

Specific Performance--Jurisdiction--Personal Service Outside of State (Garfein v. McInnes, 248 N.Y. 261 (1928))

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annulled the lease, *unless* by a proper survivorship clause the landlord reserved the option to keep it alive for the purpose of reletting and holding the tenants for the deficiency.⁴ A mere provision that in case of "re-entry" the lessor may so relet does not give him such authority upon the recovery of possession by summary proceedings.⁵ Where, however, the parties by their contract give the word "re-entry" a broader scope than its technical common-law definition, such is not the case.⁶ Therefore, until the landlord by some affirmative act terminates the lease, the action is premature.

SPECIFIC PERFORMANCE—JURISDICTION—PERSONAL SERVICE OUTSIDE OF STATE.—The vendee brought an action to compel specific performance of an agreement to convey real property situated in Westchester County, N. Y. The vendor, a resident of Connecticut, was not served in New York, nor did he appear in the action but he was personally served with a copy of the summons and verified complaint in the State of Connecticut. The Supreme Court at Special Term, issued an order directing the Sheriff to convey the property to plaintiff as provided by statute. Defendant's motion to set aside the service of the summons and complaint was denied.² Upon appeal he contended that the Court was without jurisdiction to make the decree in question, since equity acts *in personam* merely, in the absence of a statute enabling it to make a judgment *in rem*; that there is no statute which authorizes personal service outside of the State in an action for specific performance. *Held*, order affirmed. The service was proper and sufficient to give the Court jurisdiction to grant a judgment *in rem*, binding upon the non-resident. *Garfein v. McInnes*, 248 N. Y. 261 (1928).

The language of the Civil Practice Act³ is broad enough to include an action for specific performance and service without the State is sufficient to give the Court jurisdiction to render a judgment *in rem* binding upon the non-resident so served. But a decree *in personam* must be supported by actual service within the State.⁴ Consequently it is necessary to decide whether the judgment is directed solely against the defendant himself or whether it operates directly upon the property resulting in a transfer of title to plaintiff. That "equity acts *in personam*" is one of its oldest maxims and a

⁴ *Hoffman Brewing Co. v. Wuttge*, 234 N. Y. 469, 138 N. E. 411 (1923).

⁵ *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425 (1902).

⁶ *Anzolone v. Paskusz*, 96 A. D. 188, 89 N. Y. S. 203 (1st Dept. 1904), herein approved.

¹ C. P. A., Sec. 979.

² 223 App. Div. 28, 227 N. Y. S. 585 (2nd Dept. 1928).

³ C. P. A., Secs. 232, 235.

⁴ *Hart v. Sansom*, 110 U. S. 151 (C. C. No. Dist. of Texas, 1884).

basic principle of its jurisdiction.⁵ There is, however, no authority which conclusively denies to equity the right or power to act *in rem*. The method by which the early chancellors acted "upon the conscience of defendants"⁶ was simply a convenient mode of procedure, and not due to any inherent disability to do otherwise. It has been held that the power of a court of equity to pronounce a judgment *in rem* does not depend on statute and may be exercised against a non-resident whenever constructive service is allowed.⁷ Many States have virtually abolished the ancient theory that equitable decrees are confined or limited in effect⁸ and have generally provided that in all cases where justice requires it, a decree shall operate either *ex proprio vigore* to transfer title, or else the object of the judgment shall be accomplished by having an officer of the court, acting in the name of the party against whom judgment has been had, convey the property.⁹

The Legislature has expressly provided that in an action of this kind, the Court may enforce its decree by other means than a command to the defendant.¹⁰ The effect of this legislation is to change the nature of the action to one substantially *in rem*.¹¹

⁵ Cook, Powers of Courts of Equity, 15 Columbia Law Review, 37 (1915); Felch v. Hooper, 119 Mass. 52 (1875); Merrill v. Beckwith, 163 Mass. 503 (1895); Fowler v. Fowler, 204 Ill. 82 (1903); Gardner v. Ogden, 22 N. Y. 327 (1860).

⁶ 1 Pomeroy's Equity Jurisprudence, Sec. 135.

⁷ Tennants Heirs v. Tretts, 67 W. Va. 569 (1910).

⁸ *Supra*, note 6.

⁹ *Ibid.*

¹⁰ *Supra*, note 1.

¹¹ Boswell's Lessee v. Otis, 50 U. S. 336 (C. C. Dist. of Ohio, 1850)