

OCT 07 1977

CLERK SUPREME COURT

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## IN THE COURT OF APPEALS OF IOWA

CHARLES W. GLINN and  
COLLEEN A. GLINN,

Plaintiffs-Appellees

v.

GEORGE C. LYALL and  
MATILDA LYALL,

Defendants-Appellants

AND

GEORGE C. LYALL and  
MATILDA LYALL,

Cross-Petitioners-Appellants,

v.

NATHAN R. BOOK and FLORANNA  
M. BOOK, Husband and Wife and  
DENNIS R. BOOK and JOAN BOOK,  
Husband and Wife,

Defendants to Cross-Petitioners-  
Appellees.

Filed October 7, 1977

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2-57401

Appeal from Cass District Court - R. Kent Martin, Judge.

Cross-Petitioners appeal judgment quieting title in plaintiffs, asserting priority of their mortgage and entitlement to judgment on their note. - Reversed and remanded.

John Donahey, of Panora, for Defendants-Appellants and Cross-Petitioner-Appellants.

James Van Ginkel, of Kluever & Van Ginkel, of Atlantic, for Plaintiffs-Appellees and Defendants to Cross-Petitioners-Appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

## PER CURIAM

Defendants-cross-petitioners, George C. and Matilda Lyall, appeal an adverse judgment quieting title to certain property in Griswold, Iowa, in plaintiffs Charles W. and Colleen A. Glinn. Cross-defendants Nathan and Floranna Book bought the Griswold property in 1954 and lived on the premises until the fall of 1971. On June 23, 1970, the Books executed a promissory note and mortgage on the same property to defendants George and Matilda Lyall in return for \$5000. However the mortgage was not recorded until November 25, 1970.

In the interim, the Books executed a warranty deed conveying the real estate to their son, Dennis Book, and the deed was recorded October 22, 1970. By warranty deed dated September 28, 1971, Dennis and his wife Joan conveyed the property to the plaintiffs Charles and Colleen Glinn. The Glinns then brought this action to quiet title to the property in an effort to remove the cloud of defendants' mortgage. Defendants subsequently cross-petitioned against Nathan and Floranna Book on the note and against Dennis and Joan Book denying that Dennis was a good faith bona fide purchaser of the property and that Dennis took the property subject to the prior unrecorded instrument. This appeal ensued.

Defendants' first contention is that the trial court erred in refusing to grant judgment against Nathan and Floranna Book on the promissory note of \$5000. Their signatures on the note were not denied as required by Rule 100, Rules of Civil Procedure, and as such, the signatures were deemed genuine for all purposes in the case. Rule 100(a), R.C.P. The production and proffer of the note under such circumstances constitutes sufficient evidence of title to establish a prima facie case. *Grimes Savings Bank v. McHarg*, 204 Iowa 322, 324, 213 N.W. 798 (1927). Further, no special defenses to the note sued on were specially plead as required by rule 101, R.C.P. Accord and satisfaction is such a defense. Finally, the Books admitted the existence of the note when they answered the cross-petition. We find the trial court erred in refusing to enter judgment on the note in favor of the Lyalls against Nathan and Floranna Book in the amount of \$5000.

The second contention asserted by the Lyalls is that the trial court erred in not finding that the conveyance from Nathan and Floranna Book to their son Dennis

was without consideration or for a grossly inadequate consideration and that it left them unable to pay their debts and was an attempt to defraud, hinder or delay their creditors. Therefore, the trial court erred in quieting title in favor of plaintiffs Glinn and should have foreclosed the mortgage held by the Lyalls or at least declared the realty subject to the mortgage and superior to any claims of Dennis Book and his grantees.

A transfer of property made by an insolvent grantor with the intention to defraud his creditors is valid provided the grantee acts in good faith and gives an adequate consideration therefor. However where the evidence shows that a conveyance of property is voluntary and without consideration or is given for grossly inadequate consideration, it is constructively and presumptively fraudulent as to existing creditors. In such event, the burden is upon the grantee to show that the grantor was solvent or had sufficient property remaining to pay his debts at the time of executing the conveyance. *Commercial Savings Bank v. Balderston*, 219 Iowa 1250, 1255-56, 260 N.W. 728 (1935).

The same rule applies where the transaction is between a parent and son. *Dolan v. Newberry*, 200 Iowa 511, 202 N.W. 545 (1925). Where the parent is insolvent or in failing circumstances, the transaction will be closely scrutinized, and if the taint of fraud is found or is fairly to be inferred, it will not be upheld. The grantee under such circumstances is not entitled to be considered a bona fide purchaser. 219 Iowa at 1257. See also *Scovel v. Pierce*, 208 Iowa 776, 782, 226 N.W. 133 (1929). In the instant case, the burden was on Dennis Book as grantee to prove the solvency of his parents at the time of the conveyance in order for him to claim the status of a bona fide purchaser and cut off the priority of defendants' unrecorded mortgage. See Section 558.41, The Code.

From a review of the record, we find that Dennis Book did not sustain his burden of proving the solvency of his parents at the time the deed was executed; nor did he disprove the taint of fraud which so often accompanies this type of family transaction. The record discloses that the real estate in question was the only substantial item of value owned by Nathan and Floranna Book. At the time of the transfer to Dennis, they had outstanding indebtedness without sufficient funds

to satisfy these obligations. All three of the loans to his parents were oral and nothing was reduced to writing. After the conveyance, Nathan and his wife continued to live in the house, until the fall of 1971, although they did pay nominal rent for several months to Dennis. Finally, on the warranty deed executed to Dennis the recital stated that the deed was exempt from transfer tax because the consideration was less than \$1000.

While there is no direct evidence of fraud, we are mindful of what our supreme court stated in *Hatheway v. Hanson*, 230 Iowa 386, 393, 297 N.W. 824 (1941):

Fraud is not presumed. The relationship of parents and child between the grantors and the grantee does not create a presumption of fraud. It does require a critical examination of the attending circumstances. Fraud is not committed openly. It is an offense of secrecy. Direct evidence is rarely obtainable. Frequently it can be shown only by the circumstances admitted by the parties to it. Fraud may, and usually must, be proved by circumstantial evidence. The individual circumstances are usually inconclusive, and, attacked separately, may be blown away. The circumstances must ordinarily be considered together, and the force and weight to be given them are that of them in combination.

The circumstances of a bona-fide transaction are ordinarily consistent with each other, and with generally recognized business methods and fair dealing, and not incredible. A fraudulent transaction naturally begets stilted, contradictory, and incredible evidence. The bona-fide transaction and the fraudulent one each has its well recognized indicia.

The trial court erred when it found Dennis Book was a bona fide purchaser for value without notice. One who asserts he is a bona fide purchaser must prove his good faith; and good faith is lacking if he knew or should have known others made claims hostile to his grantor's title. *Raub v. General Income Sponsors of Iowa, Inc.*, 176 N.W.2d 216, 220 (Iowa 1970). Although there is no evidence that Dennis knew the existence of the Lyalls' mortgage, the supreme court in *Hatheway* stated that knowledge of fraudulent intent may be inferred from the family relationship of the parties. 230 Iowa at 396. We find Dennis Book did not prove he was a bona fide purchaser either for value or without notice.

As Dennis Book was not a bona fide purchaser he took the conveyance from his parents subject to the unrecorded mortgage of George and Matilda Lyall. Since the conveyance to Charles and Colleen Glinn occurred after the recording of the

mortgage from Nathan and Floranna Book to George and Matilda Lyalls, they had notice of the mortgage and took subject to it.

This cause is reversed and remanded with instructions to enter judgment in favor of the Lyalls for \$5000 against Nathan and Floranna Book. Judgment of foreclosure on the mortgage to the Lyalls shall also be entered against the parties to the action and the real estate in question as provided by law.

Reversed and remanded.