

The only written declarations through which the uncle, "though dead, yet speaketh," are the deeds, his letter to his brother, the articles of co-partnership of 1884, and his notes for the unpaid purchase money for the lands. Against these the only claim which this evidence presents of a disputable character, to my mind, is whether or not there is a resulting trust in favor of the partnership against the Watts farm to the extent of the money, if any, taken from the partnership funds to complete the payments, and the extent and nature of the claim in favor of the partnership, and the residuary interest of the complainant in the Meyers lots. Should the court retain the bill for the purpose of making this ascertainment? It is true, a court of equity, as a rule, may grant any relief under the general prayer consistent with the allegations of the bill. But the bill in this case is not framed with a view to either treating this property as a partnership asset, nor as chargeable with a resulting trust, nor as an equitable tenancy in common. The evidence was not taken with a view to the settlement of partnership accounts, the ascertainment of balances, nor the exact amount of the trust funds which are claimed went into the purchase of the respective pieces of property. And what is more persuasive still that under this bill and the depositions published thereunder the court should not undertake to vary the theory of the complaint is that the respondents have consented, under the issues presented, to admit the deposition of the complainant himself. What their action would be, under their unquestionable right, in admitting this testimony on another theory, the court cannot anticipate. So long as the object of pleading is to define the issues between the parties, to advise them to what matters witnesses are to be called, the relief asked for by the pleader ought to have controlling influence. The complainant is not entitled, in my opinion, to a decree for specific performance. It is therefore ordered that the bill be dismissed, and the injunction dissolved, at complainant's costs.

MARTINEZ *v.* MOLL.

(Circuit Court, E. D. Louisiana. June 16, 1891.)

1. EQUITY—RESCISSION OF CONTRACT.

A man 28 years old bought, after examination, a plantation which was only worth two-thirds of the price he paid for it. There was no evidence of fraud or undue influence. The vendor offered to release him from the bargain before it was consummated, but he refused to be released. *Held*, that the sale could not be set aside in equity.

2. SAME—INSANITY—EVIDENCE.

Under Civil Code La. art. 1788, which provides that, where there has been no interdiction, a contract will not be void on the ground of insanity unless the party is notoriously insane, the evidence of five witnesses that a man is of feeble intellect, when contradicted by that of seven witnesses, there being no evidence that the purchaser knew of the vendor's incapacity, is not sufficient evidence of notorious insanity to avoid a contract.

In Equity.

Henry C. Miller, for plaintiff.

R. H. Browne, for defendant.

BILLINGS, J. This is a suit in equity submitted upon the pleadings, which are the bill, answer, and replications, and upon the proofs for a final decree. It is a suit for the rescission of a conveyance made by the complainant to the defendant of two lots of ground, with the buildings thereon, known as "No. 52 Canal Street," in the city of New Orleans, for a reconveyance of the same, and for the rents and profits thereof. The grounds for the decree asked by the bill of complaint are fraud and undue influence and mental incapacity. The transactions between the parties were as follows: In September, 1888, the complainant exchanged the store above described (52 Canal street) for a sugar plantation in the parish of St. John the Baptist, the store being estimated, over and above a mortgage existing upon it for \$13,000, at about \$14,000, and the plantation, together with a store upon it, which was valued at about \$2,000, at \$27,000; that is, the plantation, by itself, was estimated at \$25,000. For the difference (about \$14,000) notes bearing a mortgage upon the plantation were given by the complainant. At the time of the exchange an apparently promising crop was growing and nearly made upon the plantation, which was taken off by the complainant, netting \$3,859, instead of a much larger sum, viz., about \$10,000, which had been expected. This diminution is by the defendant attributed to the storm in August. In September, 1889, just about six months after the exchange, the complainant abandoned the whole purpose of conducting the plantation, and reconveyed it to the defendant for the amount due by him to the defendant, in the neighborhood of \$14,000. Minor facts are brought before the court in the testimony, but those above recited constitute the important ones, and give in outline the transaction. From these it is evident that in the purchase of the plantation, with all the uncertainties attending the cultivation of sugar, giving in exchange for it the productive and well-located city property, and, too, the purchaser, the complainant, being inexperienced in the production of sugar, the complainant made an unwise purchase. This is beyond all question. But that, in and of itself, cannot authorize the court to rescind the sale.

Was the complainant insane? and was he induced to make the exchange or purchase by the fraud and undue influence of the defendant?

First. Was he insane? As to his insanity, five witnesses—Mrs. Hubert, complainant's mother-in-law, Louis Hubert, complainant's brother-in-law, Robert Upton, William Pepperman, James April—testify as to his being, in their opinion, feeble—hardly average—in intellect. To these should be added the brother of the complainant, whose statement comes through the notary, (Upton.) As to his being of average intellect, seven witnesses—H. L. Bidstrup, J. J. Wetta, J. B. Ash, John Webber, sheriff, John G. Moll, Jr., Paul Turner, and L. De Poorter—testify:

"He has never been interdicted. He was at the time of this transaction 28 years of age, and had been left by his father, who had been but a short time dead, as his portion of the estate, the property which is the subject of this suit. He had quarreled with his father on account of his marriage. At the time of the purchase or exchange he was driver of a street-car, and at the time he gave his testimony in this cause he was store-keeper for an auction-house in San Antonio, Tex."

The statutory provisions as to what constitutes insanity, which, according to the jurisprudence of the state, include feebleness of intellect, are found in Civil Code, art. 1788. The party to be declared insane, when there has been no interdiction, must be notoriously insane; *i. e.*, the insanity must be such that it could not but be known to the party dealing with him. "Notoriously" means "well and generally understood." That clearly is not this case, which closely resembles, as to the want of notoriety, the case of *Kenney v. Dow*, 10 Mart. (La.) 603, where the court, rejecting the plea of insanity, say: "It must be notorious and clearly proved." In *Bank v. Dubreuil*, 5 Mart. (La.) 426, the court say:

"But the law has provided that no act anterior to the petition for interdiction shall be annulled, except where it shall be proved that the cause of such interdiction notoriously existed at the time when the deed, the validity of which being contested, was made, and that the party who contracted with the insane person or lunatic could not have been deceived as to the state of his mind." Civil Code, p. 80, art. 15. Here the existence of the cause of the interdiction at the time the mortgage was executed appears to us to be proven; but the Code requires also that we should have proof of the impossibility of the plaintiffs who contracted with the defendant being deceived as to the state of her mind."

See the late case of *Baumgarden v. Langles*, 35 La. Ann. 441, 443. In *Stockmeyer v. Tobin*, 11 Sup. Ct. Rep. 504, (Sup. Ct. U. S., decided March 2, 1891, opinion by Mr. Justice HARLAN,) that tribunal, in affirming the judgment rendered by Judge PARDEE in this court, deals exhaustively with the whole subject, interpreting Civil Code, art. 1788, subd. 3, and affirming the doctrine of the jurisprudence of Louisiana, as stated above. It is to be observed that at the common law incapacity, in and of itself, may be the ground of avoiding a deed, but that, under our law, there must be not only incapacity, but it must be so "notorious"—so generally known—as to make it certain the party sought to be affected by it knew it. I do not think that, under our law, Martinez was insane, or incompetent to contract.

Secondly. Did the defendant practice fraud and exercise undue influence? The parties contradict each other as to who first suggested the purchase by the complainant of the sugar plantation; each attributing it to the other. But the purchase was made after an inspection of the plantation and its stock by the complainant. There is not the slightest evidence that the defendant made any false representations, unless it is to be inferred from the estimated value of the plantation. Of the estimates of the witnesses, that of Mr. Legendre would be the best guide. His outside estimate is \$16,000, and \$25,000 was the price paid. It should be observed that at the time of the purchase the crop, then nearly

made, seems to have been so promising that the parties estimated an outcome net of \$8,000 or \$10,000, against slightly less than \$4,000 as the event proved; so that the case is one where the property was worth about two-thirds of the price paid. As to undue influence, the evidence shows that, after the brothers had objected to the complainant buying, the defendant offered to release the complainant altogether from the bargain, but that the complainant not only declined to be released, but threatened to sue the defendant for damages unless the preliminary contract was carried out. So that the case sums itself up in this: A young man of the age of 28 years, having inherited a property from his father, loses it altogether by an unwise purchase of a property worth only two-thirds of what he gave for it, and by yielding to the seductive hopes inspired in the mind of the inexperienced as to amounts to be made by raising sugar-cane. There is established neither insanity nor fraud nor undue influence. The case made by the proofs shows that the complainant made a poor bargain, and merely on account of this he cannot have relief in a court of equity.

MEYER *et al.* v. RICHARDS.

(Circuit Court. E. D. Louisiana. June 26, 1891.)

NEGOTIABLE BONDS—LIABILITY OF SELLER—WARRANTY.

The *bona fide* owner of negotiable bonds which are fraudulent reissues of genuine bonds is not liable to one who purchases them from him for the amount paid therefor, in the absence of any warranty. Following *Otis v. Cullum*, 92 U. S. 447.

At Law.

Farrar, Jones & Kruttschnitt, for plaintiffs.

Beckwith & Lazarus, for defendant.

PARDEE, J. This cause has been submitted near the close of the term without argument other than that furnished by printed briefs in other cases, where the facts did not fully appear, with a request for a speedy decision. A brief opinion is all that is possible. The agreed statement of facts shows that the defendant, prior to the sale of the bonds herein in question, was the *bona fide* holder of each and all of the bonds described, having acquired each and all of said bonds in open public market for full market value, with no notice whatsoever of any alleged vice or alleged illegality of the bonds; and that the said bonds are in no sense forgeries, but fraudulent reissues of genuine bonds. These facts being admitted, in my opinion the case is controlled by the decision of the supreme court of the United States in *Otis v. Cullum*, 92 U. S. 447. In that case the bank of which Cullum was receiver had sold certain bonds issued by the city of Topeka. The bonds were afterwards judicially declared void, because the act authorizing their issue was unconstitutional.

The purchasers sued to recover the amount paid for the bonds, alleging failure of consideration. The court said:

"Such securities through the annals of commerce which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith, and *ex contractu*, there is an implied warranty that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable, according to the principles which the plaintiffs in error insist shall be applied in this case."

The doctrine of this case has been recognized and approved in the case of *Orleans v. Platt*, 99 U. S. 676, and in *Insurance Co. v. Middleport*, 124 U. S. 545, 8 Sup. Ct. Rep. 625. It is not necessary to cite authorities to show that the *bona fide* holder of negotiable securities has title. In the view I have taken of the case, the liability of the state on the bonds in controversy is not a material question, and is in no wise passed upon. It is therefore ordered, adjudged, and decreed, that there be judgment in favor of the defendants, with costs.

UNITED STATES *v.* ALEXANDER *et al.*

(District Court, D. Idaho. June 1, 1891.)

1. JUDGE DE FACTO—TITLE TO OFFICE.

Title to an office cannot be determined in a collateral proceeding, but sufficient inquiry may be made to determine whether a claimant is a mere intruder or not.

2. SAME.

De facto officers are those who act under some color of right to the office, who perform its duties, who are generally recognized as the officers, whose acts as such are acquiesced in, and their acts are valid.

(Syllabus by the Court.)

At Law. Motion to set aside an order overruling a motion for new trial.

Fremont Wood, U. S. Atty.

James W. Reid, for defendants.

BEATTY, J. Trial of this cause having been had and judgment rendered in the first district court of Idaho territory, and a statement upon motion for a new trial having been settled, such motion was, on April 15, 1889, taken under advisement by the judge of said territorial court. On November 19, 1889, another judge was appointed, who on November 25, 1889, at Boise City, Idaho, duly qualified. On November 27, 1889, the former judge signed an order overruling the motion for a new trial, which was, on December 6, 1889, filed by the clerk of the court.