

relief that was accorded the appellee in the court below in any view of the case, for he had, as was said in *Hall v. Russell*, 101 U. S. 510, "a present right to occupy and maintain possession, so as to acquire a complete title to the soil," and that right has been lawfully conveyed to the appellee. Craig's grantees have endeavored to obtain a government survey, and to perfect their title. In 1870 they paid the expense of a survey that was made by the surveyor then engaged in surveying government lands in the township in which the claim is situated. In 1887 they were informed by the commissioner of the general land office that William Craig's proofs were deficient, because unaccompanied by the affidavit required by section 12 of the donation act, and because no certificate had been made by the surveyor general or the register and receiver, as provided in section 7. These were not valid reasons. The affidavit made necessary by section 12 applied only to settlements made subsequent to December 1, 1850, and the provisions of section 4, making void all sales and contracts of sale of lands before patent is issued, were repealed by the act of 1854 (10 Stat. 306, § 2); and, if the provisions of section 7 were not complied with, it was due solely to the nonaction of the officers of the government.

It is our judgment that the appellee has such right in the land in controversy as to entitle him to the relief afforded in the decree which is appealed from, and that decree is accordingly affirmed.

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GERMAN SAVINGS & LOAN SOC. v. DE LASHMUTT et al.

(Circuit Court, D. Oregon. April 22, 1895.)

No. 2,147.

1. **VENDOR AND PURCHASER—BONA FIDE PURCHASERS—INSANE GRANTOR.**  
A deed of an insane grantor is absolutely void, and therefore a bona fide purchaser from the grantee takes no title.
2. **SUBROGATION—BONA FIDE PURCHASERS—INSANE GRANTOR.**  
The deed of an insane grantor being absolutely void, the fact that she received and used the consideration for her support and maintenance creates no equity to which a bona fide purchaser from the grantee can be subrogated.

**In Equity.** Bill by the German Savings & Loan Society against De Lashmutt and others to foreclose a mortgage. The bill was amended, and defendant Starr excepts to the amendments for impertinence.

Milton W. Smith, for plaintiff.

M. L. Pipes, for defendant William Starr.

**BELLINGER, District Judge.** This is a suit to foreclose a mortgage executed by the defendant De Lashmutt in 1890 to secure the latter's note for \$25,000, upon which there is now due, principal and interest, about \$26,000. The title of De Lashmutt to a part of the mortgaged premises, consisting of the south two-thirds of lot 3 in block 22

in the city of Portland, is by deed from Bridget Lavin, now deceased, of date about June 7, 1887. The bill of complaint alleges that the defendant Starr claims some interest in the south two-thirds of said lot, which interest arises under a certain deed of De Lashmutt and wife to said Starr, dated April 7, 1893. The defendant Starr answers to the bill that he claims to be the owner in fee simple of the property in question, as heir at law and devisee of Bridget Lavin; and he further answers that at the time of the execution of the deed to De Lashmutt by Bridget Lavin, and for a long time prior and subsequent thereto, she was non compos mentis and insane, and was incapable of executing or acknowledging such deed. The complainant meets this defense by amendments to his bill, alleging, in effect, that at the time it made its loan to De Lashmutt, and took the mortgage in suit, it did so in good faith, without notice or knowledge of the alleged insanity of De Lashmutt's grantor; that De Lashmutt paid Bridget Lavin \$10,000, which was a fair price, for the property in controversy, and that the money was used by her for necessary expenses of maintenance and support, and that at the time of such purchase De Lashmutt acted in good faith, and without notice of her alleged insanity; that about April 7, 1893, De Lashmutt and the defendant Starr, "by a good and valid accord and satisfaction, had a full and complete settlement between themselves of all the matters and things then or theretofore in controversy between said De Lashmutt and said Starr, as heir, devisee, and personal representative of said Bridget Lavin, or theretofore in controversy between said De Lashmutt and said Lavin with respect to the ownership and possession of said mortgaged premises; and that then, and in pursuance and consideration therefor, said De Lashmutt executed and delivered to said Starr the deed referred to in the original bill, bearing date April 7, 1893; and that said Starr, in pursuance and consideration thereof, accepted said deed, and went into possession thereunder." The defendant Starr excepts to all these matters so alleged for impertinence.

It is settled that the deed of a person non compos mentis is void. A person incapable of understanding is incapable of executing a contract or deed. Whatever differences of opinion once existed as to whether the deed of an insane person was void or voidable, the question is authoritatively settled that such deed is absolutely void. Formerly the rule in England was that "the deed, feoffment, or grant which any person non compos mentis makes is avoidable"; but even under this rule, which is now no longer accepted, the doctrine was steadily maintained that, as against the heirs of a lunatic, his deed was invalid. Whatever reasons existed for enforcing a contract against the lunatic himself, they were never allowed in any case to apply to his heir. *Dexter v. Hall*, 15 Wall. 20; *Edwards v. Davenport*, 20 Fed. 756; *Farley v. Parker*, 6 Or. 105. The doctrine of bona fide purchase, which the plaintiff invokes, is not a rule of property. It does not determine the question of title between parties. It is only available by way of defense. It is a shield in the hands of a defendant, to

protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. "The very few instances in which affirmative relief is granted to the bona fide purchaser are exceptional. They rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded." 2 Pom. Eq. Jur. § 738. Moreover, the doctrine of bona fide purchaser is not applied to protect an equity as against a legal estate, but to "protect the legal title against a prior equity, by uniting with such legal title an equity arising from the payment of money, and securing the conveyance without notice and a clear conscience." Boone v. Chiles, 10 Pet. 211; Mortgage Co. v. Hopper, 56 Fed. 75. "If the defendant has a legal estate, the court does not deprive him, even as against a plaintiff clothed with an equitable interest, of the advantage which the law confers upon the holder of such estate." 2 Pom. Eq. Jur. § 743.

In the present case the plaintiff is without title or lien. It seeks in effect to acquire a lien upon the property of the defendant Starr by invoking the doctrine of bona fide purchaser. It is not claimed that either this defendant or his ancestor committed any fraud or wrong in the premises. The right to relief, as to this defense, rests solely on the ground that complainant and its grantor innocently dealt with the property of another. Such a case is not one for relief upon any principle of equity. When the legal owner is innocent, the claim of a subsequent and bona fide purchaser cannot be sustained. The good faith of a purchaser cannot create a title where none exists. Dodge v. Briggs, 27 Fed. 160. Nor is it material that Bridget Lavin used the \$10,000 paid her by De Lashmutt for her maintenance and support. The mere payment of the consideration, without a deed or agreement to convey and such actual performance as would justify a court to decree specific performance, is not enough in any case, and in the case of an insane person the reasons for refusing relief are still more imperative. The complainant relies upon the case of Edwards v. Davenport, 20 Fed. 756. In that case money was advanced to an insane person to pay off certain liens upon his property. It was held that the party advancing such money was entitled to be subrogated to all the remedies which the original lien holder had against the property, but only so far as such were valid pre-existing liens, and were to secure the debt of the insane owner. The liens in question were a lien for taxes and a mortgage to secure the debt of another person. To the extent that the money advanced was used to pay taxes the creditor was subrogated to the rights of a lien holder, but no further. The court said, as to the other lien, that the insane person received no benefit from it. Upon this statement in the opinion the complainant in this case bases its contention that the fact of the receipt of benefits was the decisive point in the case. But such was not the case. The question was simply one of

subrogation under a valid pre-existing lien. There was no contract because of the mental incapacity of the owner to enter into a contract. There was, therefore, as to the mortgage, no lien and no subrogation. But as to the tax lien the case was different. That was a valid pre-existing lien, the discharge of which necessarily inured to the benefit of the owner, whose interests could not be injuriously affected by subrogating the party who paid the money to discharge it to all the remedies of the lien.

It follows from what has already been said that the accounting between De Lashmutt and Starr, relied upon by complainant, cannot be set up against the latter's title. The case admits of but a single question, and that is the question of the mental soundness of the defendant De Lashmutt's grantor. The exceptions are allowed.

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BARR v. MAYOR, ETC., OF CITY OF NEW BRUNSWICK et al.

(Circuit Court, D. New Jersey. April 15, 1895.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMINENT DOMAIN.

The exercise of the right and power of eminent domain is due process of law, if the conditions of its exercise are observed.

2. SAME—BENEFIT TO INDIVIDUAL.

The city of N., through its common council, in the exercise of its discretion, determined to close a certain street, and lay out a new street in lieu thereof. The proposed change was greatly to the advantage of the P. Ry. Co., which had agreed to pay all the expenses attending it. The steps required to close the one street and lay out the other were all regularly taken. *Held*, that the property of one whose land was required for the new street would not thereby be taken without due process of law.

This was a suit by Henry J. Barr against the city of New Brunswick and the Pennsylvania Railroad Company to enjoin the taking of complainant's property under the power of eminent domain. Complainant moved for a preliminary injunction. Denied.

Alan H. Strong, for complainant.

James B. Vredenburg, Charles E. Gummere, and Frederick Weigel, for defendants.

GREEN, District Judge. There is but a single question presented by the moving papers in this case, and that is whether the defendant is threatening to deprive the complainant of certain of his lands, situate in the city of New Brunswick, without due process of law, contrary to the provisions of the fourteenth amendment to the constitution of the United States, which, in terms, forbids such action. The facts are that the city of New Brunswick, through its legislative department, is about to vacate a certain street within its corporate limits, and to lay out, in lieu thereof, another street for public use. To do this latter, it will be necessary to take, by the exercise of the power of eminent domain, a part of certain lands belonging to the complainant. And it is to prevent this that the interference of this court has been asked. It is alleged by the complainant, and not