1918

Acquiring Jurisdiction without Personal Service, Seizure of Aid of Statute

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ACQUIRING JURISDICTION WITHOUT PERSONAL SERVICE, SEIZURE OR AID OF STATUTE.—It is often assumed that courts can acquire jurisdiction only by personal service to give jurisdiction *in personam,* or by a seizure to give jurisdiction *in rem*; but it is not so. The assumption is induced no doubt by the fact that in the ordinary common law actions jurisdiction is acquired in that way. Mr. Justice Field very distinctly pointed out in the case of *Pennoyer* v. *Neff* (1877), 95 U. S. 714, that it was not the fact that the land was not seized that rendered the judgment void. It was the fact that the land was not the *res* in litigation in the prior case that made the judgment void.

Laying aside the common law actions of writ of error, certiorari, and the like, in which superior courts always acquired jurisdiction without any personal service or seizure, as being in their nature rather continuations of prior actions in other courts, than a grasp of fresh jurisdiction; no such explanation can be made to justify the fact that courts of probate and administration have from the earliest history of the common law to the present time taken jurisdiction without either of these supposed requisites. Someone suggests

to the court that a citizen has died and petitions that his estate be administered; whereupon the court immediately takes jurisdiction without any seizure at all, appoints someone to collect dues and guard the assets till a final hearing can be had, and orders notice published to all persons interested to appear and defend. No seizure has ever been supposed essential to confer jurisdiction. If the administrator does in fact take possession of certain assets, no one ever supposed that the court's jurisdiction was confined to the assets so seized.

Courts of equity never supposed that any seizure was necessary in the absence of personal service to give them jurisdiction in suits to quiet title, to foreclose mortgages, and the like; nor was any such seizure ever in fact made. The land being immovable there was no danger of it being spirited away before a decree could be awarded, and seizure would be an idle ceremony. If a levy on the attached property in the statutory actions of attachment at law has been required by the statute, it has been rather with the view to make sure that the property would be on hand to answer the judgment that might thereafter be rendered, than because of any notion that a seizure was necessary to confer jurisdiction.

The statutes of the various states have long sanctioned proceedings *in rem* against property in the hands of persons other than the owner without any seizure of the property or personal notice to the owner, by merely summoning the person in possession as garnishee; and even in case there is no tangible property, but a mere indebtedness by the garnishee, a summons to him to hold the indebtedness and account to the court for it has been declared by statute to give the court jurisdiction to proceed *in rem* against the indebtedness without obtaining any jurisdiction *in personam* against the principal debtor; and the constitutionality of these statutes has been sustained in *Harris* v. *Balk* (1905), 198 U. S. 215, 25 S. Ct. 625, and numerous other cases.

Courts of chancery have generally refused to entertain suits in the nature of creditors' bills until the creditor has reduced his claim to judgment at law and had execution levied or returned *nulla bona,* not because of any supposed jurisdictional impediment to entertainment of such suits without personal service on the debtor or seizure of the property, but because the creditor has no standing in equity till he has exhausted his remedy at law. POMEROY, EQ. JUR., § 1415.

But if the creditor's claim is not legal but merely equitable, for which reason he could maintain no action at law, no reason is apparent why a court of chancery should not take jurisdiction at once to afford him relief though there is no tangible property that can be seized, and the defendant cannot be personally served in the jurisdiction, and no statute expressly empowers the court to act in such cases. The court would seem to possess this jurisdiction by reason of its general jurisdiction to grant relief on the claim involved, or because there is no adequate remedy at law.

In *Murray* v. *Murray* (1896), 115 Cal. 266, 37 L. R. A. 626, 56 Am. St. 95, a woman who had been seduced, later married her seducer, and had been immediately deserted by him, filed a bill for separate maintenance without prayer for divorce, and prayed that property that he had transferred after the

seduction but before the marriage to get it out of her reach be appropriated for that purpose. The husband was not found in the state, did not appear, and the transferee demurred, contending that she was not such a creditor at the time of the transfer as could object to the transfer for fraud, and as a creditor could not maintain a bill before obtaining judgment; but the court sustained her bill, and said that attachment is not the only means by which the court may acquire control of the property of the absentee defendant so as to make it a proceeding *in rem*; Harrison and Temple, JJ., dissenting.

The assumption of such jurisdiction in the recent case of *Kelley* v. *Bausman* (Wash., Oct. 26, 1917), 168 Pac. 181, seems fully justified on both reason and authority, though dissented from by Ellis, C. J., and Holcomb, Main, and Parker, JJ. In this case complainant seeking a decree of separate maintenance against her husband who was not found within the state, made persons holding property belonging to him and corporations in which he held stock, defendants, and prayed for and obtained a preliminary injunction restraining the defendants from parting with the property, and a final decree requiring the defendants to turn the property into the registry of the court for her benefit.

In sustaining a similar decree in a like case appealed from the supreme court of Ohio, Mr. Justice Brandeis said in *Pennington* v. *Fourth National Bank* (1917), 243 U. S. 269, 271, "In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court."

In another case, also for alimony, against a defendant not found within the state, the supreme court of Kansas said in *Wesner* v. *O'Brien* (1896), 56 Kan. 724, "The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set apart as alimony. A formal seizure is no more essential to the jurisdiction of the court in a proceeding of this kind than in an action to quiet title to land, based alone on constructive service."

The supreme court of Iowa has gone so far as to hold in a case of this kind, that a mere prayer for such alimony as the court shall deem equitable, without any prayer for sequestration of the particular property to that purpose, gave the court jurisdiction to award the alimony out of property which the complainant had caused to be attached in the proceeding in a mistaken attempt to adapt the legal action of attachment under the statute to a suit for divorce to which it did not extend, and although the defendant in the di-

vorce proceeding was not served within the state and did not appear; for the reason that the fact that the statute did not warrant attachments in divorce proceedings was an irregularity which could not be availed of collaterally. *Twing* v. *O'Meara* (1882), 59 Iowa 326. See also *Thurston* v. *Thurston* (1894), 58 Minn. 279; *Wood* v. *Price* (1911), 79 N. J. Eq. 1; *Benner* v. *Benner* (1900), 63 Ohio St. 220; *Bailey* v. *Bailey* (1900), 127 N. Car. 474.

J. R. R.