## RICHMOND *v.* BROOKINGS.

*(Circuit Court, D. Rhode Island.* November 28, 1891.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FOREIGN ATTACHMENT.
   Although the judgment in an action commenced in a state court against a non-resident by foreign attachment without personal service can bind the property only, and not the person of the defendant, yet the latter is a party to the suit in such sense that the same may be removed to the federal circuit court on the ground of diverse citizenship.
2. SAME—DISMISSAL.
   If the defendant could not in such case be considered a party for the purposes of removal, this would not be a ground for dismissing the cause in the federal court, but only for remanding to the state court.
3. SAME—JURISDICTION OF CIRCUIT COURT—NON-RESIDENT OF DISTRICT.
   Act Cong. 1888, § 1, (25 St. U. S. p. 433,) providing that no suit shall be brought in the circuit court "against any person by any original process * * * in any other district than that whereof he is an inhabitant," applies only to suits commenced in that court; and, in a case removed to it from a state court, its jurisdiction is not affected by the fact that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment without personal service. *Bank* v. *Pagenstecher*, 44 Fed. Rep. 705, followed.
4. ATTACHMENT OF LAND—SERVICE ON NON-RESIDENT.
   The Rhode Island statute in regard to attaching real estate requires personal service on the defendant or service by leaving a copy with some person at his residence, or, if he have no residence within the precinct of the officer, then by mailing a copy to him, and serving a like copy on the person, if any, in possession of the real estate. *Held*, that when the return shows service of a non-resident by mailing a copy to him, but makes no allusion to serving any person in possession of the land, the court has no jurisdiction.
5. SAME—AMENDING RETURN.
   The return may, however, be amended so as to show that no person was in possession of the lands, upon affidavits showing such to be the fact.
6. MOTION TO DISMISS—DEMURRER.
   The question whether the declaration states a cause of action cannot be considered upon a motion to dismiss, but must be raised by demurrer.

At Law. Action by William H. Richmond against Wilmot W. Brookings, commenced by process of foreign attachment. On motion to dismiss. Conditional order of dismissal.

*E. D. Bassett*, for plaintiff.

*C. H. Hanson*, for defendant.

CARPENTER, J. This action was commenced in the court of common pleas for the county of Providence, in the state of Rhode Island, by attachment of real estate of the defendant. The defendant was not personally served with process. He appeared specially, and filed a plea denying the jurisdiction of the court, and also a petition whereby the action was removed into this court. He now, still appearing specially, files a motion to dismiss the action "on the ground that he is not a resident or citizen of said state of Rhode Island, and was not found, or served upon personally with process, in said state or district of Rhode Island."

In support of this motion the defendant first contends that this court can have no jurisdiction of any action wherein the defendant is not personally served with process, and cites *Perkins* v. *Hendryx*, 40 Fed. Rep. 657. I have already had occasion to consider this question in *Bank* v.

*Pagenstecher*, 44 Fed. Rep. 705, and, following the reasoning of that case, I conclude that this court has jurisdiction of the present action. The defendant further contends that the court has no jurisdiction, because the action is not between citizens of different states. In this action, the argument runs, there can be no judgment which can conclusively bind the defendant. The judgment can be enforced only against the attached property. The action is therefore a proceeding *quasi in rem*, and not an action between persons. I cannot agree with this argument. The judgment, it is true, can bind only the property; but the judgment is in form against the person, and not against the property. It is therefore in its effect only, and not in its character, that the action can be called an action *in rem;* and, if this be not so, still there is no reason why the action should be dismissed. If the action is not between persons it cannot be between citizens, and hence it was improperly removed to this court, and ought to be remanded.

There are two other alleged grounds for dismissal which were argued at the hearing, but not referred to in the written motion. The first is that the return of the sheriff does not show that the writ was duly served. The statute of Rhode Island provides that the officer shall "leave an attested copy of such writ * * * with the defendant personally, or with some person at his last and usual place of abode, if any he have, within the precinct of the officer, or, if he have none, then such officer shall send such copy by mail to such defendant, * * * and shall also in the last-named event leave a like copy with the person, if any, in possession of such real estate." In this case the officer returned that, the defendant having no last and usual place of abode within his precinct, he had sent the required copy by mail, but made no return as to a copy to any person in possession. I think this return is insufficient. It is argued that, as the defendant is a non-resident, it is to be presumed that no person was in the possession of his real estate; but I see no possible ground for such a presumption. If, therefore, the return stands as at present, the action must be dismissed. The plaintiff, however, moves that the officer may amend the return by adding a statement that no person was in possession. This motion will be granted if properly and seasonably supported by affidavit to the effect that such an amended return is in accordance with the facts, the defendant having notice of the filing of the affidavit, and an opportunity to contradict it. The second ground which was argued is that the declaration does not set out a sufficient cause of action. I think this question is not properly raised by a motion to dismiss, but must be argued on a demurrer. The action will be dismissed, unless affidavit in support of the motion to amend be filed within 10 days.

## McBee *et al.* v. Marietta & N. G. Ry. Co. *et al.*

(*Circuit Court, E. D. Tennessee, N. D.* December 10, 1891.)

1. Jurisdiction of Federal Courts—Districts—Non-Resident Defendant.
Act Aug. 13, 1888, § 1, declares, among other things, that no civil suit shall be brought before the federal circuit or district courts against any person by original process in any other district than that whereof he is an inhabitant; but section 5 provides that nothing in this act shall be construed to repeal or affect any jurisdiction or right mentioned in Act March 3, 1875, § 8. This section provides that in any suit to enforce any legal or equitable lien on, or claim to, or to remove any lien or cloud upon, property situated in the district where the suit is brought, defendants who are not inhabitants thereof may be made parties, and brought into court by the methods there prescribed. *Held*, that this latter section applies to an original bill, brought for the purpose of enforcing various liens upon part of a railroad lying in the district as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state; and such original bill may be maintained, although some of the defendants are non-residents of the district.
2. Same—Citizenship of Parties—Supplementary Proceeding.
While such bill is an original bill within the meaning of that term as used in equity pleading, yet the suit, in its essence, is supplementary to the ancillary foreclosure suit, which it seeks to oppose, and hence the court's jurisdiction is unaffected by the fact that when the parties are arranged according to their interests in the suit, some who are residents of the same state will be found on opposite sides of the controversy.

In Equity. Bill by V. E. McBee and others against the Marietta & North Georgia Railway Company, the Central Trust Company of New York, and others, setting up certain liens upon a railroad, and opposing the foreclosure of a mortgage thereon, as injurious to their rights. On motion to dismiss the bill. Denied.

*Washburn & Templeton, Green & Shields, J. W. Caldwell*, and *W. T. Welcker*, for plaintiffs.

*Henry B. Tompkins* and *G. N. Tillman*, for defendants.

Key, J. The Central Trust Company of New York, 13th January, 1891, filed its bill in this court against the Marietta & North Georgia Railway Company, alleging that it had lately filed its bill in the circuit court of the United States for the northern district of Georgia for the foreclosure of a mortgage executed by said railway company January 1, 1887, to secure its bonds to the amount of $3,821,000 upon its entire lines of road, property, and franchises; interest upon the bonds to be paid semi-annually. The bill shows that the property covered by the mortgage extends from Marietta, Ga., to Knoxville, Tenn.; that the railway company is a corporation created by the laws of Georgia and North Carolina. The main line of road is 205 miles long, of which 95½ miles lie in Georgia and 109½ miles in Tennessee. How or by what authority the railway company came into Tennessee the bill does not disclose. The bill alleges that the defendant has made default in the payment of its interest, and is insolvent; asks to have this bill filed as ancillary to the suit in Georgia to have a receiver appointed, the mortgage foreclosed, and the money arising therefrom applied to the payment of the bonds. On the 16th of January, 1891, complainants McBee *et al.* filed