

NEW YORK SUPREME COURT

Ketchum v. Clark

22 Barb. 319 (1856) · Decided September 1, 1856

OPINION

SMITH, J.

By the Court, E. Darwin Smith, J. The reference in this case to take and state an account between the parties, was made under the second subdivision of section 271 of the code. The reference, under this subdivision, is the reference of the old courts of equity, such as was always made to a master in cases of accounting.

The practice in chancery in such cases was for the master to prepare a draft of his report and *320 deliver it to such parties as desired it, and for the parties then to come in and file objections to such draft, and after argument thereupon the master made his final report.

To this report either party who had filed objections could take exceptions based upon such objections. (See old Chancery Rules, 109,110; 1 Barb. Ch. Prac. 547.) These exceptions could be brought on before the court for argument, and nothing else in the accounts came up for review or examination.

The report of the master was final and conclusive upon all parties, in respect to all" such matters, after the expiration of the order nisi. That practice, so far as relates to references like the one in this case, is still in force in respect to proceedings before referees. Section 469 of the code, and the present rule of this court, 89, expressly retains all the customary practice in chancery, as it had heretofore existed in the court of chancery, in cases not provided for in some statute or other rule.

No objection having been taken in this case before the referee, and no exceptions taken to his report, both parties are concluded by it, and neither is entitled to raise any question in respect to the details of the account, on the hearing of the cause.

In this view of the rule applicable to such cases there is nothing before the court for review properly brought up on this appeal. But as this objection was not raised at the hearing at special term, and the judge did consider and carefully pass upon the whole case, the objection may possibly be deemed waived.

In this view I have looked into the case, and it seems to me that -.complete justice has been done between these parties by the referee and the court at special term, with one exception. The appellant is charged in his account,. by the referee,' with the sum of \$450 as received of

Millbanks. This sum, it clearly appears, was received in fact by the firm of Clark,¹ Ketchum & Sharp, of which the appellant A. Clark was a member.

The amount should not, therefore, have been carried into the account of the appellant Alva Clark, but the \$450 having been charged to him it should have been credited back. Three hundred dollars of this amount is credited back, leaving him charged, by the mistake, with the sum of \$150.

The credit on his account should have been \$450, instead of \$300. The decree should be amended, so as to reduce the amount of the indebtedness of the said Alva Clark from \$737.43 to \$587.43, as of the date of the charge against him, with interest, and in all other respects should be affirmed, with the costs of the appeal, to be paid out of the fund in the hands of the receiver.

[Monroe General Term, September 1, 1856. Decree modified. Costs to be paid out of the fund. T. R. Strong, Welles and Smith, Justices.]