

fact of his advancing the money to pay for the purchase of the half interest conveyed in 1876 by Jesse Ames to Adelbert Ames. At first blush it appears plausible that, having put \$25,000 in on the promise of a mortgage, at a time when there were no partnership debts, he has an equity superior to that of partnership creditors; but a little reflection will make it clear that this claim is without foundation. It is not a case of a third party putting money into the partnership upon an agreement for mortgage security. Gen. Butler's money added nothing to the resources of the partnership. It was simply money used between one partner and another, to effect a change of interest. As between the firm and its creditors it meant nothing. Whether Jesse Ames or Adelbert Ames was partner was to them immaterial. They took nothing by the change in interest, hence their equities remain the same as though there had been no transfer from one partner to the other. Their rights and equities are the same, their claim upon the partnership property the same, whether one partner gives or sells a portion of his interest to another partner. I think the supposed equity does not exist. This disposes of this case, and a decree will be entered for complainants, as prayed for.

CHEESMAN *et al.* v. SHREVE *et al.*

(Circuit Court, D. Colorado. December 13, 1888.)

1. MINES AND MINING—TRESPASSERS.

Parties who attempt to enter, beneath the surface, within the side lines of the lands of another, and to mine and take ore therefrom, are *prima facie* trespassers.

2. SAME—COURTS—FEDERAL JURISDICTION.

Where such entry is claimed to be made under the mining laws of the United States, and the right to enter turns upon the construction to be given to such laws, the case is within the jurisdiction of the United States circuit court.

3. INJUNCTION—PRELIMINARY—DISPUTED LEGAL TITLE—CONFLICTING AFFIDAVITS.

Where the affidavits are conflicting, a preliminary injunction will be issued against trespassers, leaving the question of the title to the property to be settled by a suit at law.

In Equity. On bill for injunction.

Application for injunction by Walter S. Cheesman and others against James A. Shreve and others to prevent trespass upon mining lands.

C. J. Hughes, Jr., for complainants.

B. F. Montgomery, for defendants.

BREWER, J. These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States, and especially section 2322 of the Revised Statutes, which give to the

owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. Involved in their claim is the question whether there is such a vein as is provided for in that section; a question as to the right of entrance, as affected by priority of location and the dip of the vein. These questions are presented, and, whatever may be the true answers thereto, it is obvious, from past judicial expressions, that they cannot be considered as mere sham, or pretended, but as real, substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable by the court. *Mining Co. v. Larimer Co.*, 8 Fed. Rep. 724; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. Rep. 28. As the defendants are entering within the side lines of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction, are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law. Temporary injunction will issue upon the giving of a bond in the sum of \$25,000, conditioned according to law.

SWIFT v. MEYERS *et al.*

(Circuit Court, D. Oregon. December 24, 1888.)

1. MORTGAGES—SUIT TO ENFORCE LIEN—SUMMONS—NOTICE.

A suit to enforce the lien of a mortgage is not one to recover money or damages only, and therefore the notice inserted in the summons must be according to the direction in subdivision 2, § 53, Comp. 1887.

2. SAME—JUDGMENT—OF STATE COURT—COLLATERAL ATTACK IN FEDERAL COURT.

The judgment of a state court may be collaterally questioned or attacked in a national court sitting in the same state, for a want of jurisdiction over the subject-matter or of notice to the defendant, the same as if it was a judgment of a court of another state.

3. SAME—SERVICE OF PROCESS—CONSTRUCTIVE SERVICE—PRESUMPTION.

A suit to enforce the lien of a mortgage by the sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident, or not found, so that he cannot be personally served with process, in the state, the court may decree a sale of the property on such substituted or constructive service of process on the mortgagor as the legislature may provide; but in such case there is no presumption in favor of the jurisdiction of the court, and, unless the record shows a compliance in all essential particulars with the statute authorizing such service, its decree is null and void.

4. SAME.

A statute of Oregon (Comp. 1887, § 53) provides that if a defendant in a suit cannot be found, service of the summons may be made by delivering a copy of the same "to some person of the family, * * * at the dwelling-house or usual place of abode of the defendant." In a suit to enforce the lien of a mortgage on property in Linn county, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said [Linn]