance of a contract to convey land was without legal title if the defendant refused to convey. Today this unwarranted restriction on the power of a court of equity has been abolished in most states either by statutes or decisions granting power in the proper case to convey legal title.<sup>2</sup> Thus, where the land is within the jurisdiction of the court and the defendant is present, his refusal to obey a decree to convey is of no significance, by decree or by the act of a court commissioner title is given to the plaintiff. But the decisions vary as to whether suit may be entertained where a non-resident defendant is served by publication only. The answer depends upon the nature of the statutes giving *in rem* power to the court and providing for constructive service, and upon what the court interprets the nature of the action to be.

It is well settled that each state has exclusive jurisdiction and sovereignty over the property within its borders and its law regulates the manner in which the rights and privileges pertaining thereto may be transferred and enjoyed.<sup>3</sup> Therefore, where

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<sup>1</sup> Langdell, *Summary of Equity Pleading* (2d ed.) 35 and note 4 (1883); Pomeroy, *Equity Jurisprudence* (5th ed.) Vol. 2, sec. 428; Cook, *The Powers of Courts of Equity* (1915) 15 Col. L. Rev. 37.

<sup>2</sup> Huston, *The Enforcement of Equitable Decrees*. (1915) 13.

<sup>3</sup> *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300 (1825), *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192 (1876) *Pennyroy v. Neff*, 95 U. S. 714, 24 L. Ed. 544 (1877) "The question is not what a court of equity by virtue of its general power and in the absence of statute, might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect the titles to real estate within its limits.

But no such imperfections attend the sovereignty of the state. It cannot bring the person of a non-resident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of im-

by statute the court has *in rem* power and where it is specifically provided that in suits for specific performance against non-resident vendors of land process may be served by publication, the courts invariably sustain jurisdiction.<sup>4</sup> But, where the constructive service statute enumerates certain actions wherein it may be used, it is held that this impliedly excludes all others.<sup>5</sup> Where, however, the constructive service statute is worded generally, with no reference to the kind of action in which it may be used, there is a question as to whether a suit against a non-resident for specific performance of a contract to convey domestic land is included. If the action is considered to be *in rem* the court may obtain jurisdiction on constructive service.<sup>6</sup> If the action is interpreted as one *in personam*, then any such attempt to obtain jurisdiction is void<sup>7</sup> since the process of one state cannot run into another and bring the person of a non-resident within its limits.<sup>8</sup> The answer to the problem depends on whether the court reasons that by virtue of the *in rem* statute the action for specific performance is changed to one, the object of which is to determine the rights and interests in land, and therefore substantially *in rem*, or whether, since the decree is in part an order compelling the defendant personally to do a certain act, the action remains, as traditionally, a suit strictly *in personam*.

In *Atlantic Seaboard Natural Gas Co. v. Whitten*,<sup>9</sup> the court, taking the view that the action is *in personam*, said.

"The suit before us is not specifically directed toward the *res*; it is directed toward the owner of the *res*. The status of the *res* is not in the slightest degree affected until after the suit against the

parting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918 (1889).

<sup>4</sup> *Watters v. Southern Brighten Mills*, 168 Ga. 15, 147 S. E. 87 (1929), *Light v. Doolittle*, 77 Ind. App. 187, 133 N. E. 413 (1921), *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442 (1908), *Felch v. Hooper*, 119 Mass. 52 (1875).

<sup>5</sup> *Hollingsworth v. Barbour*, 29 U. S. 466, 7 L. Ed. 922 (1830).

<sup>6</sup> *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928), *Clem v. Given's Exr. et al.*, 106 Va. 145, 55 S. E. 567 (1906).

<sup>7</sup> *Hollingsworth v. Barbour*, 29 U. S. 466, 7 L. Ed. 922 (1830), *Kinhead v. Clark*, 239 S. W. 717 (Tex. Civ. App.) (1922), *Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 Atl. 305 (1934).

<sup>8</sup> *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918 (1889), *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 544 (1877).

<sup>9</sup> 315 Pa. 529, 173 Atl. 305 (1934).

owner is terminated adversely to the latter. Until that stage is reached, the suit is entirely a proceeding between persons and not between a person and a certain piece of land as, for example, in condemnation or foreclosure proceedings. The suit here is to determine the respective personal rights and obligations of the opposing parties in the gas content of the land owned by this non-resident defendant."

It is true that in form the proceeding is *in personam*, but it is confusing form with substance to say that since the *res* is not affected until after the suit is terminated adversely to him the action is entirely against the person of the owner. The real object of the suit is not to enforce a personal liability as in the case of a suit for damages for breach of contract, nor it is to compel personal performance of an act by the defendant. It is rather to obtain a decree depriving the defendant of his interest in the land, vesting it by force of the decree or commissioner's deed in the plaintiff. Thus, although the action is in form *in personam*, since the real object is to dispose of *in rem* rights, it is, as said in *Garfien v. McInnis*,<sup>10</sup> "substantially" *in rem*.

In *Clem v Given's Exr.*,<sup>11</sup> a Virginia case, the plaintiff had a contract whereby the non-resident executor, having power of

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<sup>10</sup> "Though the court cannot by constructive service obtain jurisdiction of the person of a non-resident defendant, and cannot compel such a defendant to obey its decree, where the court has the power to make a decree which will affect the interests of a party in property within the state, whether that party obeys the decree or not, the action is not purely in personam. The court's decree acts upon the property as well as the person of the non-resident defendant. In such case the objection that the court by constructive service obtains no jurisdiction over the person of the non-resident is without force.

It has changed the nature of the action from an action in personam to an action substantially in rem." 248 N. Y. 261, 162 N. E. 73 (1928)

<sup>11</sup> 106 Va. 145, 55 S. E. 567 (1906). The court cited Sec. 3418 of the Virginia Code (1904) which provided: "A court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same. "

In comparison see Kentucky Code Sec. 394 which provides: "Real property may be conveyed by a commissioner appointed by the court.

(1) If by the judgment in an action a party be ordered to convey such property to another."

The Virginia Code (1904) provided for process by publication in Secs. 3230, 3231 and 3232. As to the effect of these sections the court said: "While the language of these sections is general, we are of the opinion that it comprehends quasi proceedings in rem, the object of which is to reach and dispose of property within the state." Compare sections 56 and 57 of the Kentucky Code which provide that constructive service may be had against defendants who are non-residents of the State or upon whom, for specified reasons, actual service cannot be had.

attorney to sell land of the deceased, agreed to convey Virginia land. Upon refusal of the executor to convey, the plaintiff sued for specific performance, serving process by publication. Although by statute the court had general *in rem* powers and although the publication statute did not specify particular instances where it might be applied, the court held that service by publication was sufficient in this case. The court cited *Roller v Holly*,<sup>12</sup> which says.

"When the statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another."

The Virginia court said further that where constructive service on non-residents is *generally* provided for by statute, suits against non-residents for specific performance of contracts to convey realty would have to be included. Otherwise all suits affecting title to land such as partition and foreclosure actions would have to be excluded and a primary object of the statute would thereby be defeated. One eminent writer in speaking of the effect of *in rem* statutes on the nature of such actions, has stated.

"Under many such statutes the decree is still in form *in personam*—a personal order,—but by virtue either of the decree itself or the proceedings taken under it, the complete title passes to the plaintiff. Doubtless under other statutes the decree may be in form either *in rem* (i. e., it may purport itself to vest the title in the plaintiff) or *in personam*, or perhaps both. Under all of them the equitable action against the vendor for specific performance is clearly an action *in rem*, both as to its object and as to the effects of the decree and proceedings under it."<sup>13</sup>

This problem has not confronted the Kentucky Court under the present code, although under earlier statutes it apparently considered the action to be *in rem*.<sup>14</sup> The case of *Hynes v*

<sup>12</sup> 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520 (1900)

<sup>13</sup> Cook, *Powers of Courts of Equity* (1915) 15 Col. L. Rev. 37, 127.

<sup>14</sup> *Hynes v. Oldham*, 19 Ky. (8 T. B. Mon.) 266 (1826), *Nesbit v Gregory*, 30 Ky. (7 J. J. Mar.) 270 (1832) *Berryman v. Mullins*, 47 Ky. (8 B. Mon.) 152 (1847) See also *Dickens v King*, 26 Ky (8 J. J. Mar.) 591 (1830). The statutes under which these cases were decided provided in general terms for the *in rem* power of the court and service by publication. See *Littel's Digest of the Statute Law of Kentucky* (1822) Vol. I, pages 62, 63, 228, 322. See also *Grubbs v. Steele*, 54 Ky. (15 B. Mon.) 570 (1855) where the statutes provided that the county court had power to convey title through appointed

*Oldham*<sup>15</sup> involved the validity of a conveyance made by a commissioner in pursuance of a decree taken for confessed in a suit for the conveyance of land where unknown heirs and a non-resident were served by publication. It was held that although there was an irregularity in the publication process the court had jurisdiction since the defendant had been properly warned and therefore the decree ordering a conveyance was merely erroneous and not void nor subject to collateral attack.

Also in *Berryman v Mullins*<sup>16</sup>) where the non-resident defendants were served by publication, the court said.

"The land was in the county of Livingston and a conveyance sought from non-resident heirs, in virtue of a claim, or obligation upon their ancestor. In support of the jurisdiction of the Livingston Circuit Court, in view of these facts, the case of *Hynes vs. Oldham*, (3 Monroe, 266), is directly in point. In *Dickens vs. King*, (3 J. J. Marshall, 591), this court say, 'unknown heirs or non-resident defendants may be proceeded against with a view to obtain titles, in the Circuit in which the land lies. This is a principle of necessity sanctioned by statute. Unknown heirs and non-residents can be reached in no other way.' With these authorities before us, we need not stop to inquire whether the jurisdiction has been expressly conferred by statute or assumed from necessity. It is sufficient that we consider the principle as settled."

The statutes under which these cases were decided provided that where one claimed land "as locator or by bond or other instrument of writing" he could proceed to obtain a conveyance of the same by serving process on non-resident defendants by publication.<sup>17</sup> Also, if the defendant refused to convey the land, the court could appoint a commissioner to make the conveyance and thereby vest legal title in the plaintiff.<sup>18</sup> Obviously, in these cases the court considered the action to be *in rem* since, if the action were *in personam*, the process provided by the statute would have been ineffective.

The present sections of the Kentucky Code concerning constructive service do not specify particular proceedings wherein

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commissioners and also that in a suit for specific performance of a contract to convey land in Kentucky the non-resident vendor could be served by publication. The court said that jurisdiction was afforded when the statute was properly followed. See REVISED STATUTES OF KENTUCKY (1850), Chap. 57, Secs. 1, 2, 7.

<sup>15</sup> 19 Ky. (8 T. B. Mon.) 266 (1826)

<sup>16</sup> 47 Ky (8 B. Mon.) 152, 153 (1847).

<sup>17</sup> See *Littel's Digest of the Statute Law of Kentucky* (1882), Vol. 1, 62.

<sup>18</sup> See *Littel's Digest of the Statute Law of Kentucky* (1882), Vol. 1, 228, 322.

it may be used. It is provided in section 56 that where the defendant is a non-resident the plaintiff may serve process by causing a copy of the petition with a summons annexed to be delivered to the defendant by a person to whom he is personally known.<sup>19</sup> Sections 57-61 provide that constructive service is had when an appointed attorney has taken the proper measures to warn the non-resident defendant to appear.<sup>20</sup> It is clear that under either method of service a personal judgment is improper.<sup>21</sup> However, since in Kentucky the action has been considered *in rem*,<sup>22</sup> this limitation is not applicable and therefore it may be said that the court has jurisdiction where a non-resident defendant in a suit for specific performance of a contract to convey Kentucky land has been served in accordance with the relevant sections of the code.

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<sup>19</sup> Kentucky Code, sec. 56.

<sup>20</sup> Kentucky Code, sec. 57-61.

<sup>21</sup> Kentucky Code, sec. 419.

<sup>22</sup> *Supra* note 14. However, in *Talbot v. Bowen*, 8 Ky. (1 A. K. Mar.) 436 (1819), it was held error to appoint a commissioner to convey without giving the defendant a day to do so. Thus, as to the form of the decree and the one day period in which the defendant may convey, the action is in form *in personam*. But, it cannot be said that the *in rem* qualities of the action are thereby obliterated since, should the defendant refuse to convey, the effect of the decree is of an *in rem* nature. See also, *Dan Cohen Realty Co. v. National Savings & Trust Co. et al.*, 125 Fed. (2d) 288 (1942).