HERRING, ASSIGNEE, *ETC., V.* RICHARDS AND OTHERS.

Circuit Court, D. Minnesota. June, 1880.

APPEAL FROM DISTRIOT COURT.

McCRARY, C. J. The facts are fully and accurately stated in the opinion of the district judge, which is given above, and it is therefore only necessary that I should state my conclusions:

First. At the time Richards purchased the farm in controversy, 445 and at the time he conveyed it to his daughters, he was solvent, and not indebted, and the property thus settled upon his daughters was no more than a reasonable provision for them, not disproportionate to his means, taking into view his situation.

Second. The proof does not establish the allegation of the complainant that the conveyance to the daughters was made with intent to defraud subsequent creditors.

Third. The assignee insists that Richards furnished the money used in improving the farm, and in paying off encumbrances, after the title had been vested in his daughters. The weight of evidence is against this claim, as is clearly shown by the opinion of the district judge. Suppose, however, Richards did furnish money to his daughters, or use money for their benefit in the way suggested, would that fact render invalid the original conveyance from him to his daughters? If that conveyance was in itself *bona fide,* free from fraud, and in all respects valid, a subsequent contribution by the father, for the purposes named, would not change its character. The fact of the making of such contributions would be evidence tending to show fraud in the original transfer, but not by any means conclusive. If the original conveyance was made in good faith, while the grantor was solvent and free

from debt, it was valid and must stand, even though other property may have been fraudulently given or conveyed to the same parties at a subsequent period. In such a case the remedy would not be by a bill to set aside the original conveyance, but by proper proceedings to recover the property subsequently transferred. Thus, in *Clarke* v. *White,* 12 Pet. 178, the supreme court say: "If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with the other frauds, unless in some way or other it be connected with or form a part of them." Page 194.

Fourth. It appears that Mr. Richards, the grantor, after executing the deed to his daughtors, took the same to the recorder's 446 office and filed it for record. There is no direct testimony to show either that the grantees did or did not, at the time, have knowledge of and assent to the grant.

Whether they assented to the grant at the time, or subsequently, or not at all, is left to inference. If, therefore, the presumption of the law is that the grant was accepted by the grantees, that presumption must prevail. If the presumption is the other way, and the burden is upon the defendants to prove delivery to them, or something equivalent thereto, the conclusion must follow that plaintiff should recover, since no such affirmative proof is to be found in the record.

There are numerous cases which hold that the execution of a deed or mortgage, and the delivery of the same to the recorder for record, *without the knowledge or assent of the grantee or mortgagee,* will not avail as against an attaching or execution creditor of the grantor. *Day* v. *Griffith,* 15 Iowa, 104; 4 Greenleaf's Cruise on Real Property, p. 12, note, and p. 13, note 1; *Samson* v. *Thornton,* 3 Met. 275; *Denton* v. *Perry,* 5 Vt. 382; *Cobb* v. *Chase,* 6 N. W. Rep. 264.

But the present case does not come within the principle established by these authorities.

Whether the plaintiff can be regarded as standing in the same position as an attaching or execution creditor is immaterial, since it does not appear either that the defendants were ignorant of the conveyance when made, or that they did not at any time assent to or accept it before the bringing of this suit. One or the other must be shown. If the recording of the deed is intended as a delivery, and is known to the grantee, and he assents to the same, it will take effect, 2 Washburn on Real Property, pp. 580, 581. The acceptance of the grantee will be presumed in such a case, if the deed be upon its face beneficial to him, and the circumstances are such as to warrant the conclusion that the grantor intended the delivery to the recorder to be for the use and benefit of the grantee, especially if the latter claims under it. 4 Greenleaf's Cruise, 12.

Again, the authorities are abundant in support of the proposition that the grantee in a deed executed and delivered to 447 a third party, though ignorant of the conveyance when made, may subsequently accept it, and his title will relate back to the date of the conveyance, unless an intervening levy of attachment or execution may have defeated it. *Harrison* v. *Trustees, etc.,* 12 Mass. 456; *Hatch* v. *Hatch,* 9 Mass. 307; *Foster* v. *Mansfield,* 3 Met. 412; *Doe* v. *Knight,* 5 Barn. & Cres. 632, (671;) *Hedge* v. *Drew,* 12 Pick. 141.

We cannot in this case presume, in the absence of proof, that defendants, at no time during nearly four years that elapsed between the conveyance to them and the commencement of this suit, were made aware of, and assented to and accepted, the grant. Especially is this the case, in view of the allegation in the answer that the defendants have held, owned, controlled, and managed the farm ever since the conveyance, and that

the only occupancy has been by their tenants, and for their sole and exclusive use. This is equivalent to an allegation that the conveyance was accepted by the grantees when made, and it must be overcome by proof on the part of plaintiff.

The decree of the district court, dismissing the bill, is affirmed.