

in Denver, and drawn by Mr. Bolles, of the 25th day of March, 1891, contains this language on the same subject: 'And the parties of the first part hereby further agree to pay the said second parties, their heirs and assigns, a royalty of fifteen per cent. on the net smelter returns received from all ore marketed in and under the said Silver King lode, and its side and end lines vertically extended downward.'

"That language is quite as clear as that of the deed and of the agreement. The position of the respondent is that inasmuch as there was a judgment in the district court of Pitkin county, awarding to the Sauquoit claim 1.67 acres of the territory which was within the exterior lines of the Silver King claim, it cannot be said that that territory so awarded to the Sauquoit claim thereafter remained as a part of the Silver King location, and that it should be understood by all parties and by the court, as matter of law, that by the judgment of the district court of Pitkin county the 1.67 acres was excluded from the Silver King territory. But we cannot accept that view of it. The territory which may be granted from a location, or that which may be obtained by a judgment of court, is not in any sense actually excluded from the lines of the location. It may be properly described, still, as within such lines. Parties referred to the Silver King location in all these locations, and in all the papers which they executed in respect to it, as survey No. 4,746, and referred to the exterior lines of the locations constantly, and to those lines extended downward vertically, as being the subject-matter of their contract and agreement. I do not see how we can say that any part of the territory included within those lines shall be regarded as without them. It seems to be plain enough that it was the duty of the parties, if they intended to exclude from those lines the territory included within them, or any part of it, that they should have stated so in their agreement. I am of the opinion that the complainants are entitled to the relief for which they ask."

A. E. Pattison, Thomas H. Edsall, and Henry W. Hobson, (William W. Cooley and Albert E. Pattison, of counsel,) for appellants.

Charles I. Thomson, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) The only question in this case is whether the 1.67 acres of land in controversy was excluded in the conveyance and contracts made by the appellees to and with the appellant. There is a good deal of parol testimony in the record touching this question, but, if such evidence is competent, it is too conflicting, and too nearly balanced, to vary the legal effect and construction of the written contracts and deed. The case must therefore be determined upon an inspection and construction of those instruments. Upon this question we fully concur in the reasoning and conclusion reached by Judge HALLETT in his opinion set out in the statement of the case. The decree of the circuit court is therefore affirmed.

WASHINGTON NAT. BANK OF TACOMA v. ECKELS, Comptroller of the Currency, et al.

(Circuit Court, D. Washington, W. D. August 29, 1893.)

1. NATIONAL BANKS — APPOINTMENT OF RECEIVER BY COMPTROLLER OF THE CURRENCY.

The power vested in the comptroller of the currency by Act June 30, 1876, (19 Stat. 63,) authorizing him, whenever he becomes satisfied of the

insolvency of a national bank, to appoint a receiver, is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court.

2. SAME—VOLUNTARY LIQUIDATION.

The right to put a national bank in voluntary liquidation, given to stockholders by Rev. St. § 5220, does not affect the right of the comptroller to appoint a receiver under the act of June 30, 1876.

3. SAME.

Nor does the provision of the act of 1876, providing that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, limit the power of the comptroller to take action before the bank ceases to do a banking business.

4. SAME—CLOSING UP BUSINESS.

Section 1 of the act of 1876, authorizing the appointment of a receiver by the comptroller to "close up" a national banking association, contemplates the liquidation and final winding up of the business of the bank, not the mere closing of the bank, and does not limit the power of the comptroller to take action before the bank has closed its doors.

In Equity. Bill by the Washington National Bank of Tacoma for an injunction to restrain James H. Eckels, the comptroller of the currency, and a bank examiner appointed by him as agent, from proceeding after the bank had, pursuant to a vote of more than two-thirds of its stockholders, gone into voluntary liquidation, to take possession of the assets of the bank for the purpose of putting the same in charge of a receiver. The defendant Charles Clary, bank examiner, interposed a plea in bar, alleging that the comptroller of the currency, after due examination, being satisfied that the bank was insolvent, had ordered him to take charge of the bank, for the purpose of turning the same over to a receiver, to be appointed pursuant to the act of June 30, 1876, (Supp. Rev. St., 2d Ed., 107.) Hearing on exceptions to the plea for insufficiency. Plea sustained.

Crowley & Sullivan, for complainant.

Wm. H. Brinker, U. S. Atty., and F. C. Robertson, Asst. U. S. Atty., for defendants.

HANFORD, District Judge, (orally.) In the case of the Washington National Bank against the comptroller of the currency, pending at Tacoma, I regard it as a great hardship that the comptroller of the currency should deem it necessary to interfere in the settlement of the business of the bank by the officers and means which have been chosen by the bank's stockholders, directors, and creditors, and which are satisfactory to them, especially in view of the uncontradicted averment in the bill that the bank is able to meet all of its obligations, and willing to do so, and intending to do so, and that it is proceeding as well as it can to liquidate,—that is, to pay,—and close up its business. Now, regarding it as a hardship, I have endeavored, in reflecting on the case, to bring my mind to the conclusion that the court may lawfully interfere by issuing an injunction to restrain the appointment of a receiver, but the result has not been satisfactory.

In 1876 congress passed a law which, in terms, gives the comptroller of the currency the right to appoint a receiver whenever he becomes satisfied, after an examination, that a national bank is insolvent. The power thus vested in the comptroller of the currency is discretionary, and I think the rule holds good in this case, as in others, that where the head of a bureau in one of the departments of the government is clothed with discretionary powers, and authority to investigate facts and act upon his conclusions, his conclusions as to the facts are final, and not reviewable by the courts; so that the decision of the comptroller of the currency in this case, that the bank is insolvent, is to be taken as a finality. It is equivalent to the fact, whether the bank is really insolvent or not, so far as to authorize the exercise of the comptroller's power to put the bank in the hands of a receiver. Section 5220, Rev. St., gives the stockholders the right, by a two-thirds vote, to put the bank in voluntary liquidation. But there the law, so far as it gives the stockholders or officers of the bank any rights, ceases. It simply declares that they may, by vote, go into voluntary liquidation, and then the duty devolves upon them to give certain notices,—give notice to the comptroller, and give notice to everybody by publication. But I am unable to find in that provision anything to control this later act of congress, vesting the comptroller with power to appoint a receiver to take charge of a national bank when he becomes satisfied that it is insolvent. The same statute of 1876 provides when the stockholders may choose an agent to take charge of the business of a bank in liquidation; that is, after the receiver has had charge of it long enough to pay all its debts, and after its debts have all been paid, then the stockholders can select an agent to take charge of what remains of the assets. Now, all that seems to indicate that the comptroller, as the head of the bureau having charge of the national banks of the United States, and representing the government, so far as it has any interest, and representing the creditors and stockholders, is vested with power to take charge of a bank, and appoint a receiver, whenever certain conditions exist, and I do not think that this power is limited to cases in which his action may be taken before the bank has ceased to do a banking business. The words "close up," used in the statute, mean the liquidation and closing up of the business of the bank, not the closing of the bank. It is evident from the manner in which these words are used that it relates to the final winding up of the business. All that the receiver is required to do, the only service he can render, is in transacting the business that has to be done after the bank is closed, and it certainly never was intended by the use of these words to indicate an intention to limit the power of the comptroller to taking action before the bank has closed its doors. These are my conclusions in the matter, and I shall therefore sustain the plea.

MILLS et al. v. MILLS, (RIDER, Intervener.)

(Circuit Court, D. Oregon. September 8, 1893.)

No. 1,910.

1. EXECUTORS AND ADMINISTRATORS—PURCHASE OF ESTATE BY ADMINISTRATOR—RATIFICATION OF HEIR.

The consent of the heir and sole devisee of an estate that the administrator should purchase the property, and the acceptance and retention by the heir of a promissory note made by the administrator in payment of the purchase price, is a complete authorization and ratification of the transaction, the validity of which cannot be questioned, where neither the purchase price was inadequate, nor the sale procured by unfair means.

2. DEED—DELIVERY—PRESUMPTION.

The possession of a duly-executed deed by the grantee, and the finding among the papers of the deceased grantor of a promissory note made by the grantee for the purchase price, together with an unexecuted mortgage to the grantor for the purchase price, create a presumption that the deed was duly delivered to the grantee; and the words, "Don't record your deed till you see me. I will bring up the mortgage with me,"—in a letter from the grantor to the grantee, contain an implied admission that the grantee had a right to record the deed.

3. EQUITY—MORTGAGE FOR PURCHASE PRICE.

In such case equity will direct the execution of a mortgage by the grantee to secure the note given for the purchase price.

In Equity. Bill by Ceceil J. Mills and Warrena Mills, by her next friend, against Fred H. Mills, for a reconveyance of realty and for an accounting. William M. Rider, as administrator of the estates of Warren H. Mills and Warren F. Mills, intervenes. Decree for complainants.

Frank V. Drake and Reddy, Campbell & Metson, for complainants and intervener.

N. B. Knight and C. A. Dolph, for defendant.

GILBERT, Circuit Judge. The complainants brought suit against the defendant, alleging that on January 22, 1890, Warren H. Mills died in San Francisco, Cal., leaving all his property, by will, to his only son and heir, Warren F. Mills; that a portion of said estate consisted in an undivided one-half interest in certain personal property and lands situated in Klamath county, Or.; that, with the consent of said Warren F. Mills, the defendant was upon the 21st day of July, 1890, appointed administrator of the said property in Oregon by the county court of Klamath county, and upon August 12th, following, filed his inventory and appraisement of said property; that on the 17th day of November, 1890, the said Warren F. Mills died, leaving surviving him the said Ceceil J. Mills, his widow, and Warrena Mills, an infant, his only child, and devising and bequeathing to his said widow all of his estate; that the defendant took possession of said property in Oregon as such administrator, but that he is wrongfully dealing with the same as his own, and claims to own all of said personal property, and has appropriated the rents and profits of said real