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FEDERAL COURTS - WHAT IS AN EQUITABLE CLAIM TO REAL PROPERTY WITHIN THE MEANING OF SECTION 57 OF THE JUDICIAL CODE?

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FEDERAL COURTS — WHAT IS AN EQUITABLE CLAIM TO REAL PROPERTY WITHIN THE MEANING OF SECTION 57 OF THE JUDICIAL CODE? — Plaintiff, an Ohio corporation, was the lessee of land in Kentucky. It entered into a contract with defendant lessor, a resident of the District of Columbia, to renew the lease. Defendant failed to carry out his agreement, and plaintiff sued for specific performance of the contract to lease in the United States District Court for Eastern Kentucky, jurisdiction being based on diversity of citizenship.¹ Plaintiff was unable to obtain personal service upon defendant, but obtained service by publication under section 57 of the Judicial Code,² which authorizes the

¹ 28 U. S. C. (1940), § 41 (1) (b).

² 36 Stat. L. 1102 (1911), 28 U. S. C. (1940), § 118.

court to take jurisdiction and to allow service by publication in "any suit . . . to enforce any . . . equitable . . . claim to . . . real or personal property within the district." Defendant appeared specially and objected to the jurisdiction of the court. Plaintiff appealed from an adverse ruling.³ Held, that the court is without jurisdiction. This is not an action based upon an equitable claim to real property, but rather seeks only an act by the defendant, i.e. execution of the lease, and is therefore an action in personam. *Dan Cohen Realty Co. v. National Savings & Trust Co.*, (C. C. A. 6th, 1942) 125 F. (2d) 288.

The historic position of the courts of equity seems to be that an equity decree is binding against the person of the defendant only.⁴ Thus with a contract to convey realty, the decree of the court ordering the defendant to convey title will not operate to convey title of itself, but will be successful only to the extent the court is able to compel the defendant to execute a deed by pressure exerted against his person. State statutes have substantially changed this by providing that in the event the defendant fails to convey, the court can authorize a commissioner to make a conveyance which will have the same effect as if made by the defendant himself, or in some states, by providing that the decree will have the effect of a conveyance itself.⁵ This in effect makes the equity decree operative in rem.⁶ The right of federal courts to convey legal title by their decrees in equity on the strength of a state statute giving such power to the state court having jurisdiction of the property in dispute has frequently been upheld.⁷ While the objection has been made that the state statutes regulating procedure in state courts should not affect the procedure in the federal courts,⁸ it would seem that the state statute creates a new substantive right enforceable in the federal court.⁹ Likewise Rule 70 of the rules of civil procedure,¹⁰ providing for both the decree of the court and a conveyance of a master appointed by the court as a means of passing title, would appear to answer any objection as to the inadequacy of the procedure

³ (D. C. Ky. 1941) 36 F. Supp. 536.

⁴ LANGDELL, A SUMMARY OF EQUITY PLEADING, 2d ed., § 43 (1883). Writs of sequestration, whereby the chattels of the recalcitrant defendant were sold to satisfy the plaintiff's claim, and the income of his realty devoted to the same purpose, and writs of assistance whereby the equity court put the plaintiff in possession of the land which was the subject of dispute and kept him there, were recognized exceptions to this rule. WALSH, EQUITY, § 10 (1930). To the effect that there may be other exceptions, see *Smith v. Kernochen*, 7 How. (48 U. S.) 198 (1849); *Pennington v. Gibson*, 16 How. (57 U. S.) 65 (1853); *People's Savings Bank v. Eberts*, 96 Mich. 396, 55 N. W. 996 (1893).

⁵ See the statutes collected in HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 157 (1915).

⁶ *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557 (1890); *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928).

⁷ *Clark v. Smith*, 13 Pet. (38 U. S.) 195 (1839); *Langdon v. Sherwood*, 124 U. S. 74, 8 S. Ct. 429 (1888); *Single v. Scott Paper Mfg. Co.*, (C. C. Ohio, 1893) 55 F. 553; *Deck v. Whitman*, (C. C. Tenn. 1899) 96 F. 873.

⁸ HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 37 (1915).

⁹ *Clark v. Smith*, 13 Pet. (38 U. S.) 195 (1839); 5 POMEROY, EQUITY JURISPRUDENCE, 3d ed., 25, note 33 (1905). This appears to be another example of the difficulty in drawing the line between what is procedure and what is substance.

¹⁰ 28 U. S. C. (1940), following § 723c.

of the federal courts. Thus, if under the law of the state wherein the property which is the subject of dispute lies, the plaintiff would be entitled to a conveyance of the land, independent of the action of the defendant, the plaintiff would have an "equitable . . . claim to . . . real or personal property within the district" within the meaning of section 57 of the Judicial Code, as distinguished from a claim against the person.¹¹ Here it seems that the Kentucky state courts would give such relief,¹² and therefore the court in the principal case unjustifiably refused to take jurisdiction. Particularly unfortunate is the court's approval of the language of the district judge resting the decision on the ground that "The only relief asked is that the defendants be compelled to execute the lease . . . a decree operative against the defendants in person and not otherwise." Thus to emphasize a feature of the procedure formerly employed in all actions in the High Court of Chancery but increasingly abandoned in the course of the last two centuries is to invite capricious and unintelligible distinctions. The point is illustrated in this case. In its effort to reconcile the decisions, the court draws a line between the action for specific performance of a contract for sale of land and the action for cancellation of a like contract, though both were once implemented solely by a decree in personam, requiring action by the defendant and both are now implemented by the self-executing decree. This, it is submitted, is case-law at its worst, a perpetual impediment to intelligibility and therefore a perpetual impediment to certainty,—perpetual, that is, until the distinction is beneficently forgotten.

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¹¹ To the effect that the existence of a claim under § 57 is a question of state law, see *Single v. Scott Paper Mfg. Co.*, (C. C. Ohio, 1893) 55 F. 553.

¹² To the effect that Kentucky will give specific performance of a contract to lease, see *Mattingly's Exr. v. Brents*, 155 Ky. 570, 159 S. W. 1157 (1913). Ky. Civ. Code (Carroll, Baldwin Rev. 1938), § 394, gives the Kentucky courts power to convey title by means of a deed executed by a commissioner appointed by the court. See *Todd v. Lancaster*, 104 Ky. 427, 47 S. W. 336 (1898); *Savin v. Delaney*, 229 Ky. 226, 16 S. W. (2d) 1039 (1929).