

No. 13332

Supreme Court of Illinois

Tillson

vs.

Moulton et al

Supreme Court—Second Grand Division.

January Term, 1861.

ROBERT TILLSON, *Appellant*,

v s.

CHARLES F. MOULTON, *et al Appellee*.

Said Charles F. Moulton respectfully calls the attention of the Court to the following petition, and asks that a re-hearing of said cause be ordered so far as relates to the terms and basis upon which said cause is to be referred to the Master, to state an account as directed by the opinion of this Court.

The cause was argued on both sides upon the question presented by the record, "Had Tillson the complainant below, a right to *any* relief." No discussion was had as to what the details of relief should be in case this Court should reverse the decree of Circuit Court and hold that Tillson was entitled in some form to a decree for relief.

It was certainly not anticipated that this Court would enter a decree directing a Master of a Circuit Court to proceed in a particular manner to state an account, when the question as to the *manner* of stating such account had not been discussed, but only the question whether an account *should* or *should not* be taken between Tillson and Moulton. Unless your Honors will grant a re-hearing upon the question of *how* the account should be stated, the decision in effect deprives Moulton of being heard at all, on the very important question as to how the Master should be ordered to take the account.

The contract of the 7th May 1851, upon which the Court seems mainly to base its decision, joins the land near Quincy and the Chicago lots together, and makes them one adventure, and the total proceeds on the basis of that contract should be first set down as the fund out of which Robert Tillson is to receive pay (if at all.)

The sum to be refunded to Moulton is \$10,566 with *seven* per cent. interest out of the avails of both pieces of property. The decree of reference to the Master disconnects the two pieces of property, and is silent as to the *rate* of interest. Jno. Tillson Sr. should be charged with receipt of all the avails of Chicago lot instead of one half thereof, and also charged with interest at seven per cent. from receipt of purchase money of that lot until time of accounting and credited in the account by half avails of the Chicago lot and seven per cent interest.

Jno. Tillson Sr. having forced Moulton by his, Tillson's gross violation of trust, to pay off a large debt to Clark, by which the land was saved, according to decision of Court, for the joint benefit both of the party who violated his trust, and of Moulton, should if living be charged with ten per cent. interest from time of payment to Clark until accounting as if upon money loaned, and the same rule should be applied to complainant, his assignee.

It was provided by said contract of 7th May 1851, in substance, that John Tillson Sr. should make sale both of the land near Quincy and of Chicago lots, "and after deducting the amount of taxes paid on said premises, since they were purchased in the year 1848, as well as those hereafter to be assessed on the same, up to the time of such sale or sales, the proceeds to be by him (Tillson) deposited from time to time, and with all convenient dispatch, in the New York Life Insurance and Trust Companys, to the credit of the said party of the second part, (Moulton) until the whole of the aforesaid advance of \$10,566, with seven per cent. interest should be paid and reimbursed," and all sums beyond should be equally divided. The important items of taxes and exchange seems to have been overlooked by the Court, and are not directed to be taken into account. Moulton has paid out as is shown by record, or if not as can easily be proved, in stating an account, for taxes on the Quincy land during years 1852, 1853, 1854, in all about \$477,83, which he is entitled to have refunded with interest, together with exchange on remittances to New York, to be deducted from fund made by sales of Quincy and Chicago property.

Again, on the order of reference to the Master, the Court says, "deduct also (from the fund meaning) *one half* the expenses Moulton incurred in dividing and selling the quarter section," (Quincy land.)

We think that *all* such expenses should be deducted before anything is set off to the share of John Tillson Sr., or decreed to be paid to Robert Tillson his assignee. The contract of May 7th 1851, provides: "That the said party of the first part (Tillson,) should be the agent for effecting sales of the said premises," * * "but shall not be entitled to charge the concern any commission or other compensation for his agency beyond his actual disbursements, which shall not include travelling expenses." The supplemental contract of same day, provides: "That no sale of the whole, or a large portion thereof should be made without consulting Moulton, it being the intention of the parties to divide the Quincy lot into eighty parts, for sale to persons who would build thereon, and thus increase the value of the remainder."

Now John Tillson Sr. violated his trust by encumbering the title by lien to Skiddy, by procuring the Deed of Trust to be made to Castle for Marstin's debt, and by conveying (or if you choose) mortgaging to Clark. He never rendered any services to Moulton towards selling this land according to above contracts, but violated both of them, and his share should pay all expenses of subdividing and selling the Quincy land; and it is not in accordance with agreements with Moulton to charge the fund, or avails of land, with any of the costs of subdividing and selling the Quincy land.

We suggest, very respectfully, that the account should be stated somewhat on the following basis:

First, Set down sale of Quincy lots by Moulton at	- - - - -	\$40,205 00
Chicago lots by John Tillson Sr., at	- - - - -	3,000 00

Total fund on joint adventure,	- - - - -	\$43,205 00
--------------------------------	-----------	-------------

Second, Charge that fund with advance by Moulton, as per contracts,	- - - - -	\$10,566 00
---	-----------	-------------

Add interest thereon at 7 per cent. from May 7th 1851 until computation, and deduct that amount when ascertained from gross sum, to-wit: \$43,205 00, received for sale of Quincy land and Chicago lots, - - - - -

Third, From what remains deduct taxes as per contract, with interest thereon. Also cost of advertising sale of Quincy land; surveying said land; recording mortgages and acknowledging deeds about the same, and exchange on remittances to New York, and place half the balance to credit of John Tillson Sr., - - - - -

Fourth, Charge John Tillson Sr., with amount received from sale of Chicago lots,	- - - - -	3,000 00
--	-----------	----------

And interest on same from the time he received it until computation; also, with amount paid Clark, and expenses and interest paid by Moulton about the claim of Clark; also, with all expenses of sale of Quincy land paid by Moulton, no person on behalf of John Tillson Sr., having rendered any service in effecting such sale,

This will furnish a basis for reference to the Master, upon which to found a decree in favor of Robert Tillson. And will also be in compliance with the decision of the Court on the question that counsel on both sides presented to the Court, viz: "That complainant was entitled to a decree for some relief." It would reverse and remand the case as if upon an interlocutory decree "*quod computet*," this Court settling, to some extent, the basis of such computation. The present decree is virtually a final decree of this Court, on all the questions involved in a complicated account, without an opportunity being offered to be heard as to some of the most important questions in the case, which arise upon the *mode* of accounting.

Again the question of costs being one of discretion, should be made to depend on the state of accounts [if Moulton is shown to have refused to account] when stated by the Master on such basis as the Court should decide was proper. The record shows no demand on Moulton, to account, nor refusal on his part to account. Should not this question of costs be left open until the account comes in, for if on the Master's report it should turn out that the fund owed John Tillson Sr. nothing, would it be an exercise of sound discretion to inflict upon Moulton the costs in the case, in the Circuit Court?

We are sorry to trouble the Court with the details of a mere matter of account, but ask with all respect to the Court, that we may have an opportunity of being heard in this Court, as to the details of the mode in which this account should be stated.

December 29th, 1860.

WILLIAMS, GRIMSHAW & WILLIAMS,

Solicitors for Defend't, Moulton.

154

Chas. F. Moulton
et al

Robert Hillen
et al

Petition for a
re hearing.

Justice Press

13302

15