

CLARK *v.* DEUPREE.

Opinion delivered May 28, 1928.

1. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY TO SELL CLIENT'S LAND.—In a suit by an alleged purchaser against the owner of land to enforce a contract of sale thereof by her attorney, who had no authority to sell the land, such contract was not binding on her, as the mere fact that he had been her attorney in former litigation relative to the land did not make him her agent to sell the land.
2. SPECIFIC PERFORMANCE—SUFFICIENCY OF TENDER.—In a suit for specific performance, a tender of performance by payment of the purchase money by the purchaser comes too late after the court ruled against him, where he had previously refused to pay such sum.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; affirmed.

STATEMENT OF FACTS.

A. B. Clark and W. C. Kuhl, a partnership doing business as Clark & Kuhl, brought this suit in equity against Mrs. Eliza E. Deupree and Frank S. Quinn to cancel a deed from Mrs. Deupree to Frank S. Quinn to a parcel of land in the city of Texarkana, Miller County, Arkansas, and to enforce the specific performance of a contract by Mrs. Deupree for the sale of said parcel of land to the plaintiffs.

A. B. Clark was a witness for the plaintiffs. According to his testimony, he is a member of the firm of Clark & Kuhl, which is engaged in the real estate business in Texarkana, Miller County, Arkansas, and on the 3d day of March, 1927, a written contract was entered into between him and Frank S. Quinn, as attorney for Mrs. E. P. Deupree, for the purchase of a certain parcel of land in the city of Texarkana, Miller County, Arkansas. The contract recited that \$200 of the purchase price had been received of Clark & Kuhl, the purchasers, and that the purchasers agreed to pay the sum of \$3,250 cash for said parcel of land upon the furnishing of a good and merchantable title to it. The vendor was to pay all back taxes, and to refund the cash payment if good title was not shown. According to his testimony, Quinn offered them a deed to said land, executed by Mrs. Deupree, and the consideration recited in the deed was the sum of \$2,500. Witness told Quinn that he wanted the deed to recite the amount they had agreed to pay, so if there was any controversy about it, the record would show a warranty deed for the amount they had agreed to pay. Quinn took the deed away, and agreed to write to Mrs. Deupree, who was a nonresident of the State, about it. Subsequently the person in whose favor a decree had been rendered against Mrs. Deupree for certain back taxes, amounting in the aggregate to about \$831, refused to receive them; and Mr. Quinn demanded \$250 more than the agreed purchase price of \$3,250. Plaintiffs agreed to pay that

amount in order to avoid a lawsuit. Subsequently Quinn told the purchasers that Mrs. Deupree would not accept \$2,500 for the land, and that he, Quinn, had an interest in it which he had received for representing Mrs. Deupree in prior litigation relating to the land, and demanded \$500 for it. The testimony of A. B. Clark was corroborated by that of W. H. Kuhl, his partner.

Frank S. Quinn was the principal witness for the defendants. According to his testimony, he had represented Mrs. Deupree in former litigation with other parties relating to this same land, and had won the lawsuit for her. In the decree, however, it was adjudged that Mrs. Deupree should pay some back taxes, amounting to about \$831. Witness did not have the right to sell the land for Mrs. Deupree, but stated that he was satisfied that she would agree to any trade he made. He made a contract, as attorney for Mrs. Deupree, with the plaintiffs, by which she was to receive \$2,500 and the back taxes. In other words, she was to have \$2,500 net for her interest in the land. He wired Mrs. Deupree that he had a purchaser on these terms. He received a reply to his telegram from her son, stating that they were not ready to sell for \$2,500 at that time. Subsequently witness told the plaintiffs that he would personally guarantee that the sale would go through at the price of \$3,500. Of this amount Mrs. Deupree was to receive \$2,500 net, and the witness was to pay the abstract fees and receive the balance for his interest in the land. Mrs. Deupree had given him an interest in the land in payment of his attorney's fee in recovering it for her. The purchasers did not carry out this agreement, and witness sold the land to other parties for Mrs. Deupree.

Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendants, and it was decreed that the complaint of the plaintiffs should be dismissed for want of equity.

The case is here on appeal.

G. G. Pope and Will Steel, for appellant.

Frank S. Quinn, for appellee.

HART, C. J., (after stating the facts). It will be observed from our statement of facts that the testimony relative to the first contract between the parties is in direct and irreconcilable conflict. On the part of the plaintiffs it is shown that Mrs. Deupree had agreed to sell them the land for the price of \$3,250, and that they had paid down in cash \$200 of the purchase price, and were ready to pay the balance when Mrs. Deupree should pay some back taxes, amounting to \$831, as she had agreed to do under her contract. On the other hand, according to the evidence for the defendants, Mrs. Deupree had sold her interest in the land for the net price of \$2,500, and Mrs. Deupree had executed a deed to the plaintiffs for her interest in the land, with that sum as a consideration, which plaintiffs refused to accept. It was understood at the time that Quinn, as her attorney, had also an interest in the land, which was not considered in the purchase of Mrs. Deupree's interest, and for which he was to receive \$1,000.

The conclusion we have reached renders it unnecessary to pass upon these disputed questions of fact.

According to the testimony of Frank S. Quinn, which is uncontradicted, he was not the agent of Mrs. Deupree for the sale of the land. He had merely been her attorney in former litigation regarding the land, and only assured the plaintiffs that she would ratify any contract he would make with them relative to the sale of the land. Hence, assuming that he did enter into the contract as claimed, or as testified to by the plaintiffs, Mrs. Deupree refused to execute such a contract, when informed of its terms. The mere fact that Quinn had been attorney for Mrs. Deupree in former litigation relative to the land did not make him her agent to sell the land; and, as we have already seen, according to his testimony, which is not contradicted on this point, he did not attempt to sell the land as

agent for Mrs. Deupree. Therefore conceding, without deciding, that the first contract was as testified to by the plaintiffs, such contract was not binding upon Mrs. Deupree, and was never ratified by her.

The plaintiffs testified that, as a matter of compromise, they had agreed to give \$3,500 for the land. After the court had made its finding against them, they made a tender of \$3,300 to the defendants, which, with the \$200 already paid, would amount to \$3,500. The court held that this tender came too late, and we think it was right in so holding. The plaintiffs had refused all the way through to pay \$3,500 for the land, and in the meantime the defendants had entered into a binding contract with other parties to sell the land to them.

It follows that the decree of the chancery court was correct, and it will therefore be affirmed.
