

"The appointment of a receiver works no injury to the least right of any one. It would be strange if it did. The receiver is the hand of the law, and the law conserves and enforces rights; never destroys them. His appointment determines no right, and in no way affects the title of any party to the property in litigation."

See, also, 3 Pom. Eq. Jur. § 1336. The views herein expressed dispose of all the objections raised against the right of the plaintiffs to recover in this action.

The only question remaining is as to the right of plaintiffs to recover the hay and grain upon the Spooner ranch. The testimony was to the effect that it was orally agreed between the parties that the pledge holder should take possession of the hay and grain; but in weighing the testimony it seems only to go to the extent of authorizing the possession of the hay and grain for the purpose of feeding the stock, (horses and cattle.) It is doubtful whether this testimony was admissible for any purpose. Under all the facts of this case, the judgment will be confined to the personal property mentioned in the agreement appointing the pledge holder.

While some of the parties who are interested in the disposition of this case have been wrangling over the possession of the property, and others have been bitterly engaged in much unnecessary litigation, the cattle in controversy, brute creatures as they are, have been pursuing a much better course, and perhaps setting all the parties a good example, by quietly chewing the cud of peace, and all the stock, in a more compromising spirit than has so far been evinced by any of the parties, has been peacefully eating the hay and grain, and has had the benefit of at least a portion thereof. The plaintiffs are entitled to recover the possession of the horses and cattle, and, if recovery cannot be had, they are entitled to recover the value thereof, to wit, the sum of \$6,312, and the costs of this suit.

The clerk will enter judgment accordingly.

BULLION & EXCHANGE BANK v. OTTO et al.

(Circuit Court, D. Nevada. December 11, 1893.)

No. 573.

STATUTE OF FRAUDS—MORTGAGE—PAROL AGREEMENT FOR POSSESSION.

When a parol agreement whereby a mortgagor of lands is to surrender possession to the mortgagee has been executed by actual delivery, the statute of frauds cannot be set up by one who, with notice, acquires possession under a lease from a subsequent grantee of the mortgagor.

At Law. Action by the Bullion & Exchange Bank against A. Otto and M. Healey to recover possession of real estate and the rents and profits thereof. Judgment for plaintiff.

Trenmor Coffin, (Goodwin & Dodge, of counsel,) for plaintiff.
James R. Judge, (A. L. Shinn, of counsel,) for defendants.

HAWLEY, District Judge, (orally.) The principles involved in this case are in many respects substantially the same as in No. 572,

and need not be again stated or discussed. In this case the testimony shows that James Marshall, acting for M. E. Spooner and the Bullion & Exchange Bank, under an oral agreement between said parties, took possession of the real estate known as the "Spooner Ranch," to hold and keep possession thereof for the bank as the mortgagee of said property. The defendants in this suit thereafter, on the 18th of November, 1892, obtained the possession of the real estate under an agreement or lease from Mrs. Clara Spooner, and have ever since been in the possession thereof. At the time of the commencement of the foreclosure suit the plaintiff filed in the recorder's office of Lassen county a notice of *lis pendens* of said suit, and the same was duly recorded. The other facts, so far as applicable, are the same as stated in *Marshall v. Otto*, 59 Fed. 249.

It is claimed that the oral agreement of M. E. Spooner with the bank, to deliver the possession of the real estate, was within the statute of frauds. But the question is not whether the oral agreement could have been enforced if M. E. Spooner had refused to deliver the possession. The statute only affects the parties to the agreement. The facts are that M. E. Spooner delivered the possession to Marshall for the mortgagee, and, the agreement having been executed, it is valid between the parties. The defendants are certainly not in a position to urge the statute of frauds as a defense to this suit. *Book v. Mining Co.*, 58 Fed. 106. The right to make such an oral agreement is well settled, and the effect of such an agreement, and of the possession taken thereunder, is clearly and correctly stated in *Spect v. Spect*, 88 Cal. 440, 26 Pac. 203. The question presented in that case was whether a mortgagor who had placed his mortgagee in possession of the mortgaged premises could maintain ejection against him while the debt for which the mortgage was given remained unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations. The court, after quoting section 2927 of the Civil Code, which declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration,"—said:

"The right of the mortgagee to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. *Fogarty v. Sawyer*, 17 Cal. 589; *Edwards v. Wray*, 11 Biss. 251, 12 Fed. 42. In taking such possession, the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character, or any different or greater protection, than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the

debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of, and distinct from, any right springing from the mortgage."

I find the rental value of the property to be worth \$900 per annum. The plaintiff is entitled to be restored to the possession of the real estate, and to recover the rental value from the time defendants wrongfully obtained possession thereof, at the rate of \$75 per month; and judgment will be entered accordingly.

CONNECTICUT FIRE INS. CO. OF HARTFORD v. HAMILTON.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 4.

1. INSURANCE—DEMAND FOR APPRAISAL.

A joint demand for a joint appraisal by twelve insurance companies is not within the terms of the policy of one of the companies, providing for an appraisal by two persons, one to be selected by the company, and the other by the insured, who, in case of disagreement, were to call in a third. Such policy stipulates for a separate appraisal.

2. SAME—PROOFS OF LOSS—WAIVER.

A policy of fire insurance provided that a loss should be paid 60 days after notice and proofs; that the amount should be appraised in a certain manner, and the appraisers' report should be made part of the proofs of loss; and until such proofs should be produced and appraisals permitted the loss should not be payable. Proofs of loss were furnished by the insured, to which the insurer objected because of the amount claimed. After negotiations between the parties concerning the manner of appraisal, the insurer promised to submit a form of appraisal, which it failed to do, but retained the proofs for over 60 days. *Held*, that the insurer could not afterwards object to the sufficiency of the proofs. *Severens*, District Judge, dissenting. 46 Fed. 42, affirmed.

3. SAME—APPRAISAL.

When it is stipulated in a fire insurance policy that, in case the amount of loss shall not be agreed upon by the parties, it shall be determined by appraisers chosen by them, and that their appraisal shall form a part of the proofs of loss, until the production of which the loss shall not be payable, it is the duty of the insured, in case of disagreement, and the stipulation is not waived by the insurer, to obtain such an appraisal, and no right of action arises until he has obtained it, or made reasonable effort to do so and failed. *Per Severens*, District Judge.

4. SAME—SALE PENDING APPRAISAL.

It, in such a case as is last supposed, the policy gives the insurer the right within 60 days after the reception of such proofs of loss to take the damaged property at the appraisal value, the insured has no right, while negotiations for an appraisal are pending, and while only 33 days from the transmission of the original proofs of loss have elapsed, to sell in parcels and dispose of the damaged property; and if he does so he cannot maintain his action on the policy. *Per Severens*, District Judge.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

At Law. Action by Robert Hamilton against the Connecticut Fire Insurance Company of Hartford on a fire insurance policy. Upon suggestion of the death of the plaintiff, Cora B. Hamilton and John W. Bryant, his executors, were substituted in his place and