

POWELL *v.* GRIFFIN.

Opinion delivered January 7, 1929.

1. ATTORNEY AND CLIENT—CHARACTER OF RELATION.—The relation between an attorney and client is one of trust and confidence, requiring a high degree of fidelity and good faith.
2. ATTORNEY AND CLIENT—CONSTRUCTION OF CONVEYANCE TO ATTORNEY.—In an action by a client to have an absolute deed to her attorney declared to be a mortgage, the burden was on the attorney to uphold it as an absolute conveyance, which burden, it is held, the evidence did not sustain.
3. VENDOR AND PURCHASER—INNOCENT PURCHASER.—Where plaintiffs purchased property from defendant's attorney while defendant continued in possession, without inquiring as to the nature of her possession, of which they were aware, they cannot be regarded as innocent purchasers.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy*, Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted from an adverse decree against appellant in the action against her of unlawful detainer by appellees.

Appellant, an uneducated negro woman, was sued by her husband for divorce, and employed Walter L. Goodwin as her attorney in that suit. An agreement for settlement of property rights was reached therein, under which appellant was to pay her husband \$200 and have the title to the land in controversy, held in her husband's name, vested in her. The land had been sold for taxes, and there were other liens against it, and appellant had no money to pay these charges, which amounted to \$625, including the fee to her attorney. After failing to borrow the money elsewhere, she executed to her attorney, Walter L. Goodwin, a warranty deed to the lands, reciting an express consideration of "\$50 in cash * * * and for services rendered by the grantee in the divorce suit." The \$50 was not in fact paid to her, but went to discharge the lien for plumbing in the house on the land. The other charges were also paid.

Appellant claims that the conveyance made to Goodwin was merely security for the repayment of the \$625, while he and appellees insist that it was an outright conveyance, and that appellees were innocent purchasers. Appellant, however, remained in the undisturbed possession of the premises for some months after the conveyance, and, upon demand by Goodwin for possession, offered to repay the \$625 and legal interest, under the claim that the conveyance was a mortgage only, being given for security of the money advanced or loaned, which offer was refused.

Goodwin then, on September 13, 1927, while appellant remained in possession, executed a deed to appellees, and they instituted this suit for possession in the circuit court, which was transferred to equity upon the filing of defendant's answer and counterclaim setting up an equitable defense and cause of action, praying that the deed be declared a mortgage, and that she be allowed

to redeem. After the transfer, her cross-complaint was amended, setting up the confidential relation between herself and her attorney, Goodwin, to whom the conveyance was made, and alleging that the transaction, if held to be an absolute deed, was unfair, and that the property was worth more than three times what she owed her attorney at the time of the conveyance. No answer was made to these allegations.

Goodwin testified that he sold the property for an actual consideration of \$1,500; that there had been no increase in values since he received the deed for it.

Appellees purchased the property from Goodwin while appellant was in actual possession, and say, in their response to the cross-complaint, that they paid a valuable consideration therefor, not knowing that the defendant made any claim to the title or ownership of the property. They admitted that they knew the defendant was in possession, but were informed that she was a tenant of Walter L. Goodwin at the time they purchased the property from said Goodwin, and had her household goods packed, and that she was preparing to move from the premises.

Appellant testified that Mr. Walter L. Goodwin was her attorney, and in settlement of the divorce suit he loaned her \$200 and money for other charges against the property, and that she also owed him an attorney's fee, all of which, he told her, amounted to \$625, which she agreed to pay back. That he required her to sign a paper which he said was a deed, but that it was the same as a mortgage, and when the money was paid back he would make her a deed to the land, and later he tried to put her off the place, and refused to take the money back, and wanted \$1,600 for a reconveyance; that the lots had cost \$75 each before oil was discovered at El Dorado, and that the improvements thereon had cost \$1,200; that the property was worth more at the time she testified, and that they had been offered \$2,500 for it, and refused to sell for less than \$2,600 cash. She said she did not get a penny of money from Mr. Goodwin for the convey-

ance, and that the \$50 expressed as a consideration was paid by him for plumbing already put in the house; that, before the suit was brought, she had arranged with Ed Coleman, who had the money, to pay off the debt and interest; that, after she was served with notice to quit, her attorney told her to remain in possession.

Goodwin testified that appellant tried to get him to buy the property, which he refused to do, but, after investigation of the title and charges, he figured the amount required to straighten it all up and make the settlement would be \$625, and said he told Millie he would not have anything to do with it, but later agreed, if she transferred him the property, he would give her \$50 for her equity, and pay off the debts, not knowing at the time the exact amount required, although he knew it would be over \$600. She wanted to borrow the money, and went to different places to get it. "Finally she said she would sell me the property, as Mr. Wright had it anyway, and I agreed with Mr. Shaw (her husband's attorney), and agreed to pay her \$50, and did pay it to the court. A few days thereafter, and before the money was paid her, she was arrested for failure to connect with the sewer, and called me from the police station to come down, and I paid the court \$13.18 and paid the plumber \$48.50, a bill which she had incurred." Appellant wanted him to lend her the money, which he refused to do, but agreed to make the settlement if she would deed him the property.

On cross-examination witness said, after she made the deed, she kept "ding-donging" after him to get the title to the property straightened out, and he might have told her that he would sell it back to her, might have agreed to let her buy it back; admitted that she came to his office one morning with two darkeys, and said she had come up there to pay off the money, but said that he did not see the money, and did not think he said anything to indicate the amount of money that would be required, and denied that he said he would sell the place back for \$1,600; admitted that he might have told ap-

pellant's attorney that he would take \$1,600 for the property; said he thought the place was worth \$800 when he purchased it, and that the consideration expressed in his deed was \$1,800, and that he actually received \$1,500 in cash, and that the deed from appellant to him was made in April, and he sold it in September to appellees, and the conditions had not changed in El Dorado so as to make the property more valuable between these dates.

Other witnesses estimated the value of the property at about \$1,000 when the conveyance was made to Goodwin.

Shaw, the attorney for appellant's husband in the divorce suit, testified that appellant had been unable to borrow the money to pay the amount agreed on to her husband, and that they went to Goodwin's office, and "he said he would not lend the money, but, if he advanced it, it would be upon an absolute deed."

The notary public who took the acknowledgment testified that Goodwin brought the deed to him to get it acknowledged, and asked him to call the attention of appellant to the kind of instrument she was signing. That he asked if she understood that she was signing a deed, and she said that she did.

Neither of the appellees testified in the case.

From the decree dismissing her cross-complaint for want of equity this appeal is prosecuted.

Pat McNalley and *Jordan Sellers*, for appellant.

Walter L. Goodwin, for appellee.

KIRBY, J., (after stating the facts). It is conceded that the testimony, being in direct conflict between appellant and her former attorney, Goodwin, as to the nature of the transactions resulting in the execution of the conveyance from appellant to her said attorney, Goodwin, does not meet the requirements of the rule that a deed absolute on its face can be shown to have been intended as a mortgage only by clear, unequivocal and convincing evidence; but the rule of evidence is different in transactions of this kind between attorney and client, during the continuance of such relation, which is

one of trust and confidence requiring a high degree of fidelity and good faith.

In *Swain v. Martin*, 158 Ark. 469, 251 S. W. 26, the court said:

“The procuring of the conveyance of the Carlisle property from Martin to Swain was during the existence of the relation of attorney and client. In such cases the burden is upon the attorney of proving the fairness and equity of the transaction and the adequacy of the consideration, and, upon his failure to make such proof, a court of equity will treat the case as one of constructive fraud. * * * The rule that an attorney who contracts with his client has the burden of proving that no advantage has been taken of the situation of the latter, is not restricted to contracts or dealings with respect to the rights of property in controversy in the particular proceeding in which the attorney is acting for the client, but it may extend to other transactions and contracts, where the relationship may be presumed to give the attorney some advantage over the client.” See also *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720, and *McMillan v. Brookfield*, 160 Ark. 518, 234 S. W. 621.

As said in 2 R. C. L., pp. 967 and 968: “No presumption of innocence or improbability of wrongdoing can be considered in the attorney’s favor. The power to enforce this rule does not depend upon the proof of actual fraud. Its application is the same whether attorneys abuse their trust, or act on generous impulses to assume risks and burdens of clients who are poor. Its enforcement does not involve an inquiry into the motives which prompt clients to sue for profits, when viewed from an ethical standpoint. Solicitude for them on account of their improvident contracts is not the basis of relief. The doctrine is founded on public policy. It is demanded by the welfare of society. It arises from the necessity of protecting proper relations of trust and confidence wherever they exist. Adherence to a principle which deprives fiduciaries of undue profits lessens the temptation to violate confidential relations.” The proof

herein does not meet the requirements of this rule; the burden imposed by law upon the attorney was not discharged. He admitted, and all the proof showed, the value of the property to be around \$1,000 at the time he took the conveyance from his client, agreeing to pay only \$625 of indebtedness of the grantor, part of which was in payment of his fee for services rendered his client in the divorce case in the settlement of the rights of the parties therein to the property in controversy. The testimony also shows that he did not pay the \$50 expressed consideration in the deed to his client, the grantor, but paid it in discharge of a plumbing bill for work done upon the premises he acquired under the conveyance; and further, he testified that he sold the property to the appellees herein, within about five months after it was conveyed to him, for an expressed consideration of \$1,800, and that he actually received \$1,500 in cash therefor. Also that there had been no appreciable change in value of property in the locality, and no decrease between the time he received his conveyance and the date of his deed conveying same to appellees.

Appellant stated the conveyance was a deed in form, as her attorney informed her at the time it was made, but was the same as a mortgage, and the property would be reconveyed to her upon payment of the debt. It is undisputed that she went to her grantee, having arranged for the money, the amount necessary to redeem the property, according to her understanding of the transaction, after she had been notified to quit possession by him, and he did not deny her statement about this occurrence further than to say he did not see the money at the time, and did admit that appellant kept after him so persistently that he had agreed, after he received the conveyance from her, to allow her to buy it back, but insisted that the amount for which it could be repurchased was not stated to her.

The undisputed testimony showed that appellant refused to relinquish possession of the premises to Goodwin, the grantee in her deed, upon his demand therefor,

claiming that she had the right to redeem the property upon the payment of the debt it was transferred to secure, according to her contention, and that Goodwin made the conveyance to appellee after such refusal of appellant to quit and her offer to redeem made, and while she was still in possession.

Appellees purchased the property from Goodwin while appellant continued in possession, and, so far as the testimony shows, without inquiry made as to the nature of such possession, which they were aware of, and neither of them testified on the trial. There is no question of estoppel, so far as they are concerned, and they cannot be regarded innocent purchasers, nor to have acquired any greater right under the conveyance than was possessed by their grantor when it was made.

Appellant was entitled to redeem the land from the conveyance to Goodwin, grantor of appellees, and the court erred in not so holding and declaring said conveyance to be in effect but a mortgage for the security of the money advanced by him. The decree is reversed, and the cause will be remanded with directions to allow the redemption of the lands by the appellant upon the payment of the amount of the advancement from Goodwin, with interest, and for all further necessary procedure to effect this result, in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.
