FELCH v. HOOPER et al.

Case No. 4,718.
{4 Cliff. 489.}[1]

Circuit Court, D. Massachusetts. May Term, 1878.

PRACTICE IN EQUITY—AUTHORITY OF MASTER TO DEPART FROM ORDER OF COURT—HEARING ON EXCEPTIONS TO MASTER'S REPORT—REVIEW.

1. Masters have no right to review, reject, or disregard the decision, order, or directions of the court, contained in the decretal order under which they are appointed. They are bound to follow all such orders and directions.

2. Courts of equity may, in certain cases, give the parties a new hearing, but nothing of that, kind will be allowed in a hearing on exceptions to master's report.

3. Applications for a review at law, or in equity, and proceedings upon master's report, are altogether different proceedings.

Hearing upon exceptions to master's report in equity.

A. G. Stinchfield, for respondents.

The master's functions are limited by the decree, and it was no part of his duty to go into the investigations as to the fact of a tender, or its sufficiency to stop the running of interest upon the bond. This question was not referred to him. We are entitled, by the terms of the bond, to $1,650.00, with interest at the rate of eight per cent, per annum after October 15, 1873. Of this the master has allowed one month and six days (page 2), and from April 1 to October 11 (page 7), and no more. Gordan v. Hobart {Case No. 5,608}; Lonsdale Co. v. Moies {Id. 8,497}.

At the hearing, the court considered this question of tender only as it bore upon the question of granting relief from the forfeiture insisted on in the answers, and not at all, as the master supposed, in its relation to interest. Though the master has disallowed interest, he has at the same time referred to the court the question as to whether a tender not kept good, as this confessedly was not, can defeat the interest payable by the express terms of the contract.

But, if authorized to go into the investigation of the sufficiency of a tender to stop interest, we except to the disallowance upon the facts and grounds stated in the report. The contract is a special one, and the plaintiff {Mark C. Felch} is entitled to a conveyance only upon the express condition that within ninety days from date, he tender the amount and interest after sixty days at eight per cent, which the master finds he did not do. By the terms of the bond, the tender, to be effectual to stop interest, should have been made, at latest, Nov. 14, 1873, but the master finds that, as matter of fact, it was not made till Nov. 21,1873. It is well settled that a tender after the day is ineffectual as a tender. It is an equitable circumstance, which the court regarded upon the issue submitted, by the bill and answer in granting relief from forfeiture of condition, but it cannot be regarded as

sufficient to stop interest payable by the express terms of the contract Merritt v. Lambert, 7 Paige, 344; Hume v. Peploe, 8 East, 168; Poole v. Turn-bridge, 2 Mees. & W. 223; Adams v. Cordis, 8 Pick. 269. No money was deposited in court, and the master finds, as matter of fact that the identical money intended was not kept on hand at all, but at once returned to the person of whom he borrowed it; that no money at all was at all times kept ready for the defendants; that the defendants had no notice that any money was ready for them; that on the 21st day of Nov., 1873, when the alleged tender was made to David Hooper, the title to the land was in Matilda H. Hooper, and that no tender was made to her; that the plaintiff ever, after the execution of the bond, was in possession of the

premises, taking the rents and profits. Upon such a state of facts the master was not authorized to disallow interest, which is expressly a part of the contract, and not claimed simply as damages for non-performance. Before it can so operate it must be made duly and kept good ever after. It is not enough that the money is kept a part of the time "where he could get it on short notice," whatever that means, and a part of the time in his business. Adams v. Cordis, 8 Pick. 209; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Merritt v. Lambert, 7 Paige, 344; Claflin v. Hawes, 8 Mass. 261; Dorkray v. Noble, 8 Me. 285; Reed v. Woodman, 17 Me. 46; Marshall v. Wing, 50 Me. 62; Sheredine v. Gaul, 2 Dall. [2 U. S.] 190; Livingston v. Harrison, 2 E. D. Smith, 197.

We except to the refusal of the master to report the evidence upon which he bases his conclusion, that the plaintiff at any time had, after the alleged tender, the money where he could get it-easily. We think this finding more favorable to the plaintiff than he was entitled to, or the evidence would warrant. The master is not the ultimate tribunal in the determination of questions of law and fact referred to him, and the exception is well taken. Greene v. Bishop [Case No. 5,763]; Foster v. Goddard, 1 Black [66 U. S.] 509.

G. W. Park, for complainant.

The court found a tender, and the master found that it had been kept good. Prior to April 1, 1877, the complainant got no interest or income on the money, and after this date, on the presumption of profit from use, the master charges complainant with interest on the whole amount. This should have been only on the balance due respondents after deducting costs. (no exceptions taken by us however). After a tender is refused, the party tendering need not give notice that the money is on hand, or do anything whatever until the party refusing shall call for the money. The receipt of "the rents and profits, whatever they were," without evidence of value or amount, does not show that any thing was in fact received. After tendering the purchase-money, complainant was the equitable owner of the land, and as such, was entitled to the rents and profits; and if he received no interest or income on the money left in his hands, he is not liable to pay interest. Davis v. Parker, 14 Allen, 94. And if he received interest or benefit from the money, he is only liable for so much. Davis v. Parker, Id. The interest referred to in the decree was that given by the terms of the contract before complainant's ground of suit accrued. The master allowed this to Nov. 21, 1873, the day of tender, but it should have stopped Nov. 14, when Hooper was in default in performance—no exception, however, by us), together with such interest (if any) as the evidence before the master should show that the complainant had subsequently received for the money. The court having found that Matilda H. Hooper was not a purchaser in good faith, and she not being a party to the bond, no tender to her was necessary.

The costs in the state court were lawfully taxed and certified, in pursuance of the decree in this cause. The complainant could not have that matter specifically adjudicated by

the state court unless the respondents appealed from the clerk's taxation, which they did not do. Gen. St. Mass. c. 156, § 22 et seq. The costs taxed for this court are the usual costs allowed by law, and of the usual amount.

CLIFFORD, Circuit Justice. Frequent cases arise in which the exceptions to a master's report require some reference to the original pleadings and proceedings, in order that the alleged errors imputed to the master may be fully understood. Enough appears in the pleadings and proofs to show that the suit was removed from the state court into the circuit before the merits of the controversy were decided. By the record it appears that the respondents executed a bond to the complainant, conditioned for the conveyance to the complainant of certain real estate by a deed of warranty, sufficient to vest in the latter a good and clear title to the premises, free and clear from all incumbrances, upon the payment to the complainant by the obligor in the bond of eighteen hundred and fifty dollars, as therein specified. Controversy arose between the parties, and the complainant instituted the present suit in the state court Service was made, and the respondents appeared and demurred to the bill of complaint Hearing was had, and the state court overruled the demurrer, and decided that the premises were charged with an implied trust in favor of the obligee in the bond, it appearing that he had paid or tendered the sum stipulated to be paid, and had entered into the possession of the land, and made improvements by the permission of the owner Felch v. Hooper, 119 Mass. 52.

Immediate removal of the cause was made into the circuit court, where the respondents appeared and filed an answer. [See Case No. 4,717.] Subsequent to the hearing, the circuit court entered a decree that the stipulations of the bond ought to be specifically performed and carried into execution, and that the complainant is entitled to have a good and sufficient conveyance of the land, and that the respondents should give their deed of the same, with all the covenants of title usually inserted in warranty deeds by the custom and practice of the state. Appended to the same is the further decree, that the cause be referred to John G. Stetson, Esquire, one of the masters of the circuit court, to inquire and report what amount of principal and interest is due and payable from the complainant to the respondents,

and to tax the plaintiff his costs of suit in the circuit court, and also in the state court from which the cause was removed. Directions were also given to the master, in the decree, as follows, to wit: that he, the master, shall deduct the amount of all such costs from the amount due in respect of the purchase-money of the land described in the bond, and the further decree is, that, upon the complainant's paying into the registry of the court the balance of the purchase-money, after the deduction of such cost, the respondents, including the obligor of the bond and his mother, to whom he had conveyed the premises, execute, acknowledge, and deliver to the complainant, such deeds of conveyance as, in the opinion of the master, shall be adequate and sufficient to vest in him a clear and perfect title to the premises, free and clear from incumbrances. Inquiries were to be made by the master, and the decree directed that the evidence taken for the trial of the cause in chief might be used before the master, as far as it was pertinent to such inquiries, and that the master should report upon the matters referred for his consideration.

Pursuant to the decretal order; the master heard the parties, and made the report to which the exceptions under consideration are addressed. They are all embraced in one general statement, which, for convenience, is divided into propositions as follows:—

1. To the refusal of the master to report the evidence or make findings of fact, as requested.

2. To the master's refusal to allow interest on the bond, according to its terms and conditions, as required by the decree.

3. To his refusal to find and determine, as matters of law, that the alleged tender had not been kept good by the complainant.

4. To the allowance of the costs taxed in the state court.

5. To the amount of costs, and to the charge of the master for his services.

Masters have no right to review, reject, or disregard the decision, order, or directions of the court contained in the decretal order under which they are appointed. Instead of that they are bound to obey, follow, and carry into effect all such decisions, orders, and directions. Apply that rule to the case before the court, and it disposes of most of the questions raised by the exceptions. Courts of equity, in certain cases, may give the parties a new hearing, but nothing of the kind will be allowed in the hearing of exceptions to a master's report. Applications for review in law, or in equity, and hearings upon exceptions to a master's report, are altogether different proceedings, and cannot be blended either in argument or decision. Argument to support the two preceding propositions is quite unnecessary, as their correctness is self-evident, and they are sufficient to show that it was the duty of the master to follow and obey the directions of the decretal order. All the exceptions not covered by the foregoing propositions have been carefully examined, and are hereby overruled upon the ground that the rulings and decisions of the master are correct, including the charge for his services which is deemed to be just and reasonable.

Decree for the complainant, that the exceptions to the master's report are overruled, and that the report of the master be, and the same is, hereby confirmed.

[1] {Reported by "William Henry Clifford, Esq., and here reprinted by permission.}