

ries, Ventura county. Rotsler also claims another portion of the property, described in said mortgage, which did at one time belong to Kilpatrick, and, as the grounds of his ownership, contends that this last-mentioned property was located upon and attached to lot 176 of Filmore's subdivision of the Sespe rancho, in the county of Ventura, Cal., in such a way as to be a part of the realty; that, at the time said property was so placed upon said lot, defendant Kilpatrick held the lot under a contract of purchase; that thereafter he duly assigned said contract to defendant Rotsler; that said Rotsler afterwards, on May 24, 1895, paid the balance due on said contract, and procured a deed to himself. The evidence clearly sustains Rotsler's claim to the property once owned by the Mentone Sandstone Company, and to which he asserts ownership through the execution sales under the Harper, Reynolds & Co. judgment. With reference to the other property claimed by Rotsler, and which at one time belonged to Kilpatrick, I think Rotsler's claim is unfounded. If this last-mentioned property did not become a part of the realty, by virtue of being affixed thereto, then, of course, Rotsler never acquired it through his ownership of lot 176 of Filmore's subdivision of the Sespe rancho. If, however, said property did become a part of the realty, still, when Kilpatrick assigned his contract for the purchase of said lot to Rotsler the assignment was subject to said mortgage, of which Rotsler had at least constructive notice, by reason of its having been previously recorded in said county of Ventura. Kilpatrick, of course, could not assign any other or greater interest in his contract for the purchase of said lot than that which he himself at the time had, and said interest, as just stated, was subject to said mortgage. This mortgage, conceding the property to have been realty, was valid. "Any interest in real property capable of being transferred may be mortgaged." Civ. Code Cal. § 2947. See, also, 15 Am. & Eng. Enc. Law, p. 748. I hold that the mortgage is a valid lien on all the property therein described, except that above listed and mentioned as having once belonged to the Mentone Sandstone Company, and that the property so listed and mentioned is not subject to the lien of said mortgage, but belongs to defendant Rotsler. A decree foreclosing the mortgage, and settling the rights of defendant Rotsler conformably to this opinion, will be entered.

SOWLES v. NATIONAL UNION BANK OF SWANTON.

(Circuit Court, D. Vermont. July 6, 1897.)

1. RECEIVER—SETTLEMENT OF ACCOUNTS—COUNSEL FEES.

When, at the time of the appointment of a receiver of a bank, suits are pending on notes belonging to the bank, with counsel employed and necessary, the reasonable fees of such counsel are chargeable against the assets

2. SAME—COUNSEL FEES NOT ALLOWED.

Counsel fees will not be allowed a receiver for services rendered in conducting the suit in which he was appointed; nor for services on a hearing before a master in behalf of a claim which included a charge for fees paid to the same counsel; nor for services before the master on the hearing

upon the receiver's account, where the principal contest was over the charges of such counsel to the receiver; nor for services in obtaining the appointment of a former receiver, who has been superseded.

Heard on Exceptions to Master's Report.

H. A. Burt and Wilson & Hall, for complainant.

Edward A. Sowles and C. G. Austen, for defendant.

WHEELER, District Judge. This cause has now been heard on exceptions to the report of the master upon accounts of the receiver of the assets of the bank, who was appointed by this court. They relate to charges of counsel and to personal services. The reasonableness of the latter was a fact for the master, and no good cause for disturbing his conclusions in this respect has been made apparent. Question has been made as to the right of the receiver to employ counsel without order of court. Whether a receiver could institute new litigation, and charge the assets with the expense without any order, need not now be decided. Among the assets were notes then in suit for collection, with counsel employed and necessary. The duty of the receiver as such required him to take due care of this litigation, which could not be done without counsel. The only question about paying the charges of such counsel is as to their reasonableness. The master has disallowed some of these on this score, and does not appear to have so disallowed any too much. Term fees in this suit have been disallowed on that score, but the receiver is not a party to this suit, and no counsel for him could have any right, in any view, to charge term fees to him in it. Counsel fees could be chargeable to him only for securing the assets, and not for the conduct of the cause in which he was appointed.

The former president of the bank had claims upon the assets for his services and expenditures, including charges of counsel, to which there were objections. They were referred to a master, and some of the charges here are for counsel interested in sustaining his own charges there. The success of the counsel there, for which these charges are made here, would, wholly or in part not divisible at least, tend to deplete, and not to protect, the assets in the hands of the receiver. These charges, the legality of which is submitted by the master to the court, should be disallowed for this reason.

Charges have also been made for services of counsel before this master at this hearing where the principal contest was in respect to their charges to this receiver. They were directly interested against the receiver in his duty to preserve, and not to dissipate, the assets that he had secured. No allowance should be made for services in this direction, or for charges including such services. The receiver should not pay counsel to work for their own interest against his as receiver, nor to work both ways. The propriety of these charges was left open by the master, and they are here disallowed.

A petition has been presented for an allowance to counsel for services in obtaining the appointment of a former receiver in this cause, who was superseded. These charges had nothing to do with the assets in the hands of this receiver, and have no place in the settle-

ment of his accounts. Exceptions overruled, report accepted and confirmed, and thereupon the charges for counsel before masters are disallowed.

PERRY v. GODBE et al. (WILLIAMS, Intervener).

(Circuit Court, D. Nevada. April 12, 1897.)

No. 594.

1. EQUITY—OBJECTION TO INTERVENER'S PETITION—WAIVER.

A plaintiff, by filing a replication to a petition in intervention, and proceeding to a hearing, waives the right to object to the sufficiency of the petition, or to the absence of an order granting leave to intervene.

2. SAME—BILL AGAINST CORPORATION—RIGHTS OF RECEIVER.

Where a bill against a corporation seeks to establish a lien on a portion of its property, a receiver of the corporation may properly be granted leave to intervene, and contest plaintiff's right to recover; and it is no ground for the dismissal of his petition that he introduced no evidence, but relied on the insufficiency of the evidence introduced by plaintiff to sustain his bill.

3. SAME—CORPORATION—ADMISSION BY DEFAULT.

Where a defendant corporation suffers default, its receiver, who afterwards intervenes, is bound by the admission of facts alleged in the bill, made by the corporation by such default.

4. LIEN—ESTABLISHING IN EQUITY.

Plaintiff furnished \$20,000 for the purchase of a half interest in a mining claim, under an agreement with one who held the option for such purchase that each should own a fourth interest in the claim, but that plaintiff should have the entire income from the half interest until the \$20,000 should thus be returned to him. Defendant corporation, with knowledge of such agreement, purchased the fourth interest of plaintiff's co-tenant. *Held*, that plaintiff was entitled to a lien on defendant's interest for \$10,000, less one-half the amount he had received in profits, and that his right to such lien was not affected by the fact that he had sold his own interest.

This is a bill in equity for an accounting and for a decree establishing a lien upon the one-quarter interest in the Keystone Mining Company, situate in Lincoln county, Nev., for the amount found due to plaintiff upon a contract entered into by and between S. T. Godbe (defendant) and C. O. Perry (plaintiff), July 8, 1892, and an additional agreement, indorsed on the back thereof, in relation thereto, executed by said parties July 22, 1892. The material part of said contract reads as follows:

"Whereas, the said Godbe holds a certain agreement, dated June 15, 1892, wherein he is given the right to purchase an undivided one-half ($\frac{1}{2}$) of the Keystone Mine from Jones Taylor, of Ivanpah, California, for the sum of twenty thousand (\$20,000) dollars, to be paid on or before September 15, 1892; and whereas, said Godbe desires, to sell one-half ($\frac{1}{2}$) of his interest in said agreement; and whereas, said Perry desires to purchase the same: Now, therefore, it is agreed that in consideration of one (\$1) dollar paid to said Godbe by said Perry, that if said Perry pays the further sum of twenty thousand (\$20,000) dollars to said Jones Taylor as the purchase price of said one-half ($\frac{1}{2}$) of said Keystone Mine on or before the 15th day of August, 1892, then the said Godbe will convey to the said Perry an undivided one-quarter ($\frac{1}{4}$) of the said Keystone Mine, free from incumbrances, by good and sufficient deed."

The additional agreement reads as follows:

"It is further mutually agreed that if said Perry accepts the option hereby given, and pays for said mine as herein provided, that all of the net profits