Case No. 7,268.

JENKINS v. ELDREDGE et al.

[3 Story, 325.][1]

Circuit Court, D. Massachusetts. May Term, 1845.

COMMISSIONS TO TRUSTEES—AGREEMENT OF LEASE—CONSTRUCTION.

1. An agreement for a lease of certain premises was made by the plaintiff to the defendant K., on the 1st January, 1839, and subsequently, E., on the 18th of January, 1841, in pursuance thereof, agreed to lease the same to the said K. and to W. for 10 years from the 1st of June, 1841, the annual rent being fixed by the award of referees made in virtue of the said last agreement, at $4,650. K. then took possession, and occupied the premises upon these terms until December 14th, 1842. E. then, claiming to be owner, conveyed the premises to K. on March 1st 1842. On March 7th, the plaintiff filed with K. a notice of his claim thereto; and subsequently K., as owner, agreed with himself and W., as proprietors of the Boston Museum, to reduce the rent to $3,000 and taxes. The present bill in equity having been filed by the plaintiff against K., the matter was referred to a master, who reported, 1st. That the agreement by E. was a present demise. 2d. That K. was liable for the full rent of $4,650. 3d. That the evidence did not justify a reduction of the rent by K. 4th. That the interest was properly charged upon the rent 5th. That K. was not entitled to commissions as trustee for the plaintiff. The court approved the 1st ruling, on the ground, that as no further act of demise was contemplated, and K. having taken possession under the agreement it was a present demise for ten years. The court approved the 2d ruling, on the ground, that any reduction by K. of the rent originally fixed by referees after notice of the plaintiff's claim, and without his consent was an act which, not being for the plaintiff's benefit would, in the event of the establishment of his claim, he unauthorized. The 3d and 4th rulings were assumed as necessary consequences of the second. The 5th ruling was over-ruled, on the ground, that as K. held the premises as trustee of the plaintiff, and had not been guilty of gross misconduct he was entitled to his commissions, although he was not an open and express trustee.

[Cited in Jewett v. Cunard, Case No. 7,310.]

2. The general practice in America, and especially in Massachusetts, is to allow commissions to trustees in cases of open and admitted express trusts, unless the trustee have forfeited them by gross misconduct in the administration of the trust.

3. An agreement for a lease will be construed to be a present demise, if no future formal lease be contemplated, and especially if possession be taken under it.

4. *Held,* that the defendant should pay all ordinary costs of the suit.

[This suit was originally before this court. In Case No. 7,266. There was a decree for plaintiff, Joseph Jenkins, and the cause was referred to a master to take an account. A petition for a rehearing filed by Charles H. Eldredge, one of the defendants, was denied in Case No. 7,267.]

The cause was afterwards argued upon the exceptions to the master's report filed by the defendant Kimball. As to the claim of Kimball, upon which the exceptions arose, the report of the master was as follows:

"The following state of facts was laid before me by the complainant's counsel, and duly proved: 1st. That certain rooms in the said building have been, since the first day of June, A. D. 1841, hitherto, occupied by a corporation, styled 'The New England Museum and Gallery of Fine Arts.' That, in May, 1839, the complainant and the said defendant, Kimball, entered into the contract, found on page 206 of the printed record of this cause (see page 514, post); and afterwards, the said Eldredge, and the said corporation, entered into the contract, found on pages 206, 207 (see page 515, post), of the said printed record; and an award upon the rent, to be paid, was made thereupon,

is found also on the said 207th page, of the said record. That the said Kimball was proprietor of 275 shares of the capital stock of the said corporation, the par value of which was $100 per share, and one Alfred A. Wellington was proprietor of the remaining 25 shares thereof, the said Wellington being the president, and the said defendant, Kimball, being treasurer of the said corporation. That the said corporation continued to pay the rent of $4,650, fixed by the said award, from the first day of June, 1841, to the fourteenth day of Dec, 1842; during which time the stockholders and officers of the said corporation remained as above stated, except, that twenty shares of the said capital stock were sold, in Nov., 1842, to Mr. David S. Greenough, but the same were not transferred to him until the 27th day of Dec, 1842. That, on the first day of March, 1842, the said defendant, Eldredge, conveyed the whole estate, in fee, to the said Kimball, and on the 7th day of the same month, the said complainant served a written notice upon the said defendant, Kimball, giving him, the said Kimball, notice of his, the said complainant's title, and prohibiting him from doing any thing affecting the said property in any way. That on the 14th day of Dec, 1842, the said Kimball, by agreement with the said corporation, reduced the rent to the sum of three thousand dollars per annum, and taxes. And thereupon I have ruled, and do report, that the said Kimball is chargeable, in his said account, with the rent of the said rooms, specified in the instruments mentioned, at the rate of $4,650.00 per annum; because, first the instruments contained on pages 206, 207 (see page 515, post), of the said printed record, constitute together a demise of the said rooms, to the said corporation, at an annual rent of $4,650, payable quarterly; and because, secondly, the said Kimball, in the transaction aforesaid, whereby he reduced the rent, is to be treated as a trustee, dealing with himself.

"In justification of the aforesaid reduction of rents, the learned counsel for the said defendant, Kimball, offered the evidence of one Moses Kimball, the agent of the said Boston Museum, tending to show, that, in December, 1842, when the said rent was reduced, it seemed probable, that the said corporation would not continue to be able to pay the rent of $4,650 per annum, and to go on with its business, for several months previous, and also, from the fact, that its property was under mortgage, to nearly its whole value; and hence it was contended, that there existed no means of enforcing the payment of the existing rent. The testimony of the said witness was also offered, to show, that the building was constructed, and adapted to the purposes of a museum, and that no other tenant could probably have been found in Boston, who would hire it for such a purpose. Upon this evidence, I ruled: First. That the said Kimball having, as a trustee, dealt with himself in a matter, affecting the income of the trust property, cannot be permitted to show, that, at the time he so dealt, there was more or less risk of the failure of the existing tenant to pay the stipulated rent; because a court of equity does not go into matters of probability, in order to ascertain, whether a trustee, who has dealt with himself, would or could not

have made a better contract; secondly, that, if the justification of a controling necessity is ever admissible in such cases, the evidence in the present case, did not show a full justification.

"I, therefore, report, that the account of the said Kimball is surcharged in the following items; to wit; that each of all the items of rent, in which the said Kimball debits himself, as received "of museum," on and after March 14th, 1843, ought to be debited, respectively, in the sum of $1,162.50, instead of $750.00; and that, from the sum total of the account, thus surcharged, should be deducted the sum of $305.00, being the amount of the taxes, paid by the said corporation to the said Kimball, upon the said rooms, and debited by said Kimball to himself in his said account; and that the interest account should be adjusted accordingly. Second. The account, brought in as aforesaid, by the said Kimball, contains an item, credited to himself, on the fifth page, being the sum of $791.00, for commissions on the amount of rent, collected by him, which I report as disallowed, and that the same ought to be deducted from the sum total of the credit side of the said account. And thereupon I find, and report, that there is due, on the day of the date of this report, from the said Kimball to the said complainant, as the true final balance of the said Kimball's account, the sum of twelve thousand seven hundred and eighty-one dollars and seventy-three cents, as stated in the schedule hereto annexed."

The contracts referred to in the foregoing report, were as follows:

"Memorandum of agreement made this first day of May, in the year of our Lord eighteen hundred and thirty-nine by and between Joseph Jenkins of Boston of the one part and David Kimball of said Boston of the other part, witnesseth—That, whereas the said Jenkins is about to erect a spacious and elegant edifice, occupying the entire front and length of the lot of land on Tremont street, recently purchased by him of Miss E. Deblois, which edifice is identified and described in the drawings and specifications exhibited and to be embraced in the lease hereafter mentioned—the building to be completed on or before the first day of January next;—Now it is hereby agreed mutually by the parties that all of the said edifice above the basement is to be leased to said Kimball by said Jenkins for the term of ten years from the time when said building is to be completed,

for the purpose of a museum and other kindred objects, the said Kimball yielding and paying for the same to said Jenkins the sum of five thousand dollars for each and every year in quarter yearly payments, without taxes. It is however understood that, whereas the said Kimball is immediately to repair to Philadelphia for the purpose of purchasing the 'American Museum,' if he, the said Kimball, shall be unable to purchase the same, then this agreement is to be void, otherwise to remain in full force. In witness whereof the said parties binding themselves, their heirs, executors and administrators each to the other in the penal sum of ten thousand dollars for the faithful fulfilment of this agreement, have hereunto set their hands and seals, the day and year first above written. David Kimball. Joseph Jenkins. Signed, sealed and delivered in presence of, (nine words being first interlined,) J. Jenkins, Jr. Moses Kimball."

"Whereas on the first day of April, A. D. 1839, Joseph Jenkins and David Kimball, both of Boston in the county of Suffolk and state of Massachusetts, did covenant and agree to and with each other, that the said Jenkins should lease and the said Kimball hire certain rooms in a building on Tremont street, and whereas the said rooms were not completed at the time recited, yet nevertheless as C. H. Eldredge of said Boston did afterwards become the owner of said building, and did complete the said rooms, and the said Kimball having become a member of a corporation entitled the New England Museum and Gallery of Fine Arts, and the said corporation being desirous of occupying the said rooms, but have not or yet been able to agree with the said Eldredge upon a sum that shall be paid therefor as rent, now therefore, the said corporation and the said Eldredge do hereby covenant and agree to and with each other that the said Eldredge shall lease to the said corporation the said museum rooms in said building for a term of ten years, and the said corporation shall receive the said rooms for the said time, and pay therefor a rent to be decided as follows, viz. First, the matter shall be referred to Sam. Hubbard and E. Hasket Derby, and in case of disagreement between the referees they shall choose a third, and the decision of two shall be binding upon the parties to this covenant Second. The said corporation shall appear before the said referees with the same rights, privileges and immunities, and none other than the said Kimball would have were he a party to this covenant. Third. The said referees shall take the said contract between the said Jenkins and the said Kimball as the basis upon which to decide the rent to be paid by the said corporation, and shall take into consideration any deviation that may have been made from the said contract with all other matters and things that may appertain thereto, and shall decide what under all the circumstances shall be an equitable, just and proper rent for the said corporation to pay to the said Eldredge. Fourth. The referees shall decide when the said rent shall commence, giving the said corporation a reasonable time to fit up the said rooms. In witness whereof we have hereunto set our hands and seal this eighteenth day of January in the year of our Lord one thousand eight hundred and forty-one.

David Kimball, A. A. Wellington, Committee of the New England Museum and Gallery of Fine Arts. C. H. Eldredge. Witness, Jesse Gould."

"The aforenamed referees having repeatedly met and heard the parties to this agreement, and having given the subjects submitted to them, with the circumstances attending the same, full consideration, do decide and determine the yearly rent to be paid by the said corporation called 'the New England Museum and Gallery of Fine Arts,' to the said Charles H. Eldredge, shall be the sum of four thousand six hundred and fifty dollars, as an equitable, just and proper rent—and that the same shall commence on the first day of June, A. D. 1841—to be paid quarter yearly. The charges of this reference taxed at one hundred dollars, to be paid equally by the parties. Samuel Hubbard, Elias Hasket Derby.

"Boston, March 1, 1842.—Whereas I have this day sold to David Kimball the estate to which this obligation has reference, I hereby assign the same to said Kimball. C. H. Eldredge. Witness, Samuel Sweetser."

The exceptions filed by Kimball were as follows: First "For that the said master hath reported and ruled, that said Kimball is chargeable with the sum of forty-six hundred and fifty dollars per annum, instead of the sum of three thousand dollars and taxes, the amount credited by said defendant in his account, rendered said master, for the rent of certain rooms mentioned in said report on the ground, that the instruments, contained on pages 206, 207, of the printed record of this cause, constitute together a demise of said rooms, for a term of ten years, at an annual rent of forty-six hundred and fifty dollars, payable quarterly. Whereas the said master ought not to have ruled, that said defendant was chargeable with any other and farther sum, than the sum so credited by defendant in his said account, or that said instruments do constitute together, as against this defendant, a demise of said rooms for a term of ten years, as aforesaid. Second. For that the said master hath reported and ruled, that the said Kimball is chargeable with the sum of forty-six hundred and fifty dollars per annum, instead of the sum of three thousand dollars and taxes, the amount credited by him, in his account rendered said master, for the rent of certain rooms mentioned in said report, on the ground, that the said Kimball, in the agreement between him and said corporation, whereby said rent was reduced, was a trustee dealing with himself, and as such not permitted to show, that said agreement

by which said rent was reduced, was justifiable as being made in good faith, in the exercise of a prudent and sound judgment Whereas said master ought not to have ruled, that said defendant was chargeable with said further sum, or that in said agreement said Kimball was a trustee dealing with himself, or that, as such trustee, he was not permitted to offer evidence to justify said agreement as aforesaid. Third. For that the said master hath in and by his said report ruled, that the evidence of Moses Kimball, offered by this defendant, tending to show, that the reduction of the rent of said rooms, made by this defendant by agreement with said corporation, was proper, requisite, and justifiable, did not show a full justification. Fourth. For that the said master hath ruled and charged this defendant with interest upon the additional sums by him decreed to be payable for rent of said room by this defendant, beyond the amount credited in the account so filed by this defendant Fifth. For that the said master had disallowed a credit, taken by said Kimball in the account by him rendered and filed with said master, of the sum of seven hundred and ninety-one dollars for commissions on rents, and sums of money collected by him, said Kimball, as shown by said account, which sums said master ought to have allowed as a credit to this defendant"

B. R. Curtis, for plaintiff.

Mr. Bartlett, for Kimball.

Mr. Gardiner, for Eldredge.

STORY, Circuit Justice. In respect to the first exception of Kimball, it does not strike me, that it is of any importance in the case, whether the paper referred to is to be deemed a present demise, or a contract for a demise. In either case, as to the rent to be paid during the occupation of the premises, by the museum corporation, the asserted lessees, it is to be governed by precisely the same considerations. The original agreement in this case, between Jenkins and Kimball, on the first day of May, 1839, is certainly a mere contract for a lease at a future day, viz. when the building shall be finished. The subsequent agreement between Eldredge, and Kimball, and Wellington, on the 18th day of January, 1841, consummated as it was by the award of the referees, made under, and in virtue of that agreement, became a present demise or lease, in my judgment, for ten years, to commence on the first day of June, 1841, at the annual rent of $4,650. No farther act or demise was contemplated by the parties, and Kimball went into possession, under the agreement and award accordingly. One test, whether it is a present demise or not, is founded upon this consideration, whether a future formal lease is contemplated by the parties. If not, then the agreement will, if there be apt words, be construed as a present demise. If such a future formal lease is contemplated, it is not, of itself, decisive, that the instrument or agreement is not a present lease. I do not pretend to go over the authorities upon the subject; perhaps they cannot be all reconciled. Some of the most pointed cases, are Doe v. Ries, 8 Bing. 178; Piners v. Judson, 6 Bing. 206; Staniforth v. Fox, 7 Bing.

590; Hancock v. Caffyn, 8 Bing. 358; Alderman v. Neate, 4 Mees. & W. 709; Doe v. Benjamin, 9 Adol. & E. 644; and Jones v. Reynolds, 1 Adol. & E. (N. S.) 506.

But as has been already suggested, it is not material in the present case, whether the agreement be construed as a mere executory contract, or as a present demise, since in either case Kimball has occupied under it.

The second exception is of a very different character. The question here is, whether, under the circumstances stated in the master's report, Kimball ought to be held responsible for the original rent, agreed to be paid, or only for the reduced rent, which he agreed to take from the lessees at a subsequent period. The master held him bound to pay the original rent; the exception is founded upon the suggestion, that he ought to be liable only for the reduced rent. Now it is material to state, that, at the time when the lease was made to the museum corporation, Kimball was the proprietor of two hundred and seventy-five shares of that corporation, and Wellington was the proprietor of the remaining twenty-five shares. Wellington was president, and Kimball was treasurer, of the corporation. And this continued to be the state of things up to the 14th of December, 1842. Eldredge conveyed the whole estate to Kimball on the 1st of March, 1842, and on the 7th of the same month, Jenkins served a written notice on Kimball of his title; the present bill was brought at the May term, 1842; and the agreement for the reduction of the rent, was made on the 14th of December, 1842. So that, in fact, at the time of the reduction, Kimball and Wellington were the sole proprietors of the museum; Kimball claimed to be the sole owner of the building; and Jenkins was then asserting his title to the property, as equitable owner in the present suit. Stripped, therefore, of its artificial garb, the agreement was, in fact, an agreement by Kimball, as owner of the property, with himself, as proprietor of eleven-twelfths of the museum, and Wellington, as proprietor of the remaining one-twelfth, for a reduction of the rent, with full notice of the suit, and of the asserted trust, and without any consultation with, or assent thereto by Jenkins. Of course, Kimball had no right to make any such reduction of the rent, so as to bind Jenkins, and what he did, was at his own peril, and obviously, if the trust was established, it was a reduction for his benefit exclusively, and injurious to the cestui que trust. It was a reduction too, in the face of

the award, by which, very competent referees had fixed the rent at $4,650 per annum, for the ten years. In my judgment, there is no pretence of any necessity, as has been suggested at the argument, to reduce the rent. Admitting a depression to have existed at that time, non constat, that there might not be, and indeed there seems, subsequently, to have been a correspondent revival of the value afterwards. And certainly, in a case where the party, if a trustee, had so deep an interest in a low rent, he ought not to be permitted to make a bargain substantially to promote that interest, at the expense of the plaintiff. At all events, he had no right to change the existing state of things, at the time when the present suit was brought, to the prejudice of the plaintiff, without his consent, or approval. At the argument, it at first occurred to me, that there might be a good ground to make some distinction in his favor. But upon examining the facts, I am perfectly satisfied, that the master was right in his conclusion, and that Kimball is rightfully chargeable with the whole rent of $4,650, originally reserved during the period stated in the report.

The third and fourth exception depend upon the second, and are governed by it. No necessity is shown by the evidence for the reduction of the rent, of such a nature as can possibly apply to the present case. It was the case of a mere calculation of chances. The charge of interest follows properly from the liability to pay the full rent.

The fifth and last exception is one, upon which I have felt the most difficulty. According to the course of the authorities in England, no allowance of a claim of this sort, for commissions, would be sanctioned by a court of equity, even in cases of an open, and admitted express trust Here, the trust was denied by Kimball, as well as by Eldredge, and it has been forced upon both in invitum by the judgment of the court. In America, and especially in Massachusetts, it has been the general practice to allow commissions to trustees, in cases of open and admitted express trusts, where the trustee has not forfeited them by gross misconduct. The present case is confessedly new, and does not fall within the predicament of an express trust, nor within that of gross misconduct, in the administration of such a trust. I confess, that I do not feel sure, that the party is, under all the circumstances, entitled to the allowance of commissions; but I, nevertheless, should not feel quite satisfied with refusing the allowance. It seems to me, on the whole, equitable to allow it. If the cause shall, upon other grounds, go to the supreme court for revision, the plaintiff can, by a cross appeal, bring this matter in review before that court.

I, therefore, do order and direct, that the report of the master be confirmed as to all matters, except the disallowance of the sum of $791, claimed as commissions, which sum I direct to be deducted from the balance found due by him of $12,462.41. So that the balance, with which the said Kimball do stand charged at the date of the report, be the sum of $11,671.41, instead of the said sum of $12,462.41. I do not consider, under the circumstances, that any interest can, or ought to be allowed on the commissions; nor any deduction from the other interest be properly made on account thereof. Having disposed

of the exceptions, it remains only to say, that I am satisfied with the report in all other respects, and do order the same to stand confirmed accordingly.

In respect to the final decree, upon reflecting upon the subject, it appears to me to be the positive duty of this court, (subject, of course, to the appellate jurisdiction of the supreme court), to put an end to this most protracted litigation, for the very reason so pointedly suggested by Voet, that suits may not be immortal, while men are mortal.

Upon the question of costs, there does not seem to me to be any ground to suggest, that either of the defendants is entitled to costs, or that the plaintiff ought to be denied the ordinary costs of the suit. The defendants have resisted the rights of the plaintiff, now established by the court, at every step of the controversy; and having so done, they, and not the plaintiff, ought to bear the burthen or expenses of the litigation. Of course, I do not speak of the extraordinary expenses, but only of the ordinary costs.

In respect to the suit brought by Bliss against the defendant, Eldredge, now pending in the state court, it seems but reasonable, that, as far as this court can operate upon the matter, it ought not to subject Eldredge to double vexation. Bliss has voluntarily appeared and assented, as I understood him, to any decree of this court in the premises.

{See Case No. 7,269.}

[1] {Reported by William W. Story, Esq.}