

BABAHAMY *et al.* v. ALEXANDER.

1896.

July 16.

D. C., Galle, 3,119.

Legal tender—Agreement to sell land—Tender after lapse of term of agreement—Time, of the essence of the contract.

Defendant, as owner of a parcel of land, promised to convey the same to S, on a certain sum being paid by S to defendant within four years of the date of promise. Defendant further agreed not to sell or gift the land to anyone else within the four years. S having died, a notary on behalf of S's heirs met defendant on a day within the four years, and told him that he had the money and the conveyance ready and requested him to sign the conveyance and receive the money. Defendant refused to do so,—

Held, that the notary's act did not amount to a legal tender of the money. The tender should not have been conditional on defendant signing a deed which he had no opportunity of examining; and a mere statement that money was ready without its being offered for acceptance was not sufficient to constitute tender.

Held further, that in the above agreement time was of the essence of the contract. If the four years expired without payment or legal tender of the money, defendant was absolved from his promise.

THIS was an action by the plaintiffs as heirs of one Elias de Silva to enforce specific performance by the defendant of an agreement dated the 24th July, 1890, to convey to Elias de Silva a certain parcel of land. According to the agreement, if within four years of its date the sum of Rs. 634 was paid by Elias de Silva to the defendant, the defendant was to execute a conveyance in his favour for the said land. The defendant pleaded that the money was not tendered within the four years. The plaintiffs led evidence to prove a tender on 23rd July, 1894, and in addition contended that time was not of the essence of the contract, and that the institution of the action on the 20th August and deposit of money in Court on the 12th September, 1894, constituted a tender in time. The District Judge was not satisfied with the evidence of the alleged tender on the 23rd July, and dismissed the plaintiff's claim. The plaintiffs appealed.

Sampayo and Wendt, for appellants.

Dornhorst, for respondent.

16th January, 1896. LAWRIE, J.—

The issue on which the parties went to trial was, Did the plaintiffs tender the money, and were they ready to pay it ?

No date is stated in the issue as the day of the alleged tender. The learned District Judge held that the proof of tender on 23rd July was so weak that he could not give judgment on it. I do not disturb that finding. I take the evidence of Mr. de Abrew as correctly describing all that took place on 23rd July. He said that he and two others went to Baddegama, not having made an appointment with the defendant, and met him in a field; that he

1896.
July 16.
 LAWRIE, J.

told the defendant he was ready with the money and the transfer. The defendant said he had suffered some damage, and until he was paid that he would not sign the re-transfer. Mr. de Abrew said he did not show defendant the money. The evidence of other witnesses who differ from Mr. de Abrew in saying that the money was shown to the defendant is not worthy of credit. It is impossible to believe that the notary public could forget so material an act. If the money was offered, it must have been on the notary's order, but he says that the money was not shown.

This conversation, as recorded by Mr. de Abrew, was not a tender. In the first place, it was not an unconditional offer of money. It was conditional on the defendant there and then signing a deed which the notary said he had brought with him. The defendant was entitled to refuse to sign a deed which he had had no opportunity of examining. It is not clear what objection he stated, but if (as seems probable) he objected to at once signing the transfer and to yielding possession without compensation for the crop on the land, his objection may have been reasonable. In the second place, the money was not offered. It has been repeatedly held that a mere statement that money is ready is not sufficient.

I think that the District Judge rightly held that there was not a tender on the 23rd July. Mr. Sampayo argued that time was not of the essence of the contract, that the institution of this action on the 20th August and the deposit of the money on the 12th September was a tender in time. That, however, was not the position taken by the plaintiff in his plaint. I may, however, say that in my opinion time was of the essence of the contract. The defendant was the owner of lands which the plaintiffs' ancestor desired to re-purchase. On the narrative that a sum of Rs. 634 had been spent by defendant on and for the land, the defendant executed on 24th July, 1890, a deed that "if the said sum of Rs. 634 be paid to me within "four years from the date hereof, I do hereby agree to get a bill of "sale written conveying all the right, &c., and to grant unto the "said Elias de Silva and to his heirs, executors, administrators of "his estate, and I do hereby direct that during the said term of four "years either I or the heirs of my estate shall not sell nor gift." The defendant was entitled to a strict construction of this engagement. He had promised to refrain from alienating his land, and had promised to re-convey it, provided the plaintiff paid him Rs. 634 within a given time. If that time expired without payment or legal tender of the money, the defendant was absolved from his promise.

I would affirm with costs.

WITHERS, J.—I concur.