

rights of the mortgagees and lienholders, whose mortgages and liens were prior in point of time to the acquisition by the appellant of the mortgagors' equity of redemption in the premises. We decide nothing more than that, in determining the amount necessary to effect redemption, the rule prescribed by the Nebraska statute, as construed by the supreme court of that state, should be followed, and that the effect of the redemption, and the rights acquired by making it, must be left to be determined when a case shall properly arise presenting those questions. As the appellant may have been misled by the action of the lower court in the premises, the order of this court will be that the decree of the circuit court be reversed, and the cause remanded, with directions to that court to enter an order immediately upon the receipt of the mandate of this court giving the appellant the right to redeem, as he may be advised, within 10 days after the entry of such order. Ordered accordingly.

RUTLEDGE v. WALDO et al.

(Circuit Court, S. D. New York. May 12, 1899.)

MATTERS OF DEFENSE TO REVIVOR—BURDEN OF PROOF.

In defense to a bill of revivor to carry into effect a decree in a suit which has abated by the death of the original complainant, the defendants may show that the decree was rendered without jurisdiction over their persons, but the burden rests on them, in such case, to prove that the attorneys who appeared for and assumed to represent them in the case acted without authority.

In Equity.

R. H. Worthington, for complainant.

Preble Tucker, for defendants.

WALLACE, Circuit Judge. This is a bill of revivor to carry into effect a decree against the defendants in a suit which has abated by the death of the original complainant. While it is no doubt true that generally the sole questions before the court in such a bill are the competency of the parties and the correctness of the frame of the bill to revive, I have no doubt that the defense introduced to the present bill, that the original decree was obtained without jurisdiction of the persons of the defendants, is good if established by the proofs, because, in that event, the original decree would be void, and no subsequent proceedings could be founded upon it. I am of opinion that the defense is not established by the proofs. The burden of proof is upon these defendants to establish that the appearance in their behalf by the attorneys who assumed to represent them in the original action was unauthorized. *Hill v. Mendenhall*, 21 Wall. 454; *Osborn v. President, etc.*, 9 Wheat. 738. These attorneys were the law firm of Tucker, Hardy & Wainwright. The defendant Mrs. Tucker was the wife of one of them, and the defendant Miss Waldo was the sister of Mrs. Tucker. These attorneys had represented the defendants in other litigations of the same character, pending about the same time, when they appeared for them in the original action. It cannot for

a moment be believed that Mr. Hardy would have taken charge of the action, and the steps in it he did, without the instructions of Mr. Tucker; nor can it readily be believed that Mr. Tucker would have given these instructions unless he had understood himself to be authorized to do so, as otherwise he would have been deliberately lending himself to a deception calculated to jeopardize the rights of the complainant. The lapse of time since the occurrences afford a charitable explanation of Mr. Tucker's present testimony, as well as that of Miss Waldo, and suggests that they have forgotten the facts rather than intentionally misstated them. The relations between Mr. Tucker and the defendants render it extremely improbable that they were not informed of the commencement of the action, or that Mr. Tucker's intervention in their behalf was without their sanction. The case is one where conduct is of far more probative force than asseverations or denials by witnesses.

A decree is ordered for the complainant, with costs.

DIMICK et al. v. SHAW.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,136.

1. EQUITY JURISDICTION—ENJOINING CONTINUING TRESPASS.

A court of equity has jurisdiction of a suit to enjoin a trespasser from working a mine upon, and removing mineral from, land the title to which has been finally adjudicated in complainant's favor.

2. APPEAL—REVIEW OF INTERLOCUTORY ORDER GRANTING INJUNCTIONS.

A circuit court of appeals will not disturb an interlocutory order granting an injunction where the questions of law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain, and great if the relief is denied, while the loss of the opposing party will be comparatively small if it is granted.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from an interlocutory order granting a temporary injunction restraining appellants from in any manner working the property known as the "Independent Mine," and from extracting or removing ores therefrom, or removing or selling any ores, until the final determination of the cause. The bill charges that the appellee is the owner of a certain large tract known as the "Baca Grant No. Four," his title thereto having lately been determined by the supreme court of the United States in the cause of *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632; that defendants, while said cause was pending in the supreme court, went into possession of the lands in controversy under verbal permission of appellee's manager for the purpose of prospecting only, until the final determination of the cause then pending in the supreme court; that after the final determination of that cause, and the decision of the court that appellee was the owner of the tract, appellants were notified to quit the premises, but refused, and since then have commenced mining operations on a large scale in excess of the permission granted to them, to prospect, and continue their mining operations and trespasses; that they are insolvent, and, unless enjoined by a court of equity, will commit an irreparable injury to appellee's property. Appellants filed an answer setting up, among other things, the same defenses which had been expressly adjudicated by the supreme court in the case of *Shaw v. Kellogg*, supra, and also that appellants' manager