

ELLIS *v.* REYNOLDS.

Circuit Court, W. D. Pennsylvania.

June 1, 1888.

WRITS—SERVICE OF PROCESS ON ABSENT DEFENDANTS IN SUITS IN
REM—SUPP. REV. ST. U. S. 176.

The specific prayers of the bill being (1) for an account of lumber, etc., taken from demised premises; (2) for damages for defendant's breaches of covenant; (3) for the appointment of a receiver of demised premises, lumber, etc.,—*held*, that the suit was not one within the contemplation of the act which authorizes service upon non-resident defendants wherever found in suits "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought."

In Equity. *Sur* motion to rescind an order on an absent defendant to appear, plead, answer, or demur, and to strike off the service thereof.

B. J. Reid, for complainant.

J. O. Parmlee, for defendant.

ACHESON, J. The order of April 21, 1888, was made by me upon an *ex parte* application, supported by the plaintiffs affidavit, beyond which I did not then look. That affidavit brought the case within the terms of the act of congress which authorizes such order and service where the suit is brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought." Supp. Rev. St. U. S. p. 176; Rev. St. § 738. But upon a careful examination of the bill, I am persuaded that the suit is not within the scope of the statute. The first prayer of the bill is for an account of the lumber, etc., taken by the defendant from the demised premises, and a decree against him for the balance due the plaintiff. The second prayer is for a decree in favor of the plaintiff for the damages he has sustained by reason of the defendant's breaches of covenant. These are the principal prayers, and they disclose the substantial purpose of the suit. They involve, it is plain, only the personal rights and obligations of the parties. The third prayer of the bill, indeed, is for the appointment of a receiver, but this is an auxiliary remedy, invoked as an aid to the principal relief sought. As the bill now stands, I do not see how the suit can be regarded as a proceeding *in rem*, within the contemplation of the act. This conclusion has been reached after consultation with Judge McKENNAN, and with his concurrence. And now, June 1, 1888, the order upon the defendant made April 21, 1888, that he appear, etc., is rescinded, and the service thereof upon him is set aside.