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Process--Delivery of Summons to Sheriff for Service--Service Thereof by Individual (Cohoes Bronze Co., Inc. v. Georgia Home Ins. Co., 243 App. Div. 224 (3d Dept. 1935))

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Nerwal Realty Corp. v. *9th Avenue–31st Street Corp., et al.*, N. Y. L. J., February 25, 1935.

A Court of Equity has power to appoint a receiver as an incident to its jurisdiction and such power is not dependent on any statute.[1] The receiver has the right to collect the rent in advance, pending the judgment by the court in the foreclosure action and the sale which transfers ownership to the purchaser.[2] The court cannot, however, pending such transfer of ownership, terminate the rights of the mortgagor under leases made by him or the rights of tenants to the use and occupancy of the premises for a stipulated rental, so long as their lessor's title has not been divested.[3]

Where a tenant has paid rental in advance, as per his contract with the mortgagor, he cannot be compelled to pay occupational rent.[4] A tenant covenants for the right of quiet enjoyment,[5] and upon eviction, actual or constructive, the covenant is broken.[6] A wrongful demand for rent, as in the case at bar, is such eviction,[7] and where a tenant is required to pay for use and occupation a sum beyond the rents reserved in the lease to him, the necessary effect of an order requiring it to pay for such use and occupation is to free it from further obligation under its lease and constitutes a disaffirmance of the lease.[8] Therefore, the lease being terminated, the tenant was free to negotiate a new lease with the receiver.

A. S. G.

PROCESS—DELIVERY OF SUMMONS TO SHERIFF FOR SERVICE—SERVICE THEREOF BY INDIVIDUAL.—Plaintiff sued on a fire insurance policy. The summons was delivered to the sheriff for service upon defendant, pursuant to Civil Practice Act §17[1] within the time lim-

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[1] Hollenbeck v. Donnell, 94 N. Y. 342 (1884); United States Trust Co. v. N. Y. *etc.* R. Co., 101 N. Y. 478, 5 N. E. 316 (1886); Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814 (1891).

[2] Keeney v. Home Ins. Co., 71 N. Y. 396 (1877); Prudence Co., Inc. v. 160 W. 73d Street, 260 N. Y. 205, 183 N. E. 365 (1932); Markantonis v. Madlan Realty Corp., 262 N. Y. 354, 186 N. E. 862 (1933).

[3] *Ibid.*

[4] *Ibid.*

[5] Mygatt v. Coe, 147 N. Y. 456, 62 N. E. 17 (1895).

[6] Scriver v. Smith, 100 N. Y. 471, 3 N. E. 675 (1885); Shattuck v. Lamb, 65 N. Y. 499 (1875).

[7] Giles v. Comstock, 4 N. Y. 270 (1850).

[8] Markantonis v. Madlan Realty Corp., *supra* note 2.

[1] N. Y. CIVIL PRACTICE ACT (1920) §17:

"An attempt to commence an action * * * is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with intent that it shall be actually

ited by the policy.[2] The sheriff held the summons, without effecting service, for nineteen days, and after that time plaintiff caused service to be made upon defendant by a private person. Defendant sets up the limitation in the policy, claiming that such service did not validate the attempt to commence the action within the meaning of Section 17. *Held,* that it is immaterial what person serves the summons if delivery is made to the sheriff with intent that he serve it. *Cohoes Bronze Co., Inc.* v. *Georgia Home Ins. Co.,* 243 App. Div. 224, 276 N. Y. Supp. 619 (3d Dept. 1935).

Prior to the instant decision, the issue here decided had never been raised. It is elementary that the meaning of the statute must be determined by seeking the intent of its enactors.[3] The avowed purpose of Section 17 is to afford protection to a creditor, in an emergency, against an elusive debtor, when the limited period has nearly expired.[4] The section involved herein does not define its usage of the term "personal service." Consequently, other provisions of the Civil Practice Act must be read to ascertain that definition.[5] Civil Practice Act §220 [6] provides how personal service may be made, and distinguishing process delivered to a sheriff for service, states: *"the sheriff must serve it,* and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence."[7] Does this mean that the sheriff must be the *party* to serve it?[8] The Act is to be liberally construed.[9] It has been held that the arising of the bar of limitation depends upon the *delivery* to the sheriff, with intent that it be served,[10] and upon the fact that the action has been *commenced*[11] rather than the manner of making service. Thus, the court's decision is in keeping with the declared liberal spirit of the Act.[12]

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served, to the sheriff * * *. But in order to entitle the plaintiff to the benefit of this section, the delivery of the summons * * * must be followed within sixty days after the expiration of the time limited * * * by personal service of the summons * * *."

[2] N. Y. CIVIL PRACTICE ACT (1920) §17 applies to such a limitation. Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863 (1898).

[3] Caddy v. Interboro Rapid Transit Co., 195 N. Y. 415, 88 N. E. 747 (1909); Wiley v. Solvay Process Co., 215 N. Y. 584, 588, 109 N. E. 606, 608 (1915); New York Railways Co. v. City of New York, 218 N. Y. 483, 113 N. E. 501 (1916).

[4] Clare v. Lockard, 122 N. Y. 263, 266, 25 N. E. 391, 391 (1890); 2 CARMODY, NEW YORK PRACTICE (1930) §465.

[5] New York Railways Co. v. City of New York, *supra* note 3; Rees v. Teachers Retirement Board, 247 N. Y. 372, 160 N. E. 644 (1928); *In re* Davison's Estate, 137 Misc. 852, 857, 244 N. Y. Supp. 616, 622 (1930).

[6] N. Y. CIVIL PRACTICE ACT (1920) §220.

[7] Italics are writer's.

[8] See 2 CARMODY, *op. cit. supra* note 4, §633, n. 25, for the view that such is the construction that apparently must be given.

[9] Continental Ins. Co. v. Equitable Trust Co., 137 Misc. 28, 244 N. Y. Supp. 377 (1930), *aff'd,* 229 App. Div. 657, 243 Supp. 200 (1st Dept. 1930).

[10] Riley v. Riley, 141 N. Y. 409, 411, 36 N. E. 398, 399 (1894).

[11] Clare v. Lockard, *supra* note 4.

[12] *Supra* note 9.

But this construction gives a special meaning to Section 220 which disregards the distinction there made between service in general and service by a sheriff when process is delivered to him for that purpose. Such interpretation should not be made unless the intent of the legislature clearly points to that construction.[13] Generalization by the court of the meaning of "personal service" under Section 17[14] does not seem warranted,[15] nor does their disregard of the evident distinction found in Section 220.

J. T. B., JR.

WORKMEN'S COMPENSATION—LIABILITY OF EMPLOYER IN COMMON LAW ACTION FOR DAMAGES RESULTING FROM A DISEASE NOT ENUMERATED IN THE STATUTE.—His claim having been dismissed by the State Industrial Board, plaintiff brought this action at law. He alleged that he was an employee of the defendant and that in the course of his employment in defendant's factory he inhaled dust and other impurities which caused him to contract silicosis. The defendant is charged with failure to exercise reasonable care in the performance of duties imposed by statute and common law.[1] The disease from which the plaintiff is suffering is not an "occupational disease" for which the statute imposes a liability on the employer to provide compensation.[2] The defendant, having complied with the Workmen's Compensation Law in all respects, moved to dismiss the complaint under rules 106 and 107 of the Rules of Civil Practice. This was denied and on appeal *held,* affirmed. In cases not covered by the statute, the Workmen's Compensation Law (Consol. Laws, ch. 67) does not bar an action at law by the employee against the employer to recover damages sustained through his contracting an occupational disease not enumerated in the statute, by reason of the alleged negligence of the employer. *Barrencotto* v. *Cocker Saw Co., Inc.,* 266 N. Y. 139, 194 N. E. 61 (1934).

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[13] People v. Long Island R. Co., 194 N. Y. 130, 87 N. E. 79 (1909).

[14] *Supra* note 1.

[15] People v. Richards, 108 N. Y. 137, 150, 15 N. E. 371, 376 (1888); Pardy v. Boomhower Grocery Co., 178 App. Div. 347, 164 N. Y. Supp. 775, 777 (3d Dept. 1917); *In re* Kassam's Estate, 141 Misc. 366, 252 N. Y. Supp. 706 (1931), *aff'd without opinion,* 235 App. Div. 609, 255 N. Y. Supp. 835 (1st Dept. 1931).

[1] Flike v. Boston & Albany R. R. Co., 53 N. Y. 549 (1873); Daurizio v. Merchants Despatch Transp. Co., 152 Misc. 716, 274 N. Y. Supp. 174 (1934).

[2] N. Y. WORKMEN'S COMPENSATION LAW (1922) §3, subd. 2, and §§11, 38, 48; see 73 A. L. R. 543, citing Williams v. Guest, Keen and Nettlefolds, 18 B. W. C. C. (Eng.) 535 (1925) for the proposition that silicosis is not an accidental personal injury arising out of and in the course of employment but is an industrial disease. The burden of proof is on the plaintiff to set forth facts showing that the statute does not apply. Nulle v. Hardman, 185 App. Div. 351, 173 N. Y. Supp. 236 (1st Dept. 1918).