# New Jersey Court of Errors and Appeals

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| FREDERICK L. SMITH, *Complainant-Appellant,* *vs.* EDWARD C. BALCH, *Defendant-Respondent.* | *On Bill, &c.* *Appeal from Chancery.* |

## BRIEF FOR COMPLAINANT-APPELLANT.

### General Statement.

The final decree in this cause is in favor of the complainant (case, p. 183). He appeals, however, because the decree fails to allow interest on the sum of $50 due on the completion of each house, and on wages withheld, as the Master had done (case, p. 190), and also because the decree should have allowed $100 a house for the first ten houses and interest from the completion of each, instead of $50 a house. The Vice-Chancellor allowed interest only from the time of the filing of the bill, on the supposition that no demand had previously been made (case, p. 182). This deprives the complainant of $1,636.38, made up as follows:

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| Master's report (case, p. 178) | $1,866.56 |
| Interest from July 15, 1917, to date of decree | 54.42 |
| Commissions on two houses not included in Master's report, but allowed by Vice-Chancellor | 100.00 |
| Interest on $100. (1 yr. 3 mos. 25 days) to date of decree | 7.90 |

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| Difference between $100 a house for first ten houses (Nos. 41 to 50 inclusive, case, pp. 165-166), and $50 a house payable under decree ..... | 500.00 |
| Interest from dates of completion to date of decree ..... | 257.50 |
| | $2,786.38 |
| Amount of decree (after cancellation of mortgage and costs) ..... | 1,150.00 |
| Add to decree ..... | $1,636.38 |

Inasmuch as there are cross-appeals (the defendant Balch having appealed from the whole of the decree), the facts will be fully discussed in our brief on the main case, and reference will be made now to only a few points bearing on the question of interest.

It is not correct to say that the complainant made no demand prior to the filing of the bill. When on the stand the first day he was asked (case, p. 29):

> "Q Did you ever ask for an accounting?
>
> "A I asked him several times if something couldn't be paid off, and he told me I was well enough off the way I was, receiving wages weekly and money deducted from the wages paying interest and taxes."

And on the second day (case, p. 153):

> "Q As you finished each house you were entitled to at least $50?
>
> "A Yes, sir. * * *
>
> "Q Did you ever ask for any credit?
>
> "A I asked young Mr. Balch how we stood.
>
> "Q What was preventing you from demanding what was coming to you in 1911, 1912, and 1913?

"A I thought when Mr. Balch had the money he was going to pay, just the same as he did when he paid the $750. When he had some money on hand *I supposed of course* I was going to get credit on the house."

And on re-cross on the first day (case, p. 55):

"A I asked Mr. Balch's son nearly every year about whether there was anything more credited to me than on the purchase price, and he said 'No,' he said all that was credited to me was the $1,250 that had been paid.

"Q What did you do then in regard to that?

"A I kept—the next year I asked the same question.

"Q But did you ask the defendant for any explanation of why you were not credited with the amount to which you were entitled for the finishing of these houses?

"A Well, I didn't ask him until the last year.

"Q Why did you wait until then?

"A Well, I thought I had enough money to pay for it; that was all. * * * I thought that when the thing was settled up, I would have a little money left over, to fix my house up, and have the house free and clear."

Besides, the defendant's book negatives any idea that $3,000, or any other sum, should accumulate without interest. The first entry in the defendant's book is a charge to the complainant as follows (case, p. 159):

"Fred Smith, 1909, July 17, House
and lot, Chestnut Street..... $4,250"

And under the same date, on the other side of the account, is a credit to Fred Smith, as follows (case, p. 159):

"1909, July 17, By Commission... $ 500"

The defendant's books show that the defendant "*sold*" the premises in question to the complainant for $4,250—not $4,250 *and* a sum to be accumulated in defendant's hands the interest on which should amount to many hundred dollars, which interest should belong to the defendant; for that would be equivalent to *selling* the premises to the complainant (although the property was bought with complainant's own funds) for something like $5,128.88. It is evident that defendant had no right to make this or any profit—in fact *he had no right to take title in his own name at any time.* The defendant never paid out a dollar on account of the complainant from his own funds, either in the two installments of $500 and $750 paid on the purchase price, or on account of interest on the mortgage, taxes, or anything else. *There was always a surplus amount in the hands of defendant belonging to the complainant.*

Moreover, the defendant Balch not only charged the complainant interest on the mortgage, but interest on other items, such as insurance, taxes, jobbing, coal. Interest on other items is included in the charge under date of "Dec. 31, 1 yr. int. to 12/31 $165.22," and in the item "Dec. 31, 1915, 1 yr. int. to 12/31 $165.64," and again in the items of ~~"Dec. 31 1 yr. int. to 12/31, $165.64,"~~ "June 30, 1916, 6 mos. int. $83.32," "Dec. 30, 1916, 6 mos. int. $81.29" (case, p. 160). This is more than the interest on the balance due on the mortgage of $3,000. That was $75 semi-annually.

But even if no demand had been made, the situation of the parties was such that *a formal demand was unnecessary.* Balch was trustee for the complainant, and in the nature of the transaction there was an imperative duty resting on the defendant, namely, to account regularly to the complainant. That duty cannot be escaped by saying that no formal demand was made. In equity the call to account was loud and continuous, and the defendant cannot take advantage of his own wrongful conduct. He had the entire confidence of the complainant, and the defendant would have us believe that he "treated the complainant as a son" (case, p. 133).

It must be remembered that the agreement for commissions was made about a year before the complainant's house was purchased, and that the purchase for complainant was an independent matter entirely. At the time of the purchase a number of houses had been erected. It is clear that the complainant was then entitled to his commission on each building as completed. A year later, when the premises were purchased complainant was still entitled to be paid his commission on each house as soon as finished. The defendant then came under a special obligation to the complainant as his trustee to see that the commissions were properly and promptly applied to the reduction of the mortgage on complainant's house, the complainant trusting him implicitly. *The case is barren of any suggestion that $3,000, or any other sum should be accumulated in defendant's hands, without interest, and that then the mortgage should be paid off in a lump sum.* On the contrary, the complainant's testimony is that the commissions as earned were "to be applied to the reduction of the mortgage; that was

the understanding'' (case, p. 54). And that is the common sense of the transaction. The defendant's duty was to apply the money in his hands to the reduction of the mortgage as soon as it became due to the complainant.

No obligation rested on the complainant to continue working for the defendant until $3,000 should accumulate in his hands; and no obligation rested on defendant to employ complainant until his commissions should amount to $3,000 or any other sum. The contract was to pay $50 on each house *and* wages. The wages were due as earned; so also the commissions.

## The Agreement.

The bill of complaint was prepared under trying circumstances. The draftsman found the complainant so worried over his case that complainant was on the verge of collapse, and it was with difficulty that his story could be pieced together. Naturally slow of speech, the complainant on this occasion had not the poise to tell his story thoroughly and connectedly, and the draftsman had to do the best he could. When the case came on for trial, however, the complainant had not been on the stand ten minutes when it was made clear that the original agreement was for $100 a house, and that the agreement had been changed to $50 a house after ten houses had been erected. An amendment to the bill was made, to conform to the proofs.

That the original agreement was for a commission of $100 on each house is evident when we turn to the case, page 27, lines 1 and 24; and see case, page 37. It is brought out fully on an

examination of the witness by the Court (case, page 51):

"Q Mr. Smith, as I understand it, you said you had an arrangement with Mr. Balch by which, first, you were to share equally in the profits from the houses that he built, and that later on he told you that instead of that he would give you $100 for each house?

"A Yes, sir.

"Q And still later, he cut that down to $50?

"A Yes, sir.

"Q That was about the time, as I recall it that the first ten houses were completed; is that so?

"A Well—

"Q That last arrangement?

"A They were not all completed, of course; they were standing up—some were completed and some were entirely completed.

"Q We will say that they were in course of construction?

"A Yes, sir.

"Q Did you say anything to him or make any protest after the reduction of your interest at the time that he made this reduction?

"A I made no protest. I didn't know what I was going to get, first off, you know, and he told me to get started, and we started, and then after we got started I asked him for a written contract, so I would know—

"Q I remember what you said about that, but that was in relation to $100 a house, wasn't it?

"A That is what I thought I was going to get, first off.

"Q *What made you think you were going to get that?*

"A *That's what he told me.*

"Q *He told you you were going to get $100 a house?*

"A *Yes.*

"Q When he reduced that to $50 a house, as you said, did you make any objections to that reduction, or did you say anything to him about it?

"A When he made the reduction, 'well, if I am going to get $100 for ten houses, all right,' and if he wants to make—he says, '*After this,* I am not going to give only $50 bonus besides your wages,' and he made an agreement right there, and of course, we worked right on through the whole business.

"Q Then it is my understanding that *your contention is that you are entitled to $100 apiece for the first ten houses,* and $50 apiece for the remainder?

"A Well, that's what I thought I was going to get, first off.

"Q I want to know if you thought you were going to get that or by virtue of your agreement you would receive that?

"A *Yes, sir; that's what I thought I was going to receive; yes, sir.*"

Mr. Charles R. Reeve, who conducted the negotiations for the sale of the premises, testified to a conversation with the defendant, and on cross-examination this is the record (case, p. 56):

"Q Just say that again.

"A He was going to give him $100 on each home—sort of agreement—on each home he turned out.

"Q Tell us, as near as you can, the conversation.

"A Why, the way it started, Fred—he was going to get this home for Fred; he said

Fred couldn't save the money, and he was going to start a home for him this way, and *he was going to give him $100 for each house he turned out for him,* and he was going to credit it in some way with Fred, and give him the house."

And Mrs. Florence L. Smith, wife of complainant, referring to an interview with Balch, testifies (case, p. 57):

"Q Where did you live prior to the house you are living in now?

"A The old house in Ridgewood road, Maplewood.

"Q Did you ever see Mr. Balch there?

"A Oh, yes; very often.

"Q And do you remember any particular occasion when he came there?

"A I remember when he came there when we asked him to do something for us about a house, *and after Mr. Smith had been there about a year with him.* Yes, I remember Mr. Balch coming there, and I told Mr. Smith that I thought we had better tell him what we found in the way of a home, so we walked over to where he was, and told him about it, and he said that—I believe he said there were ten houses, *and that after this, he could only let us have $50 on a house instead of $100 that he promised.*"

And on cross examination (case, p. 58):

"Q Mr. Balch was doing this for the purpose of getting you folks so that you would own your own home?

"A *Paying Mr. Smith, of course, what he had earned. Mr. Smith had earned that much towards a home.*"

## The Law.

In his findings the Master stated that—"so far as appears from the testimony, no specific date was set for the payment of the commission earned by complainant for the construction and completion of each house. *The implication is, therefore, that the payment of $50 became due upon the completion of each house.*" In this the Master is supported by the authorities. The law, under the circumstances of this case, will imply an agreement to pay interest. Such a promise inheres in the very nature of the transaction. The court, in the case of this trustee, will also imply a demand, a constant and increasingly persistent demand, for the payment of interest.

In the leading case of *Selleck* v. *French,* 1 Conn., 32, 6 Am. Dec., 185, it was held that an implied contract to pay interest arises when the parties make no express agreement therefor, but from the circumstances the law infers that they contracted with reference thereto, and interest may be recovered upon a contract thus implied as well as upon an express contract to pay it. The court, at p. 187 (6 Am. Dec.) said:

> "If one should make advances for the benefit and at the request of another, *or a mechanic should perform some considerable piece of work, as building a house,* or a farmer should sell the produce of his farm, as his wheat, beef, etc., it could not be presumed that they were to rest on the footing of a mutual account on book, but that payment was to be made when the advancements were closed, *the work completed* and the produce delivered; *of course* interest would be chargeable on such accounts if unreasonably delayed, though partial payments

have been made, and the accounts were unsettled; for here has been a breach of contract."

And at page 188:

"In this case it appears that there were not mutual dealings; the advancements were all on the part of the plaintiff. It is not denied that the debts were due, and the payment unreasonably delayed; *of course,* the defendant became liable to pay the interest, though the account was not settled, *and there was no promise or usage to pay it.*"

Speaking for this court in the case of *Ruckman* v. *Bergholz,* 38 N. J. L., 531, Chancellor Runyon said, at page 533:

"Bergholz was entitled to his money as soon as it was earned. * * * The general rule is that where there is an agreement to pay money, but no time is limited for the payment, interest is payable from the time when the money becomes due," citing *Selleck* v. *French.*

In *People* v. *New York,* 5 Cow., 331, the general principle is stated—"that, whenever the debtor knows precisely what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay;" and the rule is laid down in substantially the same terms in *Hunt* v. *Jucks,* 1 Am. Dec., 555; and see *Swett* v. *Hooper,* 62 *Maine,* 54, to the same effect.

In *Rogers* v. *Colt,* 21 N. J. L., 18, the court said at page 24: "No time being limited for payment, the debt was payable immediately."

In *Kistler* v. *Mosser,* 140 Pa. St., 367, 21 Atl., 357, the court held that a contract fixing the particular time from which interest is to run

may be implied from the terms of the agreement of the parties, or otherwise; and when so established the contract will be as effective as if it were in express terms.

And in *Whitcomb* v. *Harris,* 90 Maine, 206, 38 Atl., 138, it was held that when the debtor knows what he is to pay, and when he is to pay it, no demand is necessary to start the running of interest from the day the payment should be made.

"The fundamental principle, in regard to a trustee, whether executor, or administrator, or guardian, *or in case of an ordinary nature,* is, that he shall derive to himself no gain, benefit or advantage by the use of the trust funds. * * * When a trustee uses the trust money, in trade or by loan, he is charged with interest; so, if he mingles it with his own and uses it in common; so, if he suffers it to be idle when it might have been invested." This is stated with great clearness in *Voorhees* v. *Stoothoff,* 11 N. J. L., 145, and the principle applies here.

In the case in hand it appears that the defendant was constantly borrowing money to finance his building operations, having recourse to second mortgages, and of course the larger the sum belonging to the complainant he retained, the less he had to borrow from other sources. The defendant's own testimony is that his "money was tied up in second mortgages" (case, p. 123).

Referring to presumption of profit, it is said in *Simpson* v. *Feltz,* 1 McCord Eq. (S. C.) 213, 16 Am. Dec., 602:

> "Where one improperly retains the property of another, he will be presumed to have

kept it for the purpose of profit to himself, and will be charged with interest."

Other cases hold that interest will likewise be allowed where a person fails to *promptly apply money* in accordance with his duty, or makes use of it for his own profit. *Coddington* v. *Idell,* 30 N. J. Eq., 540.

Many of the cases state that the general rule established by the great weight of authority is that where there is a contract, express or implied to pay money, even though such contract be silent as to interest, interest will be allowed upon its breach, as damages, and not because of any promise to pay it.

In *Healy* v. *Fallon,* 69 Conn., 228, 37 Atl., 495, it was said that the law allows interest on the ground of a contract, express or implied, for its payment, or as damages for the detention of money, or for the breach of some contract, *or the violation of some duty.*

In equity the complainant was all the time the owner of the premises, and entrusted the defendant with sums of money to pay as interest on the mortgage, and also as payments on account of the principal. By taking title in his own name the defendant assumed the position of trustee, and continued such under the agreement for commissions, and must not be allowed to make a profit from the money of complainant in his hands.

Such being the rule where is no fraud, it follows that no easier rule can prevail where there is wrong-doing, where the trust itself is denied, where the agreement is also denied, where the trustee has made profit out of the money in his hands, and where the complainant has been obliged to bring his trustee into court

and establish the trust and the contract, at much trouble and expense.

In this case the amount of the debt was a definite sum for each house constructed, it was not only capable of ascertainment, but was actually ascertained, as appears by the paper produced by the defendant himself, Exhibit D. 3. (case, 161).

The authorities therefore are clear that interest must be paid in circumstances like the present, especially where, as here, fraud is present, and the defendant was in constant default. The defendant cannot be permitted to take advantage of his own wrong. That it was fraud to take title in his own name is self-evident. The only money invested in the premises was the money of complainant. Had title been taken in the name of complainant, as fair dealing required, the question now presented could not have arisen.

The complainant would then have received his commission on each and every house as earned, and from time to time would have reduced the mortgage and finally paid it off. By acting as self-constituted trustee, and lulling the complainant to sleep, by denying the trust and also the contract, the defendant is chargeable with interest.

## In Conclusion.

Defendant Balch is an able and shrewd man of business. Complainant is inexperienced in business matters, and was helpless in defendant's hands. He was striving to get a home, and the defendant pretended to help him get the home in question, and is now endeavoring to take from complainant the fruit of years of toil. But because complainant was helpless, he should not

be penalized and the defendant rewarded for his faithlessness.

The Master, in the accounting, allowed defendant interest on every dollar advanced to complainant (including interest on taxes, search, insurance premiums and cash), as we have pointed out. Every dollar so paid out was the money of complainant, not one cent of defendant's own money at any time being employed, and the Master allowed complainant interest on the various sums to which he was entitled from the dates when the various sums accrued, and it is interesting to notice in the Master's report how very careful he was not to compound the interest on the amounts due complainant, as he might well have done, but charged defendant interest only at five per cent up to the time the mortgage should have been paid off, and then charged the defendant with interest at six per cent to the end of the account without any yearly rests. We submit that the Master's method of stating the account is entirely fair, and should not be disturbed, except that there should be added commissions of $100 on the two houses omitted by the Master and allowed by the vice-chancellor; and also an additional $500 and $257.50 interest thereon to date of decree on the first ten houses. The decree so modified, would result in giving the complainant an additional sum of $1,636.38, making the amount due him at the date of the decree $2,786.38, instead of $1,150.

FRANK BERGEN,
*Of Counsel.*

June Term, 1918.

# New Jersey Court of Errors and Appeals

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| FREDERICK L. SMITH, *Complainant-Respondent,* *vs.* EDWARD C. BALCH, *Defendant-Appellant.* | *On Bill, &c.* *Appeal from Chancery.* |

## BRIEF FOR RESPONDENT.

### General Statement of the Case.

For many years the defendant Balch was engaged in business in New York, where he had evidently accumulated considerable money. He was also engaged in building houses in Maplewood, Essex County, for sale. The houses were erected under contracts with Wolfe & Jilson, a firm of builders operating in that neighborhood. Smith, the complainant, was employed by that firm as foreman (case, p. 36), and evidently was an excellent mechanic. About April 1, 1907, after Wolfe & Jilson had erected a number of houses for Balch, he suggested to Smith that they could build houses as well as anybody else, and the following month Balch proposed that if Smith would come with him and begin building houses right away he would give him half the profit made on each house (case, p. 25). Smith told him it would not be fair to leave Wolfe & Jilson at that time because they had a number of houses in course of construction and he had the handling of the whole thing for them, and informed Balch that he would go with him as soon as that work was finished. In June of the following year (1908)

Balch told Smith that they must start then, and an agreement was made whereby Smith was to receive $100 for each house constructed under his supervision, and wages (case, p. 27, ll. 1 and 24; p. 37). Work was begun at once, and ten houses were built pursuant to that agreement. Thereupon Balch, evidently thinking that Smith was making too much money, announced that thereafter he would give him only $50 for each house and his wages (case, p. 27). Smith, an easy going man, acquiesced in the new arrangement that Balch proposed.

Balch's custom was to get ideas for houses from little plans or sketches published in the Ladies' Home Journal and similar publications, and from small pictures on postal cards of houses in other places, modify the design somewhat, have Smith make floor plans worked out to a scale, and construct the buildings under Smith's supervision (case, pp. 26, 45, 47). Occasionally Balch would build a house to suit a prospective purchaser (case, p. 138).

About the time ten houses had been completed, Smith thinking that he had a credit with Balch of about $1,000, desired to purchase a house for himself. This fact came to the knowledge of Balch, and Smith and his wife having found a house which they thought would be suitable, mentioned the matter to Balch, and thereupon Balch proceeded to purchase the house for $4,250, and made a payment thereon of $500 (the smallest sum the seller would take; case, pp. 63, 108, 114, 115, 116 and 127) out of the money he owed Smith, and took title in his own name, giving a mortgage for $3,750. Immediately after the purchase the complainant took possession, made valuable improvements, and

has remained in possession ever since. A little less than a year after the purchase $750 was paid on the mortgage, also out of money due Smith. This left the mortgage $3,000, at which amount it stood at the time of the filing of the bill.

Under the agreement for commissions 118 houses were erected. No architect was employed. All of Smith's commissions were retained by Balch, and he also retained part of Smith's wages—at first $5 a week, and afterwards $4 a week—to pay interest on the mortgage, and taxes; and when Smith's commissions and the amount of wages withheld were more than sufficient to pay the balance due on the mortgage, and Balch had assumed an attitude of defiance of complainant's rights, this bill was filed for a cancellation of the mortgage and a conveyance of the premises, and for an accounting.

The agreement for commissions is clearly stated in the bill (case, p. 1). The answer (case, p. 6), and the answer as amended (case, p. 10) undertake to deny the agreement, and also the trust; but Vice Chancellor Stevens, to whom the cause was referred, had no trouble in reaching the conclusion that the answers distinctly admit the trust. Referring to such admission the court said—**"It is just as plain as that two and two are four"** (case, p. 18). Thereupon the Chancellor signed an order which recites that it appears from the pleadings that "the defendant holds the premises in trust for the complainant, subject, however, to an accounting," and referred the accounting to Mr. Hugh B. Reed (case, p. 20). Evidence was produced before the master, and after hearing counsel fully he made his report (case, p. 162). Among other things the report finds:

"It is established by the evidence that about the month of May, 1909, complainant and defendant entered into an arrangement whereby in consideration of the services rendered and to be rendered by the complainant to defendant, defendant agreed to pay the complainant, in addition to his daily wages, the sum of $50 for each house erected, in the course of erection and to be erected for defendant under superintendence of complainant." (Case, p. 162.)

"So far as appears from the testimony, no specific date was set for the payment of the commission earned by complainant for the construction and completion of the houses. The implication is, therefore, that the payment of $50 became due upon the completion of each house." (Case, p. 164).

"I do, therefore, report that considering the complainant as charged with the purchase price of the house and lot on Chestnut street purchased for him by defendant and held in trust for him as set forth in the pleadings in this case, together with all charges in connection therewith and moneys advanced to him by the defendant, I find that there is due from the defendant to the complainant over and above all of said amounts on this day (July 15, 1917) the sum of $1,866.56." (Case, p. 178.)

To this report exceptions were filed (case, pp. 178-181), and the matter again came before the vice chancellor, who, after hearing counsel orally as well as on briefs, wrote a short opinion in which he stated—"I think the conclusions of the master are warranted by the evidence" (case, p. 182). However, he added commissions on two houses that the report omitted, and

allowed interest from the time suit was brought, instead of from the time of the accrual of the various items of credit. The final decree will be found on p. 183 of the case.

From this decree both parties appeal, the defendant Balch from the whole and every part thereof (case, p. 186). The complainant's appeal on the question of interest, and allowance of $100 a house for the first ten houses, is presented in a separate brief.

## The Facts.

The master's finding of fact is stated so concisely, that we quote it as follows:

> "Defendant vigorously denies that any agreement to pay a bonus or commission to complainant was made, yet the circumstances render it probable. Prior to the employment by defendant of complainant, defendant had been building houses through Wolf & Jilson, complainant's employers, and evidently concluding that it would be less expensive to employ complainant directly, severed his connection with Wolf & Jilson and continued his building operations with complainant in charge. Defendant had a business in New York which occupied most of his time, and evidently depended upon complainant for the supervision of the buildings while he was away. In addition to this, the items of credit of $500 and $750 were entered by defendant's son and bookkeeper, in his book of account with complainant, as 'commissions.' Defendant testified that his son was his confidential man, and knew what he, defendant, had in mind. Defendant in explaining the $500 and $750

> items claimed that they were gifts to complainant made because of defendant's deep interest in him and of a generous disposition. The fact that the credit of $500 was made July 17, 1909, approximately one year after the employment, and the credit of $750 on July 30, 1910, taken in connection with the further fact that at the date of the first credit, nine houses had been completed and a tenth one was approximately completed, and that prior to July 30, 1910, more than fifteen additional houses had been completed, makes it seem probable that these were not gifts but payments." (Case, p. 163.)

The complainant is a skilled workman, and was of great value to the defendant by reason of his practical knowledge of building, but he has little initiative where his own interests are concerned. He is modest and retiring, and had to be spurred on by his wife to seek redress by this suit (case, p. 150). His faith in Balch was absolute, and it was not until a short time before the bill was filed that he began to suspect that Balch's word was not, as defendant had assured him, "as good as his bond." (Case, p. 154.)

The master, who had the advantage of seeing as well as hearing the witnesses, was evidently impressed with the sincerity of the complainant. He gave his testimony in a convincing way, and it was apparent that he was strictly observing the oath he had taken. It is clear from the testimony that in May, 1907, before any work was undertaken—

> "Balch again said if I would go building houses with him right away, he would give

me *half the profit* that was made on each house." (Case, p. 25.)

Complainant would not leave his employers, Wolf & Jilson, at that time, because he considered it would be unfair to them, as they had a number of houses under construction. (Case, p. 25.)

Complainant testifies (case, p. 25) that in June of the following year (1908)—

"Balch again came to me and said that we must start at once, so we would have some houses built for trade in the fall, and show people we are getting houses ready, and I told him all right, we had better start a cellar; and *he said I had better get some floor plans* made, so we would know what we were doing. I did this before and after working hours, and took measurements at that time, that is, before and after working for Wolf & Jilson, after my day's work was done; and about in the middle of June, I think it was, I got through with Wolf & Jilson, and then I went with Mr. Balch, and we built the first house. * * *

"And shortly after the first house was built, I think it was in August, I spoke to Mr. Balch about a contract, and Mr. Balch, —I asked him if I couldn't have a written contract, and he said, 'Why, Fred,' he says, 'Why, *my standing, connections, and being a prominent member of the church over there* [indicating the edifice] *makes my word just as good as my bond;*' and so I went on until it was a—well, anyway, a month or so later, I asked Mr. Balch about getting a place for my wife and family to own in their own right, and he said 'I have been thinking

over a bonus proposition,' and he said 'on account of my having to take all the risks and furnishing all the capital, I don't think I can allow more than **$100 bonus in addition to your wages.'** My wages at that time was $4.20 a day; and that went on until I think it was in May, 1909. I again,—well, in the meanwhile I had been looking around for a house, and I found this house at 79 Chestnut Street, and I told him about it, and—let's see; he—it was one evening he came up the street, and near where we were living * * * he came up the street, and he stood on the street, and my wife and I were out in the yard, and my wife told him, informed Mr. Balch, what I had found in the way of a house, and he asked where it was, and I told him. He said, 'All right; go ahead and buy it;' and he counted the houses that we had erected at that time, and he said 'ten houses,' but he said **'after this,'** he says, **'I make up my mind to only allow you $50 a house;'** and **we then and there both agreed to it, and we worked from that time on that basis, up to the time I stopped work in September, 1916"** (case, p. 26).

And see particularly the examination by the court of this witness, pages 151-155.

*No architect was employed to superintend the building of the houses.* The complainant prepared such plans as were drawn, and he had the superintendence of the erection of the buildings. As he is a practical builder it was unnecessary to have complete detailed plans. The details were largely carried in the complainant's mind, and were worked out practically as the work pro-

gressed under his immediate supervision. The defendant did procure some "stock" plans and show them to the complainant, and ideas were obtained from them, just as ideas were obtained from postal cards (case, pp. 26 and 45) and from sketches in the Ladies' Home Journal and elsewhere (case, p. 47); and at times complainant went on automobile trips with the defendant for the express purpose of picking out houses along the way, and when suitable houses were found defendant directed complainant to draw plans similar in design (case, p. 46). *The complainant took the place of an architect,* and at a very small cost to the defendant.

In addition to drawing plans and attending to the erection of the houses, complainant kept the time of all the workmen in time books, two of which were produced and offered in evidence (case, p. 48). They show that frequently over 40 men were on the weekly pay-roll. Complainant often handed the pay envelopes to the individual workmen and mechanics, except that the envelopes for the plumbers, owing to a rule of that trade, had to be handed to the plumber foreman, and by him given to the journeymen plumbers (case, p. 151). Complainant also kept estimate books, extracts from one of which appear in the testimony (case, pp. 49, 50). He also ordered most of the material (case, p. 44).

The complainant's story is not only inherently probable, but is supported by the evidence of other witnesses, and by the ledger entries in defendant's books, made by Edward C. Balch, Jr., the confidential bookkeeper of defendant, to whom his father had told "the circumstances of the whole thing" (case, p. 127).

Complainant's wife was called, and she narrated what Balch said in her presence. Her testimony was not shaken on cross-examination. We quote from p. 57 of the case:

"Q Where did you live prior to the house you are living in now?

A The old house in Ridgewood road, Maplewood.

Q Did you ever see Mr. Balch there?

A Oh, yes; very often.

Q And do you remember any particular occasion when he came there?

A I remember when he came there when we asked him to do something for us about a house, and *after Mr. Smith had been there about a year with him.* Yes, I remember Mr. Balch coming there, and I told Mr. Smith that I thought we had better tell him what we found in the way of a home; so we walked over to where he was, and told him about it, and he said that—I believe he said there were ten houses, and that **after this, he could only let us have $50 on a house instead of $100 that he promised."**

And on cross-examination (case, p. 58):

"Q Mr. Balch was doing this for the purpose of getting you folks so that you would own your own home?

A **Paying Mr. Smith, of course, what he had earned. Mr. Smith had earned that much towards a home."**

Charles R. Reeve, the agent in the negotiations for the sale of the property, testified to a conversation with Balch as follows (case, p. 56):

"Q Tell us as near as you can the conversation?

> A Why, the way it started, Fred—he was going to get this house for Fred; he said Fred couldn't save the money, and he was going to start a home for him in this way, and **he was going to give him $100 for each house he turned out for him,** and he was going to credit it in some way with Fred, and give him the house."

Referring to this witness, Balch himself testified (case, p. 70):

> "I told him I was getting that home for Fred. Mr. Reeve told me about how happy Fred seemed to be over the transaction; but as far as mentioning any of the details of the thing, I never mentioned it to any one."

That was a convenient denial, but he overlooked the fact that he told his confidential bookkeeper "the circumstances of the whole thing" (case, p. 127).

Another corroborating witness is Mr. Andrew Renigar (case p. 141). He was in the employ of Balch, but was called by the complainant. Renigar was a reluctant witness—a very reluctant witness. He failed to appear in response to a subpoena, as will appear by the master's certificate (case, p. 58), and it was necessary to issue a second process for him. Yet his testimony shows that Balch had admitted his obligation to give complainant "fifty dollars for the houses."

The defendant, at the time of employing complainant, was a ladies' tailor, doing business in New York, and he carried on that business for some time thereafter. He is aggressive and self-opinionated—a masterful character. Called on his own behalf, he denied the agreement ab-

solutely; but the more he talked the more he entangled and stultified himself, and the greater became the certainty that he knew as much about the agreement as the complainant had testified to, and in precisely the same way. His story is so contradictory and thin that it is a marvel that he could have given utterance to it.

It was disconcerting to the defendant to have the mild-mannered complainant, who had previously considered defendant's word "as good as his bond" (case, p. 26), assert his rights in a court of equity. At one time Balch was quite overcome by the remembrance of his goodness, mercy and charity toward the complainant (case, p. 67). But we remember Pecksniff, and the tender emotions to which *he* gave way when he recalled his goodness, mercy and charity toward Tom Pinch!

Balch assumed a role—that of stoutly denying all knowledge of the agreement for commissions. He was entirely unsuited for the part. His denials were stout enough, but he became loquacious, and stumbled and fell. He affirmed, and then denied; denied, and then affirmed. Finding that a bare denial was hardly appropriate, he indulged in talk, and presently, in spite of himself, he found himself on forbidden ground, and then essayed to escape; but the record holds him fast. On his direct examination (case, p. 60) after stating that he was "quite well acquainted with Mr. Smith long before he was employed by me," and that complainant was "anxious to get a home for his family," he proceeds:

> "I said, 'Fred, don't worry.' In fact he was very much worried; he does worry over

small things, *let alone great ones like that,* and I said, 'Don't worry about that, Fred, I will fix something for you.' **So it was on the strength of that that I closed up with Wolfe and Jilson their last house."** (Case, pp. 60, 61.)

And again (case, p. 61):

"*This house business would come up every once in a while—*

"Q What do you mean by 'house business?'

"A His home, you know. I said, 'Now, Fred, if things go all right this year, why, *I am going to give you a little bonus towards getting this house;* **the agreement—** he was to work as I engage every man that is on the job, and I never hired a man in my life, only so much per day, **and this other agreement** was only voluntary on my part—had nothing to do *with any agreement* at all. **I had never made any agreement in my life—**

"Q You started to give a conversation about his home.

"A *I told him I would give him a little bonus if I made out this year*—I thought I would help him get this home; I was in the habit of doing that. *I had helped others to get homes.*"

A little farther on (case, p. 63):

"Q Now, have you told us *all* of the conversation had with Mr. Smith respecting this alleged agreement for bonus?

"A *Yes, sir.*"

And on page 65:

"Q You have heard the testimony of Mr. and Mrs. Smith respecting the alleged conversation with you at their home, or near their home, in which you are alleged to have stated, or they said you stated that from that point on, they would have $50 per house. Do you remember the occasion of talking with Mr. and Mrs. Smith about this arrangement?

"A I remember talking with Mrs. Smith; I remember her leaning out of the window when I was out in the yard, because they had a very nice little vegetable garden there, and Fred occasionally would give me a few tomatoes or a boquet that was raised on the place there, or something of that kind, and Mrs. Smith—and I said, 'Well, we are getting along very nicely with this, and,' I said, 'I am going to give Fred a little something extra on this thing, and,' I said, '*any house this year that I make anything on—that there is anything in why,* **I am going to give him $50.' There is where the fifty-dollar story originated."**

Then thirteen days later—his direct examination not having been concluded on the first day—he returned to the witness stand still intent on denying the agreement, but evidently forgetful of his previous words. At the bottom of page 120 of the case we find the following, on cross-examination:

"Q You say you never promised him a bonus?

"A No, purely voluntary. I gave him these things afterwards. Why, that is all there was to it. I would say, 'Fred, now

if this thing turns out all right, why, *I will give you a little bonus,* on this house or that house. *I never in my life thought of such a thing,* because I lost money on some of them. *For a business man to say, 'I will give you fifty dollars on a house, or a hundred dollars'* **is perfectly absurd.** * * *

"Q On what particular houses did you promise him a bonus?

"A *I didn't promise him.* On one or two houses, I said, 'Now, Fred, if I make anything, I will give you a little extra.' I have got men that I do the same with today. I tell them I will give them four dollars extra that week if they do something on time. I say, 'I will give you an extra bonus'—a two and a half gold piece. *Purely voluntary.* **I never promise anything.**

"Q So that you do occasionally promise a bonus?

"A Yes.

"Q And are you apt to forget that you promise that bonus?

"A No, sir, I am not.

"Q Do you remember telling Mrs. Smith that you were going to pay Mr. Smith a bonus?

"A I told Mrs. Smith if things went all right I would give him a little bonus.

"Q Did you tell her how much it was?

"A **There was no amount stated at all."**

And as bearing on his great liberality to others (case, pp. 128, 129):

"Q $500, of course, was a considerable amount for a man who had been working for you for only a year to receive. Did

you advance that amount to a man that had been working longer than a year?

"A No, sir; **he was the first man.**

"Q **He was the first man?**

"A **Yes, sir.**

"Q And had you any other men who had been working for you approximately the same length of time?

"A They came on later.

"Q How much later?

"A We started to take on men about two or three weeks later.

"Q Do you remember whether the men —other men that you employed had been working for you nearly the same length of time that Mr. Smith had? *Did you make any contribution among the men generally, or was it only to Mr. Smith?*

"A **ONLY MR. SMITH.**

"Q Did you talk to Mr. Smith about that $500 that you were going to give him? Remember any conversation you had with him?

"A **We had considerable conversation about it.** He seemed so delighted to get this thing started—a home of his own.

"Q What did you say to him about the gift of $500 to him, if anything?

"A *I think* I told him at that time I would *loan* it to him, but I am *not quite clear* on it—whether I said I would loan it or I would help him get that home. That was the first time.

"Q Did you say you would *give* that to him at that time or later?

"A *I can't remember.*

"Q You can't remember whether you had a conversation with him about it at all?

"A *We had a lot of conversation about the house,* and I told him I would help him.

"Q Nothing more specific than that. You didn't state that you had given him or would give him $500?

"A *I told him that I would give him $500 to give to Mr. Lord.* I would make that first payment.

"Q A moment ago you said that you were *loaning* it to him. I want to know whether you told him that you were going to make him a present of it?

"A *I don't remember.*

"Q At any time since then have you told him?

"A Yes, I told him several times since that.

"Q What did you say about it when you spoke of it to him?

"A *I think* I told him that I did pretty well that year.

"Q Remember when that conversation took place?

"A *Around the time that he was looking about at the houses.* * * *

"Q What did you say to him—about the gift to him of this $500?

"A **I can't just remember the drift of what I said.**"

We call attention to the master's examination of this witness, beginning on page 126 and running to page 133.

These are only a few instances of the utter unreliability of the testimony of the defendant, but they are sufficient to show that he was fully cognizant of the agreement.

In view of these many denials and admissions of the defendant it is interesting to turn for a moment to his answer to the bill of complaint. In paragraph 3 it is stated (case, p. 7):

> "That the said purchase was made pursuant **to an offer** made by this defendant to give to the complainant **some additional money in recognition of complainant's faithful service to defendant,** and because of defendant's interest in complainant's procuring a home."

Paragraph 4 of the answer (case, p. 7):

> "That besides the $500 so paid, the defendant has also paid the sum of $750 on account of the principal of the mortgage given at the time of the transfer of said premises, which said sum was also paid on complainant's account as a voluntary gift and **in recognition of the services of complainant,** and in order to still further assist him to the point of actually owning a home of his own."

Interesting, too, is the attempt in the amended answer, filed more than four months later, to get rid of the admission that the purchase was made pursuant *"to an offer;"* and four months' lapse of time was taken as warrant for the withdrawal of all reference to *"some additional money in recognition of complainant's faithful service to defendant,"* and the like omission, in paragraphs 3 and 4 of *"recognition of the services of complainant"* (case, p. 11).

In paragraph 8 of the amended answer it is stated that *"an account has been kept with complainant on the books of defendant, which defendant is willing to produce at such time as this court may require"* (case, p. 12); and

paragraph 9, on the same page, admits—"that **defendant holds the title to said premises to secure the payment of the amount due from complainant,** and that upon receipt of the said sum he is willing to transfer said premises to complainant," although in the middle of paragraph 3 of the amended answer **"he denies that he has held said premises in trust for complainant"** (case, p. 11).

We come now to the two ledgers produced by the defendant covering the period in question (case, p. 72). They were kept by his son, his confidential bookkeeper, who, as we have seen, was told "the circumstances of the whole thing" (case, p. 127), and to whom defendant would "*just dictate the things*" (case, p. 114 bottom, p. 115 top). The ledgers speak for themselves and are of more value in corroborating the complainant than a host of witnesses. A number of the items have been written over, a balance is carried into the second ledger falsely (case, p. 79), a correction of such false balance is made two and a half years later, as appears by the ledger itself, but no correction is made of the interest on the false balance (case, pp. 80, 105). But there is the account, just as the defendant cared to present it to the court, and the very first entries carry their own refutation of his denial of the agreement. The first entries on the ledger are charges *against* the complainant, as follows (case, p. 159—Exhibit D. 1):

"1909

| | | |
|---|---|---|
| July 17 | House & Lot, Chestnut Street | $4,250.00 |
| | Insurance, 3 years | 18.75 |
| | Taxes, 1909 | 44.29 |
| | Headley search | 68.20" |

and the very first entry on the other side is a credit on the same date *in favor of* the complainant, as follows:

"1909
July 17 By Commission .....$500.00"

What is the significance of this credit of "July 17, 1909, By Commission, $500"? Commission on what? According to the dictionaries a "commission" is the percentage or allowance made to a factor or agent for transacting business for another; and according to the confidential bookkeeper who made the entries "it is remuneration paid to somebody for what they have done; something earned" (case, p. 102). Balch would have us believe that this was an absolutely free gift. It is a record of a part payment on account of money earned as commissions. As a matter of fact the commissions then earned were $900, at $100 a house. Up to that time ten houses had been erected, but one was not completed (case, pp. 115, 116, 152). There was a charge for search fee, insurance and taxes of $131.24, making, with $500, a total of $631.24. The entry of $500, therefore—or $631.24, to be strictly accurate—was not a statement of all the commissions earned up to that time, but was, as Balch testifies **"the lowest** Mr. Lord, the owner of the house, would take" (case, p. 63); "at that time $500 was **the lowest** that Mr. Lord would take, so I gave him the $500" (case, p. 108); "to start the thing he **needed** $500" (case, p. 114); "I was to give him $500, and he was to pay for it through me; **I went his security for it"** (case, p. 115); **"they wouldn't take any less than $500"** (case, pp. 116 and 127). Balch was not parting with any more money than was absolutely needed at the time,

because, as he says, **"my money was tied up in second mortgages"** (case, p. 123).

The entries also demonstrate that it was a fraud for defendant to take title in his own name, as the amount paid on account of the purchase price was complainant's own money. Smith, however, had implicit faith in Balch,—"I thought as much of him as I did of my own father—nearly as much" (case, p. 40); "I had implicit faith in Balch, and I left it to him" (case, p. 39); "I had all confidence in Mr. Balch" (case, p. 39).

And a little more than eleven months later another credit in favor of complainant appears on the ledger account:

"1910
June 30 By Commission, check
to Lord .....$750.00"

Again, what does this second entry of "Commission" mean? It records another part payment of money earned as commissions. It is not a statement of all the commissions earned to that time, but only of the amount of money that had to be paid, for, as we have seen, Balch's money was "tied up in second mortgages." He testifies—"*that, you see, I had to pay;* I was obligated to pay that under the agreement—that at the end of the year I would have to pay $750 more; *and in order to do that I was able to get a note at five per cent. in place of six,* and I thought that would cost that much, and I agreed to assume that" (case, p. 108); "why, of course, as I said, I obligated myself for the $750. I met at the time it was due" (case, p. 66).

Another *gift* says the defendant!

Who, or what, instigated the defendant to fail to give further credits on the ledger, is known accurately only to the defendant himself. But probably the fact is that he became convinced that Smith was too "slow" to challenge him and demand his rights, and the temptation to which he yielded is suggested by defendant's counsel in an illuminating paragraph in the brief he presented to the master and served on the complainant:

> "**Smith is slow,** given to taking many things for granted; given to assuming that one favor entitled him to another; given to 'imagining' that he was to receive something more because he had already received something. He is hired by Balch; generous, given to a desire to help out when he can. Balch and Smith get on well together. Smith thinks a great deal of Balch, and Balch does a great deal for Smith. **Balch proposes that for the year which had been successful he would allow Smith a sum on account of the houses erected.** Smith and his wife desire a home; they appeal to Balch for help, and after Balch consents to help the home is purchased and Balch pays the necessary cash and gives the mortgage, opening an account upon his books, *at once charging the house to Smith and giving him credit for the amount paid.* Nothing is said about any agreement, and an installment is paid on account of the mortgage. The house is carried at Smith's expense and with his knowledge. Other favors are shown him, and he is contented, awaiting the day *when the generosity of Mr. Balch would again lead him to help out* with another payment on account of

> this house. *He assumed that there would be another time when defendant's good heart would go still further when another payment might be expected,* when the deduction from the wages would be still less. *But that time did not come.* Years went by and still the deductions from the wages. *Complainant had been contented and believed that defendant had been good to him. He was willing to await the time when defendant, out of his abundance, would again make him the object of his beneficence.* He seems, up to this point, not to have fallen quickly a victim to 'the most popular sin in the world,' the sin of ingratitude."

Balch in his answer states that he "has known complainant intimately for a number of years and has always been interested in complainant and his family, and anxious to encourage in complainant habits of thrift and frugality, and has endeavored to show unusual consideration to complainant," and yet he so managed his *ledger* account (a truer witness to "defendant's good heart" than any eulogy by his counsel) as to actually bring the complainant in debt on January 2nd, 1917, to the extent of $3,332.42 (case, p. 160), a sum greater than the complainant was indebted to defendant, according to defendant's own books, on June 30th, 1910, six and a half years earlier.

In an effort to discredit the complainant the defendant called a number of witnesses, all of whom were in his employ, to belittle the services of complainant. It is sufficient to say of these witnesses that they thought more of their jobs than of the truth. But here again, on this side

issue, the complainant on rebuttal successfully defended himself by introducing a number of witnesses, none of whom were in the employ of defendant.

[Note. There is a mis-report on page 155, line 5, of the case. The answer as made was: "I asked Mr. Balch last summer about it, and he said he thought I was well enough off as I was." See case, p. 29, l. 30.

On the same page, line 1, the words "why I have no more work" is also a stenographic slip. Counsel do not recall the words of the witness, but the fact is that complainant continued at work for defendant until September 16, 1916, a little more than six weeks after the filing of the bill. This is also the date to which defendant made up his list of houses, exhibits D. 3 and D. 4, case, p. 161, and it is also the date of the last item of credit he has given the complainant on the ledger account; case, p. 160.]

## The Law.

The defendant pleads the statute of frauds and seeks the aid of every technical defense. This, however, is not the kind of a case where such defenses should have any unnecessary weight. The statute of frauds is intended to prevent rather than facilitate fraud. *Maddox* v. *Rowe,* 23 Ga., 431; 68 Am. Dec., 535; *Morrill* v. *Cooper,* 65 Barb., 519; *Levy* v. *Brush,* 45 N. Y., 589; *Bitter* v. *Jones,* 28 Hun, 494. "The rule in equity always has been that the statute is not allowed as a protection of fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interests betrayed." *Jenkins* v. *Eldredge,* 3 Story, 290.

# I.

## Resulting and Constructive Trusts.

For the purpose of this case it seems unnecessary to spend much time in the examination of the reasoning of judges and text-writers on the subject of trusts, when the question here involved has been settled in New Jersey by the decision of this court in the case of *Rogers* v. *Genung,* 76 Eq., 306; and again by this court in *Harrop* v. *Cole,* 86 Eq., 250, in unanimously affirming the conclusions of Vice Chancellor Stevenson, whose opinion is reported in 85 Eq., 32.

In *Rogers* v. *Genung* this court said (76 Eq., at p. 312):

> "The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of one relying upon his integrity. *Gardner* v. *Ogden,* 22 N. Y., 327, and cases there cited. *Davoue* v. *Fanning,* 2 Johns. Ch., 260. 'So if an agent employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer.' Story Eq. Jur., § 316.
>
> "As was said by Vice-Chancellor Dodd, in *Wright* v. *Smith,* 23 Eq., 106: 'The rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for the purpose and paid for it.' * * * In holding the defendant to an accounting the vice chancellor said that the fact that Smith

was not formally constituted an agent with authority to bind the complainant, or that his agreement to act for him was not formally made, 'are points which, if true, are of no sort of importance, nor is it important that no agreement was made to compensate him for his services. It is sufficient that he accepted and held a situation of trust in reference to procuring the lands. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others.' "

And at p. 315 this court said:

"The defendants also insist that if it be true that the transaction was carried out for the express purpose of defrauding the complainant, still he is without remedy, because the trust, not being declared in writing, is subject to the statute of frauds. But the statute does not apply where the 'trust or confidence shall or may arise or result by implication or construction of law.' No trust was created in this case by any agreement of the parties; it arose by implication or construction of law out of the confidential relations of the parties. Genung was not authorized to buy and hold in trust; his duty was to aid his principal in purchasing, and having been engaged to do this, he cannot, by any fraudulent act, during the period of his engagement, thwart his principal by making it impossible for him to accomplish his purpose, and if in carrying out such disloyal intent he makes a contract of purchase in his own name, it is the contract of his principal."

In *Harrop* v. *Cole,* 86 Eq., at p. 250, this court said:

> "The right of the complainants was rested upon the allegation that they had employed Cole as their agent to purchase the property, that he had accepted the employment, and then fraudulently took title in his own name, paying the purchase price out of his own funds.
>
> "The learned vice-chancellor, before whom the case was tried, found from the evidence before him that the averment of the bill with relation to the agency was true in fact; and that a constructive trust had been created, by force of which Cole after the purchase of the property held it for the benefit of the complainant, and that the latter was entitled to have the trust executed, and a conveyance made in accordance with the prayer of the bill, upon repayment to Cole of the purchase price; and that this was so, notwithstanding the fact that the employment of Cole was not in writing. In reaching this conclusion the learned vice-chancellor followed the decision of this court in the case of *Rogers* v. *Genung,* 76 Eq., 306. * * * We concur in the conclusion of the vice-chancellor that the present case is controlled by *Rogers* v. *Genung,* and conclude that for that reason the decree appealed from should be affirmed."

In the *Harrop case* the learned vice-chancellor said (85 Eq., 32, at p. 33):

> "A trust which is more correctly classifiable as a constructive trust (1 Pom. Eq., § 155; 1 Perry Trusts, § 166) than as a resulting trust (1 Perry Trusts, § 135), is

established by proof of the betrayal of confidence, of the violation of duties arising out of a fiduciary relation. The fiduciary relation may be established in a large number of ways. It is a mere accident that in this particular case, and in large numbers of others, the fiduciary relation grows out of a verbal promise. As the authorities abundantly show, equity will not tolerate the betrayal of confidence, and it makes no difference how this confidence has been obtained.

"When one man assumes to act for another, as the representative of another, he necessarily establishes a fiduciary relation between himself and the other person who stands as his principal. This is in the very nature of the transaction, because the agent undertakes to act not for his own benefit but for the benefit of his principal, and his principal stays out of his own business and confides in the agent to attend to this business for him. It is the assumption by the agent of his representative status and the confidence necessarily reposed in him by the principal which creates the agent's peculiar liabilities and casts special limitations and obligations upon him. The agency may be established by a written contract or a verbal contract, or no contract whatever, the assumption and confidence involving a purely gratuitous service for which the agent is to receive no compensation in any form. In a large class of cases analogous to the one in hand, equity intervenes where a fiduciary relation is found to exist between contracting parties, and sets aside or modifies the most solemn contracts, and for the purpose admits parol evidence."

And what has been said in these cases is in line with the earlier decisions.

In *Krauth* v. *Thiele,* 45 Eq., 407, Chancellor McGill quoted with approval the following remark of Mr. Justice Depue in *Cutler* v. *Tuttle,* 19 Eq., 549, 558:

> "It is a settled principle that where one person purchases property for a stranger and the purchase money is paid by the stranger or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the land is held in trust for the party whose money is paid. This trust arises without any declaration in writing, for it is expressly excepted by the statute of frauds from the operation of the statute, and the facts necessary to constitute such trust may be proved by parol evidence."

In *Baker* v. *Baker,* 75 Eq., 308, Vice-Chancellor Emery said that a resulting trust "arises from this original contribution of the purchase money. Such resulting trust as between the grantee and a third person, arises by implication and operation of law, and is expressly excepted from the operation of the statute requiring written evidence of a trust."

Where an agent to purchase or sell or to carry on negotiations between purchaser and seller, takes legal title to the property in violation of his fiduciary duty, equity will treat him as a trustee for his principal. This principle is stated very clearly by Pomeroy, with many citations; 2 Pom. Eq., § 959; *Dodd* v. *Wakeman,* 26 Eq., 484, 487; *Thalman* v. *Canon,* 24 Eq., 127-131.

That principle applies to all kinds of trust relations, and was cited by this court in *Marshall* v. *Carson,* 38 Eq., 250, 254, as follows:

> "The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not confined to trustees or others who hold the legal title to property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees, or solicitors. But it is a rule that applies universally to all who come within its principle, which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

In *Johnson* v. *Hayward,* 103 N. W., 1058, the court said:

> "When one employed to act as agent for another in the purchase of real estate, becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money."

Constructive trusts of this character do not require written evidence. Perry on Trusts, § 137; *Johnson* v. *Hayward,* 103 N. W., 1058.

## II.

## Statute of Limitations.

The statute does not apply to trusts which fall within the proper, peculiar and exclusive jurisdiction of courts of equity. It was so held in *Buckingham* v. *Ludlum,* 37 Eq., 137, decided in 1883 by Vice-Chancellor Van Fleet. He cites a case in which the judge delivering the opinion said:

> **"We are of opinion that the statute of limitations has no application here. This was a direct and continuing trust, and was exclusively cognizable in a court of equity. * * * Such a trust is not touchcd or affected by the statute of limitations."**

To the same effect are the cases of *Williams* v. *McKay,* 40 Eq., 189; *Williams* v. *Reilly,* 41 Eq., 137; *Rusling* v. *Rusling,* 42 Eq., 594, and *Dyer* v. *Waters,* 46 Eq., 484.

In *Lincoln* v. *Judd,* 49 Eq., 387, Chancellor McGill said:

> **"Courts of equity ordinarily act in obedience and in analogy to the statute of limitations, but they will not allow the bar of that statute to prevail where it would further manifest injustice;** hence it is a well-settled rule in equity that **in cases of fraud the time limited within which the action must be brought will not commence to run until the discovery of the fraud,** or until the complainant was in a situation where, by the exercise of reasonable diligence, he would have discovered the fraud."

In the present case the complainant brought suit just as soon as he satisfied himself of the

fraudulent intention of his trustee. Balch, however, kept the book account, and absolutely failed to notify the complainant of the state of the account. No laches can be imputed to the complainant.

In paragraph 8 of the amended answer (case, p. 12) the defendant expressed his willingness to produce his account kept with complainant showing an alleged indebtedness to defendant of $3,251.85 up to June 30, 1916, and on the trial offered his books in evidence to show such indebtedness (Exhibits D. 1 and D. 2; case, pp. 159, 160). The first item on each side is July 17, 1909, and the last item on the debit side is Dec. 30, 1916, five months after the filing of the bill. There are numerous items each year on both sides of the account, and of course the statute of limitations could not apply to any of these items. Moreover, defendant could not give in evidence stale demands on his part, and insist upon their being allowed, and at the same time set up the statute of limitations against similar demands on the part of the complainant, where the claims on both sides are matters of book account. *Gulick ads. Princeton Turnpike,* 14 N. J. L., 545.

On page 15 of his brief, counsel for Balch makes an astonishing statement as to "the unexplained delay of complainant in presenting his claim under the contract sued on," and also does some figuring by which he seeks to eliminate twenty-five houses, plus three for good measure, on the idea that twenty-eight of the houses are barred by the statute, entirely unmindful of the fact that **Balch became trustee for complainant not only with respect to the purchase of the property in question, but also, necessarily, trustee**

**for complainant with respect to the application of the funds in his hands earned as commissions,** and also unmindful of the fact that it was the trustee's duty to apply such funds promptly to the reduction of the mortgage. **The matter of accounting in a court of equity is an integral part of complainant's relief against his trustee;** and, as was said in *Lincoln* v. *Judd,* 49 Eq., 387, "it is a well-settled rule in equity that **in cases of fraud the time limited within which the action must be brought will not commence to run until the discovery of the fraud,"** and by Vice Chancellor Van Fleet in *Buckingham* v. *Ludlum,* 37 Eq., 137: **"This was a direct and continuing trust, and was exclusively cognizable in a court of equity. Such a trust is not touched or affected by the statute of limitations."**

It abundantly appears in the case that complainant brought suit as soon as he satisfied himself that Balch intended to defraud him. As we have seen, his confidence in Balch was absolute, and he considered his word "as good as his bond," and could not bring himself to believe otherwise until circumstances compelled him.

As a matter of fact, no portion of complainant's claim is barred by the statute. After crediting the complainant with $500 and $750 on account of commissions, as shown by the ledger of defendant, the whole of the balance of his claim is strictly within six years of the time of filing the bill.

Pomeroy's Eq. Jur., § 1047: "By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or

withhold from another who is beneficially entitled to it; as, for example, **when money has been acquired through a breach of trust, or violation of fiduciary duty,** and the like."

Pomeroy, § 917: "No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time."

In this case the fraudulent conduct of Balch takes the case out of the statute of limitations in any event.

## III.

## Agreement Not Within the Statute.

The defendant contends that the oral agreement is within paragraph 5 of the statute of frauds which reads:

> "No action shall be brought * * * (5) upon any agreement not to be performed within one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c. (Comp. Stat., p. 2610.)

The paragraph, however, does not apply to this case. **The clause as to agreements not to be performed within one year applies only to cases where neither party is to perform within a year.** *Berry* v. *Doremus,* 30 N. J. L., 399, 403; *King* v. *King,* 9 Eq., 44. The agreement was not one not to be performed within one

year from the making thereof. The employment could have terminated with the erection of one house, or after the completion of any number of houses.

In *Kiene* v. *Shaeffling,* 33 Neb., 21, 23; 49 N. W., 773, it was said:

> "In the case at bar, so far as appears, the employment was from month to month, and the contract could have been terminated at the expiration of any month. The fact that the defendant continued in the plaintiff's employment for three years and a half does not, of itself, make the contract one for more than a year. The contract could have been performed within a year, and is not void." (49 N. W. at p. 774.)

*Warren Chemical & Mfg. Co.* v. *Holbrook,* 118 N. Y., 586; 16 Am. St. Rep., 788; 23 N. E., 908:

> "While it is true, as insisted by the appellant, that it was not provided by the terms of the contract that it should be performed within one year from its making, neither was it provided that it should not be performed within such period. Nothing whatever was said as to time. Now, the statute does not include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be. *Kent* v. *Kent,* 62 N. Y., 560. The statute, as interpreted by the courts, there-

fore, does not include this agreement; for there is nothing in its terms inconsistent with complete performance within a year."

And see *Walker* v. *Johnson,* 96 U. S., 424; *Somerby* v. *Buntin,* 118 Mass., 279; 19 Am. Rep., 459; *Kent* v. *Kent,* 62 N. Y., 560; 20 Am. Rep., 502; *Hinkle* v. *Fisher,* 104 Ind., 84; 3 N. E., 624. The point is covered so well in *Devalinger* v. *Maxwell,* 54 Atl., 684, that we quote:

"We think the court, in its charge to the jury, stated the law very clearly and accurately as follows: The statute of frauds applies to agreements which, according to the intent and express understanding of the parties at the time of the making thereof, cannot possibly be performed within the space of one year thereafter. If the performance of the agreement within one year from the time of the making thereof be distinctly contrary to and inconsistent with the intent of the parties at the time of entering into the same, then such an agreement must be evidenced by writing as required by the statute; else a recovery thereon cannot be had. But while it is true that, when it is clearly the intention of the parties that an agreement shall not be performed within a year, it must be reduced to writing, or some memorandum or note thereof must be made and signed by the party to be charged therewith, yet it is equally true that the statute does not extend to an agreement which may by any possibility be performed within a year, in accordance with the understanding and intention of the parties at the time when the agreement was entered into. And if the specific time of perform-

ance be not determined upon at the time of the making of the contract, yet, if by any possibility it may be performed within a year, the statute does not apply, and such an agreement need not be in writing."

Page, in his work on Contracts, secs. 668, 674, 675, cites many authorities for the following:

"Applying this rule to the adjudicated cases we find that this clause of the statute has received a very narrow construction, the courts almost without exception aiming to exclude from its application as many classes of cases as possible. To have this clause of the statute apply, the contract must be one that by its very terms shows that it was not to be completed within the year. * * * If the contract is one which by its terms may be performed within the year or may be performed after the year, according to circumstances, it is not within this clause. An indefinite term of employment which lasts three and a half years is not within the statute. * * * Contracts for the performance of which no time is fixed, and which from their subject matter admit of performance within the year, are not within this clause of the statute, even if it is probable that the contract will be performed after the year. * * * A contract of employment to last as long as the employee does faithful and honest work, or as long as his services are satisfactory, or as long as both parties are mutually satisfied, or as long as the employee wishes to work, or as long as the employer continues in business, is not within the statute."

In this case Balch could have had no idea how many houses would be erected. The building of houses was a development, dependent on the demand and many other considerations. The venture might have proven a failure from the start. The contract was merely a commission for each house. It was as though Balch had said to an architect: "Now, I am going to build a house, and if that turns out to be profitable, I shall be disposed to build others. Therefore, give me your lowest figure for drawing plans and supervising." Had the architect given him a reduced figure, and a number of houses been constructed, the work extending beyond a year, could it be argued that such an arrangement was within the statute? Besides, the architect would have been entitled to his commission on the completion of *each* house.

Moreover, the contract has been completely performed, and the court would afford relief on the ground that it would work a fraud upon the one who, induced by the agreement, has in good faith so performed it as to have irretrievably changed his situation, and would not permit the other party to refuse fulfillment on his part, and take advantage of his own fraud. It is unnecessary to cite authorities on this fundamental proposition.

By no possibility could the agreement have related, as counsel for Balch argues, to the time when the premises in question should be completely paid for. The agreement was that the defendant should pay complainant so much for *each* house he superintended, *and* wages. The purchase of the premises was a later and unrelated matter. It occurred a year after the

agreement. The moment the house was purchased, as was the case at all times previous thereto, the defendant could have dismissed complainant, and, on the other hand, complainant could have quit the work. *The wages were due as earned; so also the commission.* **From the moment of its purchase the house was complainant's, and never ceased so to be.** The only money paid when the deed was passed was $500, and this was a portion of the money in defendant's hands belonging to complainant for commissions; and when a year later $750 was paid on account of the mortgage, it was with a portion of the money of complainant then in defendant's hands due for commissions.

It was wrong for defendant to take title in his own name, and to give his own mortgage. It was wrong for Balch not to credit complainant with commissions every time a house was completed; and it was wrong not to reduce the mortgage, at least once a year, by applying the money belonging to complainant in defendant's hands. Defendant cannot take advantage of his wrong-doing, for, as we have seen, "the statute is not allowed as a protection of fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interest betrayed;" and, as this court said in the *Rogers case,* "he cannot, by any fraudulent act, thwart his principal by making it impossible for him to accomplish his purpose."

It is respectfully submitted that the final decree should be reformed in accordance with the cross-appeal of the complainant, which is the subject of a separate brief on his behalf.

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*Of Counsel.*

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# New Jersey Court of Errors and Appeals

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|---|---|
| *Between*<br>FREDERICK L. SMITH,<br>*Complanant-Appellee,*<br>*and*<br>EDWARD C. BALCH,<br>*Defendant-Appellant..* | *On Bill, &c.,*<br>*On Appeal from Chancery.* |

## Brief of Defendant-Appellant.

This is an appeal from a decree of the Chancellor adjudging that the premises described in the bill of complaint are held in trust by defendant for complainant; directing defendant to convey the same to complainant free of encumbrance and also to pay to complainant the sum of $1150 with interest from January 10, 1918 (p. 183).

Upon the pleadings the Vice-Chancellor concluded that the defendant held the premises in trust for complainant (p. 16, &c.) and referred the matter to a Special Master to take an account between the parties (p. 20). The Master decided that the sum of $1866.56 was due complainant from defendant after crediting defendant with all amounts due to him from complainant (pp. 162-178).

## The Facts.

In June, 1908, complainant was employed by defendant as carpenter's foreman at $4.20 per day, in connection with the erection of certain houses by defendant in Maplewood, N. J., which employment continued until September, 1916, after this suit was brought. In June, 1909, de-

fendant purchased the premises described in the bill, taking title thereto in his own name, paying $500 as a part of the consideration and giving a purchase money mortgage for $3750 under the terms of which $750.00 was due in one year, which sum was paid by defendant when due. Complainant took possession of the premises and has occupied same since that time. When the property was purchased, defendant began to deduct from complainant's wages, a sum sufficient to enable defendant to pay the taxes, insurance premiums and interest and continued to do this during the entire period of employment (p. 65, l. 34).

Complainant claims that defendant promised to pay him $50 for each house erected and that the payments were to be credited on account of the amount due on this house (pp. 27, 37, l. 38, &c.; p. 39, l. 30, &c.; p. 54, l. 15). Defendant says that he told both complainant and his wife that he intended to give complainant $50 on every house in which there was a profit the first year (pp. 65-121), but he denies that he ever made a general agreement with complainant for a bonus extending indefinitely into the future. He says that the premises in question were purchased for complainant and that the payment of $500 made thereon was given to complainant to assist him in procuring a home (p. 116), and that the payment of $750 was credited to complainant upon his books when the installment became due upon the mortgage (p. 66). That such payments were not made on account of an agreement to pay a bonus on every house erected (pp. 66-121).

From the time when the premises were purchased (June, 1908,) complainant did not speak to defendant about any payments or credits to which he was entitled until just prior to the bringing of this suit (p. 28, l. 40; p. 55, l. 17).

Defendant kept an account with complainant upon his books which were offered in evidence (Ex. D. 1, D. 2, pp. 159-160) upon which complainant was debited with the cost of the house and all sums expended in connection therewith as well as interest on the unpaid balance. From June, 1908, to September, 1916, defendant erected 116 houses.

Upon the evidence the Master found:

(1) That an arrangement for the payment of $50 for each house erected was made between the parties in May, 1909.

(2) That no specific date was set for the payment of the commission earned and that the payment of $50 therefore became due upon the completion of each house.

(3) That a balance of $1866.50 was due from defendant to complainant (pp. 162-178).

The learned Vice-Chancellor confirmed this report with the exception of the allowance of interest and the decree was entered as above stated.

## Specification of Errors.

1. The adjudication that within thirty days defendant should convey the premises to complainant free of the mortgage.

2. The adjudication that within the same time defendant should pay to complainant $1150 with interest.

3. The adjudication that the contract for compensation was made between the parties.

4. The adjudication that the contract as proved is a valid contract binding on defendant.

Appellant's contentions may be stated generally as follows:

(1) That no decree should be given against defendant, because complainant's proof shows the alleged contract to be a contract not to be performed within one year and therefore unenforceable because of the Statute of Frauds.

(2.) That the case does not show by clear and convincing proof nor by a preponderance of evidence that the alleged agreement was in fact made.

(3.) That complaint's claim is barred as to all sums accruing prior to six years before the commencement of the action.

## POINT I.

### The Contract upon which Complainant seeks to recover a judgment is not enforceable because it is within the Statute of Frauds.

Under the principle that the Court of Chancery will settle questions which are dependent upon or germane to the main purpose of the bill, complainant asks that his rights under this employment contract be determined. Equity has taken cognizance because of the trust relationship alleged. Two independent collateral causes of action are set up; one which seeks to have the trust declared, which is determined on the pleadings (the decree in this respect awarding equitable relief), the other to recover a judgment upon an alleged agreement of hiring. While the latter cause is not incidental or essential to the equitable remedy, the court, without objection, has taken cognizance of it. It is purely a legal question and must be determined upon legal principles.

In the case of *McElroy* v. *Ludlum,* 32 N. J. E. 828, which was in many respects similar to the case at bar, the court said:

> "But if the evidence established the agreement set out in the bill, the complainant would, nevertheless be debarred of the relief prayed for. The suit is in substance an action to enforce a legal demand. It must therefore be decided upon the legal principles by which the right of a party to recover compensation for services rendered under a contract invalid by the statute of frauds is determined. Performance of a contract invalid by the statute, will not validate the contract so as to enable a party to enforce it by an action upon the contract."
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> * * *
>
> "In construing and applying the Statute of Frauds in determining what contracts come within its scope, what memoranda are sufficient to a sale by its requirements and all other matters of detail, courts of equity and of law adopt and follow the same rules." *Pomeroy's Equity Jurisprudence* (3rd Ed.) Par. 1293.

In the case of *Collins* v. *Leary,* 77 N. J. E. 529 (1910), complainant sought to compel the execution of a deed and also to account for the use of a dredging bucket. The contract was performed by complainant, although the amount of money consideration had not been agreed upon. The decree directed the conveyance to be made and allowed an accounting for the reasonable use of the bucket. The Court said:

> "The contract so far as it involved matters to be done by Leary was made up of two independent provisions—one, the conveyance of a specified piece of real estate, the other

> the payment of a sum of money to be afterward agreed upon. So far as the first provision is concerned it is complete and certain in all its parts. The partial performance of it is of such a character as to justify a court of equity in specifically enforcing it, notwithstanding the Statute of Frauds. * * *
>
> But the ascertainment of the amount which should be paid in cash to the complainant as executrix of her deceased husband as a further consideration for the right to use the dredging bucket is in our opinion not the province of a court of equity."

The equitable remedy in the case at bar is fully given by the portion of the decree which declares the trust. In the remainder of the decree the court of equity is enforcing, not an equitable but a legal demand.

Complainant's suit is based upon a verbal contract of hiring. He understood that he was to work for defendant until the amount due upon the property was entirely paid by the successive installments of $50 on each house built. In view of the progress made during the first year, the facility and equipment of defendant to do the work, and the attending circumstances known to complainant when the arrangement was finally agreed upon, the period contemplated, until the purpose was effected (i. e., until the house was paid for; until the mortgage debt, secured by defendant's bond was extinguished), *according to complainant's own statement would be five or six years* (pp. 38-39-54).

The answer of defendant denies the making of the contract sued on and the Statute of Frauds is set up as a defense. Even though the statute were not pleaded, a denial of the con-

tract would be sufficient to raise the statute as a defense to the action.

*Lozier* v. *Hill,* 68 N. J. E. 300.

Section 5 of the Statute of Frauds provides:

> "That no action shall be brought * * (5) upon any agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or &c."
>
> Compiled Statutes, 2612 Sect. 5.

WHERE THE MANIFEST INTENT AND UNDERSTANDING OF THE PARTIES ARE THAT THE AGREEMENT WAS NOT TO BE PERFORMED WITHIN ONE YEAR, THE CONTRACT FALLS WITHIN THE STATUTE.

The principle upon which this contention is based is stated in *20 Cyc.* 206, as follows:

> "If from the nature and terms of the contract it is manifest that the parties intended to enter into a permanent arrangement or that they did not contemplate a complete performance within a year the contract is within the statute although no time for performance is specified."

In the case of *White* v. *Fitts,* 66 Atl. Rep. 533, Supr. Ct. of Maine 1906, suit was brought to recover damages for the breach of an oral contract to cut and saw into logs the stave wood on a lot owned by defendant. The Statute of Frauds (the provision of which is identical with our statute) was pleaded in defense. The contract specified no time within which the work

was to be done. The plaintiff was to cut the wood as fast as defendant needed it for use in his mill. There was evidence that, with a mill of the capacity of defendant's, operated as it ordinarily was by defendant, three or four years would be required to do the work. The plaintiff was a lumber man of experience and he understood the circumstances under which the work was to be done upon a large tract of land. The court held, after reviewing a number of cases, that the contract fell within the statute. In its opinion, the court said:

> "Considering then the terms and subject matter of the contract, the nature and extent of the work to be done and the knowledge of the parties respecting the capacity of the mill and all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, * *."

*Boydell* v. *Drummond,* 11 East 140 (1809) was one of the early cases on the subject and is cited in many of the cases in this country. The court there held that if it appears to have been the understanding of the parties to the contract at the time, that it was not to be *completed* within a year, though it might, and was, in fact, in part performed within that time, it is within the Statute of Frauds and if not in writing signed by the party to be charged, cannot be enforced against him.

In *Hill* v. *Hooper,* 67 Mass. (1 Gray) 131 (1854) the court held:

> "It is the settled construction of this clause of the statute that unless an agree-

ment can be completely performed within a year no action can be maintained on it. * * *

"There are cases in which it has been decided, when agreements within this clause of the statute have been terminated or waived, after partial performance, that an implied contract may be raised, on which one party may be held to pay the other for goods received or the services rendered before such termination or waiver. But an action in such cases must be brought on the implied and not on the express contract."

In *Farwell* v. *Tillson,* 76 Me. 227 (1884), the following instructions were held to be correct:

"We want to put ourselves in the position of these contracting parties at the time they made the contract, for the purpose of finding out what they intended by it—not for the purpose of making any new contract for them—so that we may see things in the light in which they were before the parties at that time, and be able to apply the contract to the subject matter and so get more closely to the intent of the parties as declared by the language of the contract itself. * * *. Was it within the understanding and intention of the two contracting parties as declared by the contract that it might be performed within a year? * * *. The subject matter of the contract might be a thing which could not possibly be done within a year. A consideration of the subject matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract that it was not to be performed within a year. So also, a

consideration of the circumstances and subject matter might show that performance of it within a year would require such extraordinary methods, such extraordinary appliances or resources as could not by fair construction be regarded as within the intention of the parties at the time when the contract was made; and the question is, considering the subject matter and the situation of the parties as known to each other, and reading the contract in the light which these give, whether by fair construction it was within the understanding and intention of the parties as expressed in the contract, that it might be performed in a year or not."

In *Warner* v. *Texas & Pacific Railway Co.*, 164 U. S. 418 (1896) the United States Supreme Court reviews the authorities on this subject, citing with approval *Saunders* v. *Kasterbine*, 6 B. Monroe 17 * * * in which the contract proved, was to execute a bill of sale of a slave when the purchaser had paid the price of $400 in monthly installments of from $4 to $8 each, which would necessarily postpone performance by either party beyond the year. Citing also *Peter* v. *Compton* (1693) Skinner 353 as follows:

"where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." * * *

"An agreement that is not to be performed within the space of the year from the making thereof means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of such performance within the year."

The principle is suggested in the language of the court in the case of *Eisner* v. *Schneider,* 60 N. J. L. 291 (1897).

> "To be within the statute it must be such an agreement as does not admit of performance according to its language *and intention* within a year from the time it is made."

See also:

*Day* v. *N. Y. Central R. R. Co.,* 51 N. Y. 583 (1873).

*Swift* v. *Swift,* 46 Cal. 266.

*Schultz* v. *Tatum,* 35 Mo. App. 136 (1889).

*Marcy* v. *Marcy,* 91 Mass. 8 (1864).

*Herrin* v. *Butters,* 20 Me. 119 (1841).

According to complainant's case and his understanding at the time the contract was made, it would have been physically impossible for him to give the amount of service necessary to complete the entire work contemplated in the arrangement within one year.

Before the contract was made he had one year's experience in which 9 houses were erected. He understood what progress was possible during the year following the making of the contract. He knew that, with defendant's equipment, he could not possibly work out the obligation which he undertook when the contract was made and the house was purchased, in less than five years.

It is urged that the principles of the above cases apply to the facts of the case at bar.

Performance by complainant will not take the contract out of the statute.

*McElroy* v. *Ludlum,* 32 N. J. E. 828 (1880).

*Buckingham* v. *Ludlum,* 37 N. J. E. 137 (1883).

*Kirkpatrick, Recr.* v. *McEnroy,* 41 N. J. E. 539 (1886).

*Brown* v. *Brown,* 33 N. J. E. 650 (1881).

*Cooper* v. *Colson,* 66 N. J. E. 328 (1903).

## POINT II.

### The alleged contract was not proved.

Complainant's proof of the making of the contract rests upon his own testimony. He says that in August, 1909, defendant said to him that he could not allow more than $100 bonus (p. 27, l. 1) having suggested, the previous year to divide the profits (p. 25, l. 20). That after May, 1909, he said that he would only allow $50 a house (p. 27, l. 2) and that there was no further conversation on the subject until September, 1916 (p. 28, l. 40; p. 55, l. 14). Complainant's wife testifies to a conversation referred to by both complainant and defendant when the bonus of $50 per house was mentioned (p. 57, l. 34). The corroboration sought in the testimony of Reeve (p. 56) is contrary to complainant's case. Prior to that conversation defendant had stated that he would give $50 per house. It is quite unreasonable to believe that defendant would tell Reeve that he was going to give complainant $100 per house, after he had told complainant that he would give him but $50.

Complainant's brother-in-law, Reniger, after having refused to answer complainant's subpoena (p. 58, l. 25) testified that on the day he went to work for defendant in January, 1917 (five months after this suit was brought) defendant "mentioned $50 on the houses" and said he would give complainant "$50 on the houses."

Against the testimony in support of complainant's claim, defendant denies ever making any arrangement for the payment of regular amounts on account of houses erected (p. 64). He says that there were conversations with complainant about a bonus upon the houses erected during the first year of the employment to start complainant towards securing a home for himself (p. 62, l. 4; p. 120, l. 38, &c.), and he says that there was a conversation with complainant's wife in which he stated that during that year he would give complainant $50 on each house upon which he made anything (p. 65, l. 32; p. 121, l. 28), but he denies the making of any arrangement, stretching indefinitely into the future, by which he would be compelled to pay a bonus of $50 on every house thereafter erected (p. 121, l. 2; p. 132, l. 2). Defendant denies making the most unusual statements testified to by the witnesses Reeve and Reniger (p. 70, l. 38; p. 155, l. 22).

It is earnestly contended that the direct proof of the making of the contract is not convincing. The weight of the evidence was that the work of the complainant was not unusual and that it was little more than the ordinary duties of carpenter's foreman (p. 35, l. 3, &c.; p. 67, l. 16, &c.; p. 83, l. 14, &c.; p. 88, l. 35; p. 91, l. 33; p. 96, l. 14).

$500 was paid on account of the house at the time of making the agreement (p. 27.) This was credited to complainant on defendant's books (Ex. D. 1) as commission.

The payment made on account of the mortgage over a year later was so credited (Ex. D. 1). From this time on until the bringing of the suit, complainant never spoke to defendant about any sum due, although deductions were continuously made from complainant's wages to pay the carrying charges of the property and although com-

plainant says he knew that an amount which would have completely liquidated his indebtedness had accumulated long before (p. 52, l. 38, &c.; p. 38) complainant stood by after the credit of $750 was given him permitting the deductions to be made from his wages for a period of seven years, without even mentioning the matter to defendant. Does not this indicate that the payments by defendant were voluntary, as he says they were, and that complainant was awaiting the time when defendant might choose to make a further payment to him?

To justify a court in rendering judgment against defendant in this case there should be the clearest and most convincing proof by which it affirmatively appears from all the circumstances that the contract was in fact made. Complainant has not met this burden.

## POINT III.

**Complainant's claim for compensation is barred by the Statute of Limitations.**

Complainant will argue that the arrangement was for payments of $50 each, as the houses were erected. This is contrary to complainant's testimony (p. 54, l. 13).

Under any construction of the agreement a part of the claim accrued more than six years before the suit was brought.

In the case of *Kirkpatrick, Receiver,* v. *McElroy,* 41 N. J. Eq. 538 (at page 550) it is argued that a similar claim cannot be enforced because barred by the Statute of Limitations. In its opinion the Court agrees with this argument in the following words (p. 555):

> "The suit being brought for the enforcement of a legal right, with respect to which

the Statute of Limitations would be a bar in a court of law the statute will be available in bar of relief in a court of equity."

The Statute of Limitations is applied by the Court of Equity by analogy.

The unexplained delay of complainant in presenting his claim under the contract sued on, his failure to advance his claim for a period of seven years, permitting defendant during that period to continue with the deductions from his wages all go to show that complainant's conduct was such as to warrant the court in denying the relief sought on the ground that the claim was barred under the statute mentioned.

The action was brought August 4, 1916. This would exclude all houses completed prior to August 4, 1910. From the statement (Ex. D. 3, p. 161) it appears that three houses were completed during August, 1910. It is fair to presume that they were not completed before August 4th. Appellant therefore respectfully contends that complainant cannot recover at all upon the houses erected prior to the month of August, 1910; *i. e.* upon all the houses down to and including the house completed June, 1910. There were twenty-eight houses completed prior to that time.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors for and of Counsel*
*With Defendant-Appellant.*

FREDERIC W. SMITH,
*of Counsel.*

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| FREDERICK L. SMITH, *Complainant-Appellant,* *vs.* EDWARD C. BALCH, *Defendant-Respondent.* | *On Bill, &c.* *On Appeal from Chancery.* |

## Brief of Defendant-Respondent in Reply to Brief of Complainant-Appellant.

Counsel for complainant-appellant has ignored the rules of this court as to the form of his brief. This renders it difficult to reply to the same in a proper manner. Of necessity this reply must take up the general discussion as it is advanced by appellant. We shall endeavor, however, to omit jury arguments and appeals for sympathy.

The Master found that "no specific date was set for the payment of the commission" (case, p. 164). The Vice-Chancellor's conclusion is "that it was not intended that defendant should pay to complainant each $50 as it became due * * *. He (complainant) allowed defendant to deduct sufficient from his wages to pay interest and taxes. *Under these circumstances I think the equity of the case will best be met by allowing no interest until demand made*" (case, p. 182).

Appellant contends that it is not correct to say that complainant made no demand prior to the filing of the bill. He is apparently attempting to dispute the statement made by the Vice-Chancellor, which was that complainant *did not*

*request that the mortgage be discharged.* Attention should be given to the testimony preceding and succeeding the portions so carefully selected and elaborately quoted by appellant in his briefs. After a long recital regarding the making of the arrangement, complainant testified (case, p. 28, l. 38):

> "Q Did you ever have any other conversation with Mr. Balch regarding the agreement? A *Why, the only conversation I had with Mr. Balch about the agreement was just before I left last September.*"

It was this conversation to which he referred in the testimony quoted in complainant's brief (p. 2) from page 29 of the printed case, which is shown by his further statement.

> "Q You say that was the cause of the trouble at home? What do you mean by that? A My wife was forever nagging at me because I didn't go to Mr. Balch and demand that the mortgage be paid off the house and why I have no more work. Q Why didn't you go then to Mr. Balch? A I asked Mr. Balch last summer about it and he thought I was well enough off, and so I was" (case, p. 154, &c.).

Assuming it to have been proved that demands were made upon defendant's son, this was not sufficient. It was not proved even that such demands were made; it was specifically and satisfactorily denied in the testimony of Edward C. Balch, Jr. (case, pp. 98, 99).

*The defendant's books negative clearly the idea that any sum of whatever amount should accumulate on complainant's account.* The books show a running mutual account and the charge of interest upon the balance at the end of each

six months indicates clearly what the account contemplated. No point in the case so certainly negatives any contemplation by defendant that installments or interest were due complainant as does the manner in which this account was kept. It shows, that so far as defendant communicated the matter to his son, who kept the books, the arrangement was precisely what defendant claims. That the property when purchased was to be charged to complainant and against this and other charges were to be credited the amounts which defendant chose to advance as well as the amounts deducted from wages.

The contention that defendant had no right to take title in his own name is now made for the first time in the case. No such idea is expressed or may be implied from the bill of complaint or from the evidence. It does not appear in fact in any part of complainant's case that it was not thoroughly understood that the title was in defendant. Complainant's testimony clearly shows that he understood it (case, pp. 37-39).

The charge of fraud against defendant is refuted by the fact that complainant was given immediate possession of the property and has had the full enjoyment thereof since that time.

It is argued that defendant was trustee for complainant, and therefore liable to account regularly. Then follows this statement:

> "It must be remembered that the agreement for commissions was made about a year before the complainant's house was purchased and that the purchase for complainant was an independent matter entirely." (Complainant's Brief, p. 5.)

Counsel thus clearly points out the dual nature of the remedy which he seeks in this action as contended by defendant.

If there is this distinction between the two phases of complainant's claim, whatever sum may have been due complainant under the alleged contract at the time of the purchase of the house, was due to him as a creditor. According to complainant's case, a new arrangement was made at this time: the house was to be purchased, a bonus of $50 per house was to be paid, and it was to go toward paying off the balance due upon the house so that complainant could own it (case, pp. 37-39). It is submitted that under the pleadings and the proofs the trust is shown to be an express trust: not a resulting nor a constructive trust, but a trust which is the result of an express agreement.

The relationship must therefore be viewed in the light of complainant's proof of the agreement upon which he sues; there was no such obligation to account upon the defendant as that now claimed.

There is nothing in the case to warrant the finding that $50 was due to complainant upon the completion of each house.

Such a finding would be flatly contradictory to complainant's testimony.

> "Q Was there ever any understanding as to when this $50 should be paid you? A No, I don't think so" (case, p. 54).

*But if such payments were due at such time complainant was grossly careless in his neglect to demand and enforce such payment.*

As an afterthought counsel for complainant again raises a claim respecting the first ten

houses, in spite of his pleadings, his proof, and the conclusion of both the Master and Vice-Chancellor.

His argument regarding the preparation of the bill of complaint and the physical or mental condition of complainant prior to the filing of the bill is in explanation to overcome the variance between the claim as stated in the bill and the testimony of complainant. It need but be said in this regard that *the bill was filed on August 4, 1916, when complainant was still employed by defendant* (case, p. 27, l. 30). The hearing was had eight months afterwards, and yet counsel would say that during all that time, because complainant was worried, he had not been able to give an intelligent statement of his claim to his counsel.

If the testimony of complainant (case, pp. 25-27) is carefully examined it will appear that defendant's contention in this entire cause is fully proved: that there was never an agreement between the parties to pay a bonus indefinitely: that the arrangement made when the house was purchased contemplated only a year "if things went all right that year" (case, p. 61). It should be noted in complainant's own statement that he entered defendant's employ expecting to receive half the profit on the houses; that he worked with this impression, from June, 1908, until September, 1908, at which time he says, defendant stated, without discussion, for no apparent reason and without remonstrance by complainant, that he would only give complainant $100 bonus; that at the time the house was purchased—*when it is contended ten houses had been erected, although but nine are shown upon the statement, Exhibit D*—he permitted a $500 payment to be made on

account of this house, at which time he claims he was entitled to $1,000. He commenced to pay interest on the balance of the purchase price of $3,750 with $500 more coming to him at that very moment (case, pp. 25-28). AND HE NEVER SPOKE ABOUT THE MATTER AGAIN TO DEFENDANT UNTIL JUST PRIOR TO THE INSTITUTION OF THIS SUIT. That is not the conduct of a man who has made such a contract, however humble and docile counsel may paint his client to this Court. A careful reading of the testimony quoted in defendant's brief will indicate that complainant was acting upon his anticipation, his expectation, his belief, in defendant's generosity, rather than upon a contract made between them in good faith and fully understood by both.

## The Law.

Whether an allowance of interest will be made, depends upon the facts of the case and it cannot be said that because it has been determined that defendant holds the title to this real estate in trust for complainant, the law will imply a demand for the payment of interest. Defendant's obligations to complainant depend upon the contract.

The facts of this case show no fraud on the part of defendant. The contention that he was deliberately attempting to perpetrate a fraud on complainant is not in any sense warranted by the evidence. His attitude throughout the entire period of seven years is that of a person who had no idea that a claim, of the nature now alleged by complainant was accumulating against him. And the conduct of complainant, if *he* believed that he had a valid enforceable

claim against the defendant during that period, was such as to prevent such a suspicion by defendant. The authorities cited by complainant on the question are not helpful unless it appears that defendant believed or had reason to believe that he was under a still further obligation to complainant.

The case of *Sellick* v. *French,* 1 Conn. 32, contains the following, immediately after the quotation recited by complainant.

> "But where there are current accounts founded on mutual dealings, unless there be some promise or usage to pay interest, *it will not be allowed;* for in such cases no time of payment is stipulated, each party is making payment, the balance is constantly varying, it is understood that the demands are to remain on book, and *the presumption is that interest is not to be allowed.* Such is the case of farmers and mechanics in their mutual intercourse."

In the case at bar *there were* mutual dealings, and there is a bona fide denial that the debt alleged by complainant has been at any time due to him. No implied contract to pay interest arises in such cases.

In *Ruckman* v. *Bergholz,* 38 N. J. L. 531, on page 533, immediately following the paragraph quoted by complainant, the Chancellor says:

> "There may be circumstances which render the application of the rule inequitable and by which it will be controlled, but it does not appear that in this case the attention of the judge was called to any such circumstances."

It is submitted that this is in entire accord with the decision of the Vice-Chancellor in the case at bar.

In *Rogers* v. *Colt,* 21 N. J. L. 18, the suit was *upon an agreement under seal* for the transfer of an equitable estate.

In *Whitcomb* v. *Harris,* 90 Me. 206; 38 Atl. 138, there was an express promise in writing to pay a certain amount at a certain fixed time, the action being to recover back the amount paid in excess of the sum to which defendant was in fact entitled on account of a mortgage.

*There was no evidence whatever in the case that defendant was using any money to which complainant was entitled for the purpose of making a profit for himself.*

In *Coddington* v. *Idell,* 30 N. J. Eq. 540, a demand had been made upon one partner by the others and he had refused to pay the sums due and had used the money for his own purposes.

IF COMPLAINANT IS ENTITLED TO INTEREST AT ALL IN THIS CASE IT WILL BE ALLOWED AS DAMAGES AND NOT BECAUSE OF A CONTRACT TO PAY IT.

See 22 Cyc. 1495.
*Scudder* v. *Morris,* 3 N. J. L. 13.
*Howell* v. *Burnett,* 20 N. J. L. 265.

As to when interest becomes due there is no doubt about the general rule.

It is expressed as follows in 22 Cyc., p. 1482:

> "The general rule is that interest becomes due and payable at the same time that the principal becomes due and not before, *but this rule is subject to be varied by the contract of the parties and interest may become due and payable at any time,*

*irrespective of the maturity of the principal, according to the true intendment of the contract therefor.*"

See also

*Cooper* v. *Wright,* 23 N. J. L. 200.
*Ware* v. *Lippincott,* 45 Eq. 220.

The matter of intendment should be collected from the circumstances or from the usage between the parties.

*Morris* v. *Allen,* 14 N. J. Eq. 44.

"In the absence of an express agreement to pay interest or a positive rule of law that interest shall be computed as part of the damages *the allowance of interest is discretionary, and depends upon the circumstances of the case. The general rule is that interest is not allowed on a debt until debtor is in default.*"

*North Hudson R. R. Co.* v. *Booraem,* 28 N. J. Eq. 593.

*Collins* v. *Babbitt,* 67 N. J. Eq. 165.

BUT THE RIGHT TO RECOVER INTEREST DEPENDS NOT ONLY UPON ALL OF THE CIRCUMSTANCES OF THE CASE, BUT UPON OTHER WELL SETTLED AND DEFINED RULES WHICH ARE RECOGNIZED IN THE BOOKS AND AMONG WHICH ARE THE FOLLOWING:

1. "As a general rule interest is not allowed on running accounts so long as they remain open and unliquidated unless there is some statutory provision that permits it or some contract between the parties, express or implied, that interest shall be paid." *22 Cyc. 1510.*

*Polhemus* v. *Annin,* 1 N. J. L. 176.

The books of account of the defendant in this action indicate clearly that there were items of debit and credit, properly made, and that the account should be viewed as an open, running account between the parties.

2. "Where the amount of the demand is disputed on reasonable grounds and in good faith, or the right to recover is in good faith denied, interest will not be allowed on the demand prior to its liquidation by verdict or otherwise." *22 Cyc. 1515* and numerous cases there cited.

Complainant's charge of fraud is not borne out by the facts. Complainant's claim is disputed by defendant in good faith on good grounds and the above rule applies.

3. "WHERE INTEREST IS CLAIMED AS DAMAGES AND NOT BY REASON OF ANY CONTRACT THEREFOR, IT WILL NOT BE ALLOWED IF THE DELAY IN THE PAYMENT OF THE PRINCIPAL DEBT IS THE RESULT OF THE NEGLECT OF THE CREDITOR TO DEMAND AND ENFORCE SUCH PAYMENT."

See *22 Cyc. 1485* and a long list of authorities cited in a note following this paragraph. These authorities are taken from many jurisdictions and include cases in the English, New York, Illinois, Vermont and United States Courts, among which are the following:

*Brinkley* v. *Wollis,* 22 Ark. 1, which held that "though a trustee violated his trust, if the party interested in the trust delay for many years (10) to bring suit for its recovery without showing any reason for such delay,

interest will be allowed him only from the commencement of the suit."

*Thompson* v. *Fullinwider,* 5 Ill. App. 551, which held that in an action upon an account, where it appears that the party claiming a mistake and over-payment had the means at hand of detecting it, he cannot recover interest by way of damages for the detention of his money when the delay, if any, was by his own neglect.

*Denise* v. *Swett,* 68 Hun. 188; 22 N. Y. Supp. 950, which held that in an action for royalties accruing under a license to manufacture a patented article, interest will not be allowed the patentee on the amount recovered, where the complaint does not ask for it and the patentee has made no demand for payment or for an account of sales until about the time he brought suit. In this case there was a delay of about 9 years.

*L. R. & A. O. Brainerd* v. *The Champlin Transportation Co.,* 29 Vt. 154-1857, which held "that under the circumstances of the case the plaintiffs would not be entitled to interest upon the account *during the time they so omitted to present it.*"

In *Newell* v. *Executor of Caroline Keith,* 11 Vt. 214, a claim for personal services was not presented until after the death of the person served. Held "that no interest should be allowed except from the date of the death."

*Sanborn* v. *U. S.,* 135 U. S. 271, in which it appeared that the United States delayed the assertion of its right to recover money, and which held "that interest before the commencement of the action is not recoverable."

The learned Vice-Chancellor in reducing the amount of interest allowed by the Special Master in this case did not go into the reasons, but concluded: "Under the circumstances * * * the equity of the case would best be met by allowing no interest until demand made." His conclusion was undoubtedly based upon the principles herein referred to, and it is submitted that the argument of complainant upon the question of interest is without force, and that in this particular the decree should be affirmed.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors for and of Counsel with Defendant.*

FREDERIC W. SMITH,
*Of Counsel.*

# INDEX.



Testimony of Complainant.

TESTIMONY FOR DEFENDANT.

Exhibits.

## Bill of Complaint.

Filed August 4, 1916.

# In Chancery of New Jersey.

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*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:*

The complainant, Frederick L. Smith, of Wyoming, Township of Millburn, County of Essex, and State of New Jersey, respectfully shows that:

1. He is a carpenter and builder and has been for a number of years.

2. On or about June 10th, 1908, one Edward C. Balch, the owner of a large tract of land in Maplewood, N. J., entered into an agreement with complainant to take entire charge of the construction of certain houses to be erected by the said Edward C. Balch upon the said and other tracts of land, and that the said Edward C. Balch would pay the said complainant the sum of $23.10 per week, and the further sum of $50.00 for each house or building erected under complainant's supervision, to be paid upon the completion of said house or building.

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3. After the agreement aforesaid complainant took the entire charge of the construction of houses upon the said tracts for the said Edward C. Balch, hiring men, superintending the construction, making plans and doing all things necessary from the beginning of the foundation to the completion of the building, being on the grounds a long time ahead of the workmen, so

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that there should be no delay, and working at all hours in the night time, making working plans for said buildings.

4. On or about July, 1909, complainant informed the said Edward C. Balch that he desired to have a home of his own and was informed then by the said Edward C. Balch that complainant had a credit with him of $500.00 on account of ten houses which were then completed.

5. After negotiations with Mr. Charles R. Reeves, the said Edward C. Balch purchased and held in trust for complainant the following described premises in Wyoming, in the Township of Millburn, County of Essex, and State of New Jersey, BEGINNING at a point on the Northeast side of Chestnut street distant Northwest 150 feet from the Northerly corner of said Chestnut street and Wyoming avenue and running thence Northeast and parallel with Wyoming avenue 150 feet; thence Northwest and parallel with Chestnut street 50 feet; thence Southwest and parallel with Wyoming avenue, 150 feet to the Northeast side of Chestnut street; thence Southeast along the Northeast side of Chestnut street 150 feet to the place of BEGINNING, for the sum of $4,250.00, paying for the same the sum of $500.00 and giving a mortgage for $3,750.00, which said mortgage was to be reduced in one year to $3,000.00, interest on said mortgage to be at the rate of 5% per annum, payable semi-annually.

6. Complainant thereupon entered into possession of the said premises and has resided there continuously ever since; has made extensive repairs and improvements thereto, and since which time the said Edward C. Balch has

deducted from his salary the sum of $4.20 per week, alleging that this amount was necessary to pay for interest on said mortgage, and the taxes and insurance on said premises.

7. Complainant was informed later that he had a credit of $1,300.00 with the said Edward C. Balch on account of houses which had been completed in accordance with the terms of the agreement heretofore mentioned.

8. Since entering into the said agreement with the said Edward C. Balch, complainant has completed 117 houses and a factory for which he should have received the sum of $5,900.00 in addition to his salary and there are two more houses under construction.

9. Notwithstanding the amount of money to complainant's credit in the hands of the said Edward C. Balch, the said Edward C. Balch has deducted from complainant's salary each week as aforesaid the sum of $4.20 to pay for insurance, taxes and interest on the aforesaid mortgage, which should have been cancelled, and the said premises conveyed to complainant free from all encumbrances.

10. There is still due the said complainant the aforesaid sum of $5,900.00 and accrued interest, less any payments made by the said Edward C. Balch on behalf of complainant.

11. Complainant has applied to the said Edward C. Balch for an accounting of the money due him and also to convey the said described premises to complainant but the said Edward C. Balch has always refused and still does refuse to render him any accounting or pay the complainant the money so due.

Complainant is without adequate remedy in the courts of law and, therefore, prays:

1. That Edward C. Balch, who is the defendant to this suit, may answer this bill of complaint without oath and each statement therein made.

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2. That an account be taken of the amount due complainant.

3. That the defendant may be decreed to pay the complainant the amount so found due with interest and costs and convey the said described premises to the complainant by proper deed of conveyance, free from said lien of mortgage and at a valuation of $4,250.00 and pay complainant whatever sum of money in addition thereto may be found due and owing to complainant.

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4. That the complainant may have such other and further relief as may be equitable and just.

5. That a writ of subpoena may issue commanding the said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

WILLIAM TYACKE,
*Solicitor and of Counsel with Complainant.*

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## Amendment to Bill of Complaint.

Filed September 16, 1916.

Clerk in Chancery,
Trenton, N. J.

Dear Sir: 10

Kindly amend the bill of complaint as follows, by inserting after the word "New Jersey" on the fifth line of Paragraph 5, the following: BEGINNING in the Northeasterly line of Chestnut street at a point distant Northeasterly two hundred feet from the Northwesterly corner of Chestnut street and Wyoming avenue; thence (1) running Northeasterly and at right angles to Chestnut street, one hundred and fifty feet; thence (2) at right angles and parallel with Chestnut street Northerly twenty-five feet; thence (3) at right angles and parallel with Wyoming avenue one hundred and fifty feet; thence (4) at right angles along the same twenty-five feet to the place of BEGINNING. Also the following described premises: 20

WILLIAM TYACKE,
*Solicitor and of Counsel*
*with Complainant.*

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## Answer.

Filed September 21, 1916.

Defendant Edward C. Balch of the Township of South Orange, County of Essex and State of New Jersey, answering the bill of complaint in this cause, says that:

1. He denies paragraphs two and three and so much of paragraph four as alleges that the defendant stated to complainant that complainant had a credit of five hundred dollars with defendant.

2. Complainant has been in the employ of the defendant for a number of years as a carpenter, and is now a carpenter's foreman. His wages have been from four dollars and twenty cents to four dollars and seventy-five cents per day. Defendant has known complainant intimately for a number of years and has always been interested in complainant and his family, and anxious to encourage in complainant habits of thrift and frugality and that he has endeavored to show unusual consideration to complainant, giving to complainant many privileges and assisting him to make additional money by doing outside work, extending credit to him in other companies in which the defendant was interested, and doing whatever he could to help the complainant and his family.

3. He admits that he purchased in his own name the premises on Chestnut street in the Township of Millburn, and that the purchase price was forty-two hundred and fifty dollars, which was paid by defendant as set forth in paragraph five of the bill of complaint. That

the said purchase was made pursuant to an offer made by this defendant to give to the complainant some additional money in recognition of complainant's faithful service to defendant, and because of defendant's interest in complainant's procuring a home. He denies that the sum of five hundred dollars was paid on account of any contract with complainant as set forth in complainant's bill, and says that the same was entirely voluntary on his part.

4. That besides the five hundred dollars so paid, the defendant has also paid the sum of seven hundred and fifty dollars on account of the principal of the mortgage given at the time of the transfer of said premises, which said sum was also paid on complainant's account as a voluntary gift and in recognition of the services of complainant, and in order to still further assist him to the point of actually owning a home of his own.

5. Defendant admits that complainant has had possession of the said premises but he has no definite knowledge as to the extent of the alterations or repairs which have been made thereon.

6. Defendant has paid the interest upon the mortgage, as well as the taxes and insurance premiums upon said premises from the time of taking title thereto, down to the present time, and that he has, with the consent and full knowledge and co-operation of complainant, deducted from the wages of complainant, certain sums with which to pay the said taxes, and the interest upon the amount invested in said premises by defendant; that such deductions were made at the rate of five dollars per week until

June 30, 1910, and thereafter such deductions were made at the rate of four dollars per week; to all of which complainant agreed and that such arrangement has been continued until the present time.

10 7. He denies paragraphs seven, eight, nine and ten in said bill of complaint.

8. An account has been kept with complainant on the books of the defendant, which defendant is willing to produce at such time as this court may require, and that said account shows that complainant is still indebted to defendant in a large sum, amounting on June 30, 1916, to three thousand two hundred and fifty-one dollars and eighty-five cents ($3,251.85).

20 9. That complainant is not entitled to any money from him and that he holds the title to said premises as security for the amount due him from complainant.

10. The agreement alleged by complainant in his bill of complaint, was not in writing, and under the statutes of this state, the same is void and cannot be enforced by complainant against this defendant, to the extent and for the pur-
30 poses sought by complainant in this suit.

11. A large part of the money claim by complainant under the agreement alleged in his bill of complaint, fell due, if at all, more than six years before said bill was filed, and any claim which complainant makes thereto is barred by statute.

12. The complainant has delayed bringing action for the enforcement of his said claim as
40 set forth in his said bill of complaint greatly

to the detriment of the defendant and is therefore barred by reason of such delay.

13. Defendant prays discovery and asks that complainant answer without oath, the following interrogatories:

a. On what date he entered the employ of defendant and what has been the net amount of wages paid him from that time, per week. 10

b. What payment has been made by defendant under the alleged contract other than the two payments on account of said house and his weekly wages.

c. Where the ten houses are located mentioned in paragraph four of the bill of complaint and when the same were completed.

d. What repairs and improvements have been made upon said house on Chestnut street, Millburn, giving the dates and the costs thereof. 20

e. Who informed him that he had a credit of thirteen hundred dollars with defendant, as alleged in paragraph seven of the bill of complaint; when and how said information was given; how many houses had been so completed, giving the dates of their completion and where the same are located.

f. Where the one hundred and nineteen houses and the factory are located, as alleged in paragraph eight of said bill of complaint, and when each of said houses and the factory were completed. 30

g. What payments have been made by defendant on behalf of complainant, as alleged in paragraph nine of said bill.

14. Defendant denies making any contract with complainant as alleged by complainant and 40

says that the payments and allowances made by him to the complainant were gratuitous and voluntary and that complainant is not entitled to a conveyance of said premises or to the payment of any money from defendant.

Wherefore the defendant prays that the said bill may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

FREDERIC W. SMITH,
*Solicitor and of Counsel with Defendant.*

## Amended Answer.

Filed February 8, 1917.

Defendant Edward C. Balch of the Township of South Orange, County of Essex and State of New Jersey, answering the bill of complaint in this cause, says that:

1. He denies paragraphs two and three and so much of paragraph four as alleges that the defendant stated to complainant that complainant had a credit of five hundred dollars with defendant.

2. Complainant was in the employ of defendant from July 13, 1908, until August 16, 1916; his position was carpenter's foreman and his wages were from $4.20 to $4.75 per day. Because of defendant's interest in complainant and his affairs, and because of his desire to assist and encourage complainant, he showed unusual consideration to complainant, giving to

him many privileges, assisting him to make additional money by doing outside work, on his own account, extending credit to complainant in the John O'Rourke Co., making sundry gifts to complainant, and showing him many favors.

3. He admits the purchase of premises on Chestnut street, in the township of Millburn, for the sum of $4,250 and that the purchase price thereof was paid as set forth in the bill of complaint. He denies that he has held said premises in trust for complainant. He denies that any money paid by him on account of said purchase price was by reason of any contract with complainant and he says that the said payments were made because he wished to help complainant in procuring a home.

4. That besides the $500.00 paid when said premises were purchased defendant has also paid $750.00 which under the terms of the mortgage given by defendant, became due one year from the date thereof. That defendant credited said amount upon complainant's account in order to assist him still further to the point of actually owning said property. Defendant denies that such payment was made by reason of any agreement with complainant but says that it was a voluntary gift.

5. Defendant admits that complainant has had possession of the said premises but he has no definite knowledge as to the extent of the alterations or repairs which have been made thereon.

6. Defendant has paid the interest upon the mortgage as well as the taxes and insurance premiums upon said premises from the time

of taking title thereto, down to the present time, and that he has, since said purchase in accordance with the arrangement made with the complainant and with the consent, full knowledge and co-operation of complainant, deducted from the wages of complainant, certain sums each week, with which to pay the said taxes, and the interest upon the amount invested in said premises by defendant; that such deductions were made at the rate of five dollars per week until June 30, 1910, and thereafter such deductions were made at the rate of four dollars per week.

7. He denies paragraphs seven, eight, nine, ten and eleven in said bill of complaint.

8. An account has been kept with complainant on the books of the defendant, which defendant is willing to produce at such time as this court may require, and that said account shows that complainant is still indebted to defendant in a large sum, amounting on June 30, 1916, to three thousand two hundred and fifty-one dollars and eighty-five cents ($3,251.85).

9. That complainant is not entitled to any money from defendant but that complainant is indebted to defendant in the sum of $3,500.00. That defendant holds the title to said premises to secure to him the payment of the amount due from complainant, and that upon receipt from complainant of the said sum, he is willing to transfer said premises to complainant.

10. The agreement alleged by complainant in his bill of complaint, was not in writing, and, under the statutes of this state, the same is void and cannot be enforced by complainant against

this defendant, to the extent and for the purposes sought by complainant in this suit.

11. A large part of the money claimed by complainant under the agreement alleged in his bill of complaint fell due, if at all, more than six years before said bill was filed, and any claim which complainant makes thereto is barred by statute. 10

12. The complainant has delayed bringing action for the enforcement of his said claim as set forth in his said bill of complaint greatly to the detriment of the defendant, and is therefore barred by reason of such delay.

13. Defendant says that all payments and allowances made to complainant were gratuitous and voluntary and that complainant is not entitled to any money nor to a conveyance of said premises until the amount due to defendant is paid. 20

Wherefore the defendant prays that the said bill may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

FREDERIC W. SMITH,
*Solicitor and of Counsel with Defendant.* 30

## Replication.

Filed October 2, 1916.

Complainant joins issue on the answer of the defendant.

WILLIAM TYACKE,
*Solicitor of Complainant.* 40

## Order Amending Bill.

Filed May 9, 1917.

This matter being opened to the Court by William Tyacke, of counsel with complainant, and it appearing that due notice of this motion was duly served upon counsel of the defendant,

It is on this ninth day of May, 1917, ORDERED, that Paragraph 2 of the Bill of Complaint be amended to read as follows:

2. On or about June 10th, 1908, one Edward C. Balch, the owner of a large tract of land in Maplewood, N. J., entered into an agreement with complainant to take entire charge of the construction of certain houses to be erected by the said Edward C. Balch upon the said and other tracts of land, and that the said Edward C. Balch, would pay the said complainant the sum of $23.10 per week, and the further sum of $100.00 for each house or building erected under complainant's supervision, to be paid upon the completion of said house or building; and after ten houses had been built by complainant for defendant, defendant informed complainant that he could only pay the sum of $50.00 for each house instead of $100.00 as originally agreed upon, and which the said complainant agreed to accept.

E. R. WALKER,
*C.*

Respectfully advised,

FREDERIC W. STEVENS,
*V. C.*

## Order of Reference.

Filed October 5, 1916.

It is on this 4th day of October, nineteen hundred and sixteen, on motion of William Tyacke, solicitor for complainant, ORDERED that the above stated cause be referred to Hon. Frederic W. Stevens, one of the Vice-Chancellors, to hear the same for the Chancellor, and report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
*C.*

I hereby consent to the above order.

FREDERIC W. SMITH,
*Solicitor of Defendant.*

## Oral Opinion of V. C. Stevens.

Filed February 16, 1917.

Before his Honor Vice-Chancellor Stevens.

Mr. William Tyacke for complainant.

Mr. Frederic Smith for defendant.

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Transcript of shorthand report in the above stated matter, on Friday, February 16, 1917, at Chancery Chambers, Newark, N. J.

*The Court.* I have taken the pleadings in this case home with me and read them over carefully, and it is perfectly evident that an account must be taken by a master. There is practically no dispute between the parties with reference to the house occupied by complainant. It appears that complainant was employed by Mr. Balch to construct some houses in Maplewood, and shortly after the employment began complainant informed Mr. Balch that he desired to have a home of his own, and thereupon Mr. Balch purchased a home for forty-two hundred and seventy-five dollars, paying five hundred dollars in cash and giving his own mortgage for the balance. On that mortgage I understand Mr. Balch to say in his answer he has paid seven hundred and fifty dollars, leaving the mortgage debt three thousand dollars. There is no dispute with respect to the trust. This is what the defendant says: "Complainant is not entitled to any money from him and he holds the title to said premises as security for the amount due from complainant." That is a distinct admission that he holds in trust. The only dispute between the parties is with reference to whether Mr. Balch has in his hands enough

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money to pay for this property or whether he has not. Complainant alleges that he has in his hands fifty-nine hundred dollars still unpaid. Defendant denies that and says that he has kept an account of the transactions and that complainant has not enough money in his hands to entitle him to a conveyance. Under these circumstances the usual course is to refer the account to a master to determine how much, if anything, the defendant owes the complainant and what is still payable on this mortgage.

*Mr. Smith.* If your Honor please, I should like to say with respect to your Honor's conclusions as to the admission of the trust, it was not the intention of the defendant in setting up the allegation respecting the manner in which his property was held to avoid the necessity of the complainant proving this trust relationship. The answer was drawn for the purpose of showing the relationship to be that of debtor and creditor, and for the purpose of putting upon the complainant the necessity of proving the trust relationship for the purpose of enabling the defendant to say that this agreement, being one which he as the defendant denies, being an agreement by parole, was therefor void on the ground that if it was an express trust it could not be proven by parole, if it was a resulting trust it could be only for the amount of money advanced at the time of the delivery of the deed by the vendor to the alleged trustee; he shall also be in the position of denying the agreement, and I understand that your Honor's conclusion is not that the agreement was made.

*The Court.* I do not think there is any doubt about the trust; there is a distinct admission.

*Mr. Smith.* That the agreement is made? I think it is denied.

*The Court.* Defendant says in his answer: "Complainant is not entitled to any money from him, and he holds the title to said premises as security for the amount due him from complainant"

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*Mr. Smith.* It is stated, if your Honor please.

*The Court.* Well, you cannot get rid of that allegation, it is just as plain as two and two are four. I am going to send this case to a master.

*Mr. Smith.* May I understand just what that account will contemplate. Will it contemplate the matter of the building of the houses, assuming that the agreement for the payment of fifty dollars per house was in fact made, as to how many houses were built?

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*The Court.* Yes, it will include everything. It will not assume that fifty dollars per house was to be paid. That is to be proved. It will include the entire account between the complainant and defendant.

*Mr. Smith.* Will it include not the question of whether or not the agreement was made?

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*The Court.* The defendant admits enough to show that he holds that property in trust; he says he does, and he not only says that but he says that he has for six or seven years reserved out of the complainant's wages enough money to enable him to pay the taxes and the interest on that mortgage. Now what admission could be more explicit or more satisfactory than that?

*Mr. Smith.* With the express understanding that he should be paid out of the complainant's wages.

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*The Court.* He took it out of complainant's wages.

*Mr. Smith.* There is no question about that.

*The Court.* Then he admits the trust; and not only that but that complainant has with his permission entered into possession, and that he, the defendant, has deducted from complainant's wages enough to pay taxes and interest. The relation is not that of landlord and tenant, but that of vendor and purchaser. The only doubtful question between the parties is whether the complainant is a creditor or not. Of course the defendant cannot be compelled to convey until he is completely paid. If the state of the account be as the defendant claims it is, he has not been completely paid.

*Mr. Smith.* I want to get your Honor completely. If the proof is that the houses are the number which the complainant alleges, that practically is the only question which is in your Honor's mind.

*The Court.* I don't know anything about it, I do not know what the agreement as to compensation was; I do not know whether complainant was to receive fifty dollars per house in addition to his wages or not; that is a matter of proof. The master will do what every master does when an account is referred to him; he will consider the disputed items and say whether they ought to be allowed or not. We want a competent master in this case, and if Mr. Hugh B. Reed is unobjectionable to the parties I would suggest that the reference be to him.

## Order of Reference.

Filed March 1, 1917.

This cause coming on to be heard in the presence of William Tyacke, of counsel with the complainant, and Frederic W. Smith, of counsel with the defendant, and it appearing from the pleadings that the defendant holds the premises described in the bill of complaint in trust for the complainant, subject, however, to an accounting:

It is, on this twenty-eighth day of February, 1917, on motion of William Tyacke, solicitor for complainant, Ordered, Adjudged and Decreed that the matter be referred to Hugh B. Reed, Esq., one of the masters of this court, to take an account of the money due the complainant from the defendant, and the amount due the defendant by the complainant. And that when the said master shall make his report to this court the case be set down for further hearing on five days' notice.

E. R. WALKER,
*C.*

Respectfully advised,

Frederic W. Stevens,
*V. C.*

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between*<br>FREDERICK L. SMITH,<br>*Complainant,*<br>*and*<br>EDWARD C. BALCH,<br>*Defendant.* | *On Bill, etc.* |

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Testimony taken in the above stated cause before Hugh B. Reed, Esquire, Master in Chancery, pursuant to an order of reference dated February 28, 1917, on Friday, April 13, 1917, at the office of the Master, 810 Broad street, Newark, New Jersey.

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Appearances:

Mr. William Tyacke, representing the complainant.

Mr. Frederic W. Smith, representing the defendant.

Florence I. Carman, sworn as stenographer.

EDWARD C. BALCH, being duly sworn on his oath, according to law, testifies as follows:

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*Direct examination* by Mr. Tyacke.

Q Mr. Balch, where do you live? A 30 Ridgewood road, Maplewood.

Q What is your business? A I am interested in several different businesses. John O'Rourke Lumber and Coal Company, 17 Park avenue, president of that, and also president of the Orange Screen Company of Valley Road, South Orange, that is near Maplewood.

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Q And interested in building houses? A In houses also, yes.

Q And are you the record holder of the premises known as 75 Chestnut street?

*Mr. Smith.* It is admitted that the witness is the holder of record of the property and premises described in the bill of complaint, and in the amended bill of complaint.

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Q Have you the deed to the premises with you? A (Witness produced deed.)

Deed from Benjamin F. Lord and wife to Edward C. Balch, dated June 30, 1909, recorded in the office of the Register of Essex County in Book O-45 of Deeds, page 330, is offered in evidence.

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Received in evidence and marked Exhibit C. 1.

Deed from Ellen E. Lord, *et als.*, executors, to Edward C. Balch, dated June 30, 1909, recorded in said Register's Office of Essex County in Book O-45 of Deeds, page 332, is offered in evidence and marked Exhibit C. 2.

Both of these deeds are produced by the defendant's counsel.

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Q Did I understand you to say you have never been in the house? A Oh, no; I have been in the house several times; three or four times.

Q Three or four times? A Yes.

Q Is there a mortgage on that house? A Yes, sir.

Q How much? A $3,000.

Q And is the interest paid to date on that? A That I cannot—my son tends to all those things; I cannot tell whether the last payment was made or

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not. I don't know. I know it has been paid right along.

Q Is the interest in arrears at the present time? A I don't think so.

Q You personally did not attend to the payment of interest? A No, sir.

Q Are the taxes paid for the year 1916? A I think they are. 10

Q Do you know whether they are or not? A I am not positive; you will have to ask my son when he comes on the stand; he can tell you all these details.

EDWARD C. BALCH, JR., of full age, being duly sworn on his oath, according to law, testifies as follows:

*Direct examination* by Mr. Tyacke. 20

Q What is your business? A I am secretary and treasurer of the John O'Rourke Company.

Q Have you charge of your father's personal affairs? A To a certain extent.

Q Have you charge of the building operations in Maplewood and vicinity? A No, he has charge of them himself. 30

Q Have you charge of the financial end of it? A I pay the bills and give receipts for the money that is paid in.

Q Do you attend to the payment of interest on the property? A Yes.

Q Do you know whether the interest on the property covered by these two deeds with which you are familiar, Exhibits 1 and 2, whether that interest has been paid to date or not? A Not to date; no mortgage money is paid to date. 40

Q When is the interest paid to? A To January 15, 1917.

Q It was paid up to January 15th? A Yes, sir.

Q And when was it paid? A I will have to refer to my records for that; can't give you the exact date.

Q Can you give any idea when it was paid? A In January, approximately—about the 15th; about then or before.

Q Do you know whether the taxes for 1916 are paid? A They have been.

Q Are there any arrears of taxes on that property? A Not that I am aware of.

Q And the only arrears of interest on the mortgage is from January 15, 19— A —17.

Q I mean the accrued— A They have been paid up to the last interest period.

FREDERICK L. SMITH, being duly sworn on his oath, according to law, testifies as follows:

*Direct examination* by Mr. Tyacke.

Q Where do you live, Mr. Smith? A I live at 79 Chestnut street, Wyoming.

Q What is your business? My business is carpenter, foreman carpenter.

Q Do you know Mr. Balch? A Yes, sir.

Q Did you have any business dealings with him? A Yes, sir.

Q When? A On from June, 1908, to September, 1916.

Q Now in June, 1908, what were you doing at that time, do you remember? A In June, 1908, why, at that time I was finishing a house for his son, Harry, on Ridgewood terrace.

Q And what business did you have for Mr. Balch then? A Why, at that time, I was working for the firm of Wolfe and Jilson, and they had their shop or headquarters at West Orange. They had a number of houses in construction at the time, and among them there were several for Mr. Balch, and 1907, in about the first of April, Mr. Balch on his way home from New York came to where I was working on the house on Highland place, where Mr. Warren Baker— 10

Q April 1, 1907? A April 1, 1907, and Mr. Balch asked me if I thought he and I could build houses as well as anybody else, and I told him I thought we could, and he said he thought so, too, and the following May, Mr. Balch again stopped, I was working at the same place, he again stopped and said that if I would go building houses with him right away, that he would give me half the profit that was made on each house. I told him at the time that it would not be fair to my employers, because they had ten houses in the course of erection at the time, and I had the handling of the whole thing for the firm of Wolfe and Jilson, and I did not think it would be square for me to leave at that time, and I told him I would come with him as soon as these houses were finished; so in the following year, 1908, in June, when I was working on his son's house, Mr. Balch again came to me and said that we must start at once, so we would have some houses built for trade in the fall, and show people that we are getting houses ready, and I told him all right, we had better start a cellar, and he said that I had better get some floor plans made, so we would know what we were doing, so I did this before and after working hours, and took measurements at that time, that is, before and 20 30 40

after working for Wolfe and Jilson, after my day's work was done, and about in the middle of June, I think it was, I got through with Wolfe and Jilson and then I went with Mr. Balch, and we built the first house on—I think it was No. 1 Ridgewood terrace. It was a gambrel gable house with three dormer windows in front. The next house was known by the people in Maplewood as the City Hall on account of having two large pillars running from the porch floor to the under side of the main roof.

Q Mr. Smith, before you started to build these, did you have any understanding with Mr. Balch about any profits or any salary or any arrangement whatever? A Well, I will come to that later. I had some understanding afterwards.

Q Yes? A The next house was a house, Mr. Balch brought a postal card from Maine or some place, of a large hotel, and it had octagonal windows on each corner, front corner, and then after that, houses following in rapid succession, as many as ten cellars being dug at one time, and sold—that is the house sold before the cellar was started; and shortly after the first house was built, I think it was in August, I spoke to Mr. Balch about contract, and Mr. Balch—I asked him if I couldn't have a written contract, and he said, "Why, Fred," he says, "Why, my standing connections and being a prominent member of the church over there makes my word just as good as my bond," and so I went on until it was a—well, anyway, a month or so later, I asked Mr. Balch about getting a place for my wife and family to own in their own right, and he said, "I have been thinking over a bonus proposition," and he said, "on account of me having to take all the risks and furnishing all the capital, I don't

think I can allow more than $100 bonus in addition to your wage.'' My wages at that time was $4.20 a day; and that went on until I think it was in May, 1909. I again—well, in the meanwhile, I had been looking around for a house, and I found this house at 79 Chestnut street, and I told him about it, and—let's see; he— it was one evening he came up the street, and near where we were living—we were living on the northeast corner of Ridgewood road and Ridgewood terrace, in an old house Mr. Balch had got, which was the property he had bought from the North Company and for which I was paying a mere nothing of ten dollars a month, and rarely ever received a receipt for the rent. At, any how, an evening shortly after, he came up the street and he stood on the street, and my wife and I were out in the yard, and my wife told him—informed Mr. Balch what I had found in the way of a house, and he asked where it was, and I told him. He said, ''All right, go ahead and buy it,'' and he counted the houses that we had erected at that time, and he said, ''ten houses,'' but he said, ''After this,'' he says, ''I made up my mind to only allow you $50 a house,'' and we then and there both agreed to it, and we worked from that time on, on that basis up to the time I stopped work in September, 1916.

Q Now, you said you spoke about a house at 79 Chestnut street. A At 79 Chestnut street.

Q These premises in question? A These premises in question, and had a lot 150, and the house—175 feet front and 150 feet deep, and the house had 11 rooms in; that's the house in question at the present time.

Q Well, what about that house? A Well, Mr. Balch said, ''Go ahead and buy it,''

so I went to Mr. Charles Reeve, of Wyoming, and informed him that I had a credit with Mr. Balch, and I would like to have the house, and for him to see Mr. Balch. Mr. Reeve came and saw Mr. Balch.

Q What about the house, was it purchased?
10 A The house was finally purchased.

Q And did you move in the house? A I moved in the house in August, 1909. We lived in the old house—went there in December, 1907, and moved away in August.

*Mr. Smith.* I object to that; it don't make any difference about the old house.

Q Did you do any repairs to the house? A Yes, sir.

20 Q What did you do? A I made several new floors in the house, and put in new bathroom fixtures, put in new gas lights, new Richardson and Boynton range in the kitchen, new hot water boiler.

Q Is there any heating apparatus in that house? A Yes, sir. I put in a furnace for which I asked Mr. Balch to furnish me money to put it in, and he did so. He said that I should
30 have the good of the furnace while paying for the house.

Q Did you speak to him about a contract afterwards?

*Mr. Smith.* I object to the question as leading.

A I asked about the contract.

Q Did you ever have any other conversation with Mr. Balch regarding the agreement?
40 A Why, the only conversation I had with

Mr. Balch about the agreement was just before I left last September.

Q And now I want to get it clear. When you first spoke to him about having it in writing, what was the conversation then?

*Mr. Smith.* I object to that on the ground that it has already been testified to. 10

*The Court.* I will permit it.

A Why, when I asked him for a written agreement?

Q Yes. A Why, he said his standing and connections, being prominent in the church, made his word as good as his bond.

*Mr. Smith.* I move that that be stricken out on the ground that it is the same thing as testified to before, exactly. 20

*The Court.* It does no harm. I wanted to be sure what was said at the time.

Q Was that all that was said at the time? A Well, Mr. Balch was very indignant, so that was all that was said at the time.

Q Now, did you ever ask him for an accounting? A I asked him several times how—if something couldn't be paid off, and he told me I was well enough off the way I was, receiving weekly wages and money deducted from the wages paying interest and taxes. 30

*Mr. Tyacke.* Of course the answer admits the amount, so we need not bring that out.

*The Court.* He was paid $4.20 a day.

*Mr. Smith.* There is a difference in the pleadings as to what amount is deducted; you have one and we another. 40

*Mr. Tyacke.* We are willing to take your figures for it, that is, the amount per week deducted.

*Mr. Smith.* We will produce our record to show what was deducted.

10 Q How many houses did you build for Mr. Balch? A 118 houses, that is, I think, with the factory counted in.

Q And that is 108 after the first ten? A Yes.

Q Now, Mr. Smith, I have a number of blue prints made, showing the different streets and houses, where they were located.

*Mr. Smith.* I have a list here of all of the constructions, chronologically arranged,
20 built by Mr. Balch, beginning July, 1908, and ending September 16, 1916.

*Mr. Tyacke.* Perhaps we can agree on that and eliminate a lot of testimony.

*Mr. Smith.* My records show the date of the beginning of the house, and the date of the completion.

(After a comparison of records.)

*Mr. Smith.* The only difference between
30 the records is the house on the southwest side of Chestnut street, which, according to our record, was begun in July, 1916, and completed in October, 1916, Mr. Smith having left in September.

*Mr. Tyacke.* We agree upon 116 houses and one factory.

*Mr. Smith.* Our records show that between July 1, 1908, and September 16, 1916,
40 with the exception of the house that I have

mentioned, 116 houses were erected and finished, and also one factory.

Q Do you know how many houses you built in the year 1908? A 1908—I think it was ten houses, as near as my recollection was—that is, they were—I don't know whether they were all finished at the time, but as near as I can recollect, and it is a good ways back. 10

Q And then in 1909, do you remember about how many? A I think it was fifteen or eighteen; I don't remember exactly; I am not sure about that.

Q And then in 1910? A I think it was twelve, that year, if I am not mistaken. I am not sure.

Q And 1911? A 1911—I think there was twenty houses built that year. 20

Q And 1912? A Then it dropped back again; fourteen or fifteen, I guess; I don't know exactly.

A And in 1913? A 1913, I think it was twelve.

Q And in 1914? A 1914, I think we didn't build so many that year. I think it was eight or—it was in the neighborhood of that.

Q And then in 1915? A 1915, well, that was an off year—I can't give you the number exactly. 30

Q Have you any idea about how many you built in 1915? A It was a small number; I think it was six or eight, or something like that.

Q And 1916 the balance? A 1916—

*Mr. Smith.* I object to the question on the ground that it is leading.

Objection sustained. 40

Q How many in 1916? A Well, I don't know whether it was eleven or—it was in the neighborhood of that, around there.

Q Now, when you left in 1916—that is, the employ of Mr. Balch, was there any money due you for wages? A Why, a day and a half.

10 Q How much does that amount to? A About $6.50, in the neighborhood of that.

Q Was that ever paid to you? A No, sir.

*Cross examination* by Mr. Smith.

Q Your wages, Mr. Smith, were computed upon the day basis, weren't they? A The wages?

Q Yes. A Well, that was the way we got them—it was first off, yes, sir.

20 Q All the time you worked for Mr. Balch, your wages were so much per day? A So much per day, yes, sir.

Q Were you hired by the day? A Well—there was not any question about by the day or the week or anything. I was hired to build houses for him, and I was to get the same wages that I was getting for Wolfe and Jilson, when I was for them, at the time.

30 Q That was when you were first employed by Mr. Balch? A When I was first employed by Mr. Balch, yes, sir.

Q Now, right on that point; had not Wolfe and Jilson reduced your wages 40 cents a day just before you went with Mr. Balch? A The plans for Mr. Balch—

Q Now answer my question, please. A It was reduced 25 cents on account of—

*Mr. Smith.* Never mind.

40 *Mr. Tyacke.* Oh, yes it is—

*The Court.* Any explanation of that can be brought out on re-direct examination.

Q You said 25 cents or 25%? A 25 cents a day.

Q You said it was not reduced 40 cents a day? A No, sir; it was not.

Q And when you went in the employ of Mr. Balch, he agreed, didn't he, to reinstate your wages at the former amount? A He agreed to pay me the same wages I was getting. 10

Q Before the reduction? A Yes.

Q Now, we go back to the rate of wages. You said a day and a half was due when you left. If you were hired by any other rate than by the day, you would not say that a day and a half was due you, would you? A The time book was made up by days. 20

Q Yes? A Yes, sir.

Q Now, while you were in the employ of Mr. Balch, your wages were increased at different times? A They were increased only in the last month I was there?

Q Only in the last month you were there? A Yes, sir.

Q Never anything more than that? A That's when they were increased.

Q Then you were getting the same wages from the time you went into the employ of Mr. Balch until the day you left? A Practically, yes. 30

Q I want to know actually. A Yes, sir.

Q You never got an increase in wages? A Not above the $4.20 a day.

Q You are certain of that? A Not until the last month. I don't know whether it was September or August; it was either one of those months; it might have been in August. 40

Q You are taking into consideration when you talk about increase the amounts that were paid for interest and taxes on your house, too? A Yes, sir.

Q Do you know how much was deducted by Mr. Balch on account—on these accounts?
10 A $4.20 a week, yes, sir.

Q Was that amount ever increased during your employment during all these years? A Was that amount increased?

Q Yes, or rather, decreased—the amount of the deduction of your wages? A When I first went with him it was $5.00 and after the second payment on the house was paid, then it was $4.20.

Q Now, your work with Mr. Balch had to
20 do with what part of the erection of the houses, Mr. Smith? A What part?

Q Yes. A Well, I started, and Mr. Balch told me where the lot was; I measured the lot off, and measured for the cellar, and gave levels for the digging men to go by.

Q You are sure Mr. Balch never did that? A Mr. Balch, on the first cellar, took a couple of men there and started them digging until I got so I could be with him all the time, and of
30 course I made measurements to show the men where the corners were.

Q Do you mean to say that every house, during all this period, was laid out by you, the location of it? A Mr. Balch generally took me to the lot that he wanted the house built on, and told me how he would like to have it so far as the side line was, and I proceeded to lay the cellar out, and give the levels to the men.

Q You are a carpenter, are you? A Yes.
40 Q You are not a mason? A No, sir.

Q Or plumber? A No.

Q Or roofer? A No, sir.

Q You are not a stair builder? A I am not a stair builder, no sir; I am just a carpenter.

Q Didn't your work with Mr Balch consist of acting as carpenter foreman? A No, sir; did not. 10

Q Did you ever hire any masons? A Hire masons?

Q Yes. A Yes, I think I have.

Q Very seldom? A Very seldom, yes, sir.

Q Did you ever have anything to do with the plumbing work in any of the buildings? A I told the plumbers where the bath rooms were to be— 20

Q —located? A Located.

Q That had to do with your carpenter work, however, didn't it? A And we conferred where the—

Q Conferred with the plumber. There is a plumber foreman on all these jobs, isn't there? A Well, yes.

Q A man who has charge of the plumbing work? A They generally have a man in charge of the plumbing work. 30

Q And also a man in charge of the mason work? A We didn't have a foreman mason at that time.

Q At what time? A Well, not up to the time I left.

Q Now, going back, Mr. Smith, to the time that you were employed; I understand that the first time you had any conversation with Mr. Balch was in 1907 while you were working for Wolfe and Jilson? A Yes, sir. 40

Q And at that time, your position with Wolfe and Jilson was assistant foreman, wasn't it? A Assistant foreman?

Q Yes. A I was the only foreman on the job at that time, yes, sir.

Q Just before you were engaged by Mr. Balch, had you received notice from Wolfe and Jilson that they were going to lay off in two weeks? A No, sir, I did not.

Q And didn't you tell that to Mr. Balch? A Tell Mr. Balch that? No, sir.

Q And you didn't ask him for a job? A No, sir.

Q He came to you and asked you to come with him? A He did, yes, sir.

Q Why were you willing to leave them then and not the year before? A Because I had in the course of construction a number of houses which I had started, and we had no other foreman there that understood them, and I stayed to finish them.

Q But they had reduced your wages in the mean time? A No, sir; not then.

Q But you testified a few minutes ago that they had reduced your wages just before you left? A Yes. You wouldn't let me explain it.

Q I don't want an explanation; I want the fact. A All right; you have got the fact.

Q Now, the arrangement, as I understand it, Mr. Smith, respecting this agreement that you are now suing on, was made at the time or after you had found this Wyoming house to go and live in? A The arrangement?

Q The agreement for the bonus, as you call it. A Well, I—I understood then that I was to have a bonus on every house, before I had bought

any house, before I found this house in Wyoming, the agreement was.

Q It was with the idea to help you get a home of your own? A I would not handle a proposition like that for a bare day's wages; too much responsibility.

Q And when you found that house that evening that you mentioned, and met Mr. Balch on Ridgewood road, at that time when your wife told him about it, that's the time you said that the arrangements were made for the allowance of a bonus of $50.00 per house? A That was when he reduced it to $50.00.

Q Had he ever paid anything more than $50? A Had he—I don't get you.

Q You said that he had reduced it to $50. A Had he reduced it—

Q You said that he had reduced it to $50. A Well, when I asked him about it before, it was reduced from half profits to $100, and then I supposed everything was all right, and we got ten houses built, and I imagined I had that amount of money for to buy the house, and so I commenced to hunt for it.

Q But the agreement you are suing on here is an agreement for $50. You don't say anything about $100 or half profits, and I want to get the facts about that agreement. A That was the agreement we made before the house was bought.

Q After you found it? A After we found it.

Q When—the house where you lived, that belonged to Mr. Balch? A Yes.

Q That was the time that agreement was made? A Yes, sir.

Q According to the arrangements, when you proposed the purchase of this house, as to the balance of the purchase money, that is, what had

not been paid by Mr. Balch wasn't to be paid by Mr. Balch; was to be taken care of by this $50 bonus? A That was to be taken care of by this.

Q In other words, when you had earned out of this $50 bonus enough to pay for the balance on the house, that the house was to be all yours?
10 A Yes, sir.

Q Now, at that time, you had under construction, how many houses about? A We had under construction at that time ten houses, if I remember rightly.

Q And you were finishing about ten a year? A It would run in the neighborhood of about fifteen a year, yes, sir.

Q So that that would be a fair average, would it have been, for the years that you were with Mr. Balch? A Yes, sir.
20

Q And that would take until this bonus would accumulate to bring the thing through? When would that time have arrived, about, according to your computation? A Why, I imagine it was in 1914 somewhere—'12 or '14—somewhere there. I haven't figured it out.

Q So that according to the progress that you were making, that house—at the time of this so-called arrangement, you anticipated that in at
30 least six years you would own that house? A I anticipated that it would be paid for in a very short time, yes, sir.

Q What do you meen by a "short time?" A Well, some years we built more houses and some years less.

Q Well, about how much? A Well, probably —well, maybe five or six years after we had taken the house, probably.

Q That was about as good as you could do, then. You figured that when that house should
40

be all yours in five or six years, you would have gotten along as rapidly as you could reasonably expect to, according to the progress of the work? A Yes.

Q As you then saw it? A Yes, sir.

Q Now, did you keep any account in your mind of the time when you would be in a position to call for this property? A I had implicit faith in Mr. Balch, and I left it to Mr. Balch. 10

Q You didn't pay very much attention to it, as far as the time was concerned? A No, sir, I did not.

Q You just went working along? A I had all confidence in Mr. Balch, yes, sir.

Q And you knew that amounts that were required for interest and the amounts of the taxes were being deducted by him? A Were being paid, yes, sir. 20

Q I understand that no writing was made between you? A No, sir; was not.

Q And I just want to get this point fixed. That the $50 bonus upon the arrangement would be applied by Mr. Balch upon your credit, and would be applied on account of this house? A Well, I was to get a $50 bonus on each house, yes, sir.

Q And that $50 bonus was to be applied on account of this house that was bought for you? A Up to a certain time, until the house was paid for. 30

Q Yes, until the house was paid for. In other words, it was perfectly natural that he should not come and give you $50 once in a while? A Well, I thought as soon as the house was paid for, I would have a little money to paint it and fix it up; that was all.

Q You always thought a good deal of Mr. Balch while you were working for him, didn't 40

you? A I thought as much of him as I did of my own father—nearly as much.

Q You got along well together? A We got along well, yes.

Q You used to tell him a lot of things about your home and how you got along together? A He used to tell me a lot of things—

Q Just answer my question, please. A Yes, sir.

Q You worked for him every holiday, didn't you? A Well, I worked for him a good many holidays; I can't say I worked every holiday.

Q Almost every one; you were paid for all the holidays? A Yes.

Q That was not true of most of the men, was it? A No, that was not true.

Q You worked also on Saturday afternoons? A Yes.

Q And you were paid for this? A Yes.

Q And that was not true of the other men? A No, they would not work because they belonged to the Union.

Q You were permitted to undertake work of your own by Mr. Balch? A Yes.

Q Took contracts yourself? A Yes.

Q And you worked on the contracts in his time? A Worked on the contracts, no.

Q You took care of them? A When I wanted to go on these contracts in his time, I went there to get payments, and I always asked his permission and I went.

Q And he always gave you permission? A He always gave me permission, yes.

Q He let you have material from the general work on one of these jobs? A Yes.

Q And he gave you credit for that material? A Gave me credit?

Q Yes, let you have it without paying cash for it? A Well, I can't say as to that.

Q You know you still owe John O'Rourke Company money?

*Mr. Tyacke.* I object. Are we going to bring in that issue here, on outside capital? I don't think that has anything to do with this case. 10

*Mr. Smith.* The point that I am endeavoring to bring out—one of the allegations is that Mr. Balch's interest in this plaintiff was emphasized and expressed, not only by this transaction respecting this particular house, but by the other considerations which were shown to this plaintiff during the entire period of his employment. 20

*The Court.* It is hardly cross examination, though, Mr. Smith. I think that comes within the scope of direct examination.

*Mr. Smith.* It is on the part of the employment; that has been gone into fully without objection. I want to show that during his working hours, he was permitted to go on and do other things; that question is for the purpose of showing that Mr. Balch extended credit to him for the purpose of permitting him to go out and do other work. 30

*The Court.* I must exclude that.

Exception allowed Mr. Smith.

Q Now, Mr. Smith, didn't Mr. Balch furnish you with radiator fittings and labor for the installation of the heating plant in that house? A Yes, sir.

Q And you understand that he charged this against you? A Yes, sir. 40

Q And also for freight and carting of this radiator and fittings? A Yes, sir.

Q That was a part of the repairs—

*Mr. Tyacke.* We will admit the sum of $133.94. We will admit that Mr. Balch furnished us with radiators and other things for that amount for this house which should be charged against us.

10

Q Mr. Smith, you didn't leave Mr. Balch until this suit had been brought, did you? A I left Mr. Balch—

*Mr. Tyacke.* Say "yes" or "no."

*Witness.* No—yes, I guess I did—no, that's right.

20

Q Did you leave before or after? A Mr. Balch was served with notice for an accounting, yes, sir, and then I left afterwards.

Q After the suit was brought? A Yes, sir; I don't know when it was brought exactly; I can't say.

Q When did you leave? A Why, September 7th, was it, or September 15th?

*Mr. Tyacke.* I have a memorandum here of the letter which he wrote to Mr. Balch; 16th. That was right; the suit was brought on the 7th of August.

30

Q You left him a little note—you didn't see him personally and tell him you were going to leave? A I didn't see him personally. I left him a little note—I wrote him a note and sent it to him or gave it to the boy to give to him.

Q And you sent your boy around in a day or two afterwards to his house? A I think my wife sent the boy around. I never sent anybody.

40

*Mr. Tyacke.* We will admit that we sent for the money and couldn't get it.

Q You went in business, after you left, with Mr. Herrick, didn't you? A I worked for Mr. Herrick for a short time.

*Mr. Tyacke.* Has that got anything to do with this suit? 10

*Mr. Smith.* I will withdraw the question.

Q Did not you try to get a lot of Mr. Balch's men to go out with you when you left? A No, sir.

Q You did not? A No, sir.

Q You didn't speak to any of the other men to get them to strike? A I went away this Saturday so nobody could see me. I didn't want the men to go with me under any consideration. 20

*Re-direct examination* by Mr. Tyacke.

Q Why did you leave the employ of Mr. Balch? A Why, because I think I wanted an accounting—a statement; some sort of statement to know where I was standing.

Q Why did you leave at the time you did? A Why did I leave at the time I did? I didn't think it a proper thing to be fighting a man and working for him. 30

Q Now, you said that the Wolfe-Jilson Company reduced your wages 25 cents a day; do you care to explain how that was? A I certainly would like to explain. I drew a plan for Mr. Balch's son's house, and it was a little larger than the run of houses we had been doing, and Mr. Balch didn't care to pay more money for the additional number of feet it was on, and Mr. Wolfe came to me and said he would have to cut 40

all of us down so we could get the houses completed; that's the reason it was cut down.

Q Who hired the men on the jobs that you were foreman on?

*Mr. Smith.* You mean for Mr. Balch?

10 *Mr. Tyacke.* Yes.

A Why, I hired the carpenters and I hired a plumber.

*The Court.* A plumber?

*Witness.* I did, yes.

Q You mean one plumber— A I hired a plumber and I hired Mr. Tanner.

Q I mean the general run of jobs; if a carpenter came around, for instance, who hired 20 him? A I did. I generally hired the carpenters, yes, sir.

Q And how about the laborers? A The laborers—sometimes I hired them and sometimes Mr. Balch did.

Q What about their time? A Time? I kept the time.

Q And what did you do with the time? A Time?

30 Q How did you keep it, in a book or pad or what? A In the book, yes, sir; time book.

Q What did you do with these time books? A I took them to Mr. Balch's house or sent them there, every Thursday night.

Q And who then paid the men? A I generally paid the men, yes, sir.

Q Who ordered the material for the jobs? A I ordered materials, most of it, with the exception, sometimes I think on the telephone— 40 and if Mr. Balch was going home, I would ask

him to order for me. Sometimes he would order if he found out what we wanted.

Q Who drew the plans for these houses? A Well, generally, we would get a postcard, or something like that, and I made the working plans so we could go along on the different constructions. 10

Q And when would you draw these plans? A Well, I made them at nights when I first started; afterwards I done part of them on the jobs.

Q Do you know how much time you spent—

*Mr. Smith.* I don't know that this is re-direct examination.

*The Court.* The question was raised as to what extent he had charge of the work in cross examination. I will permit it. 20

Q How much time did you spend after the regular working hours on Mr. Balch's business? A Well, it was different hours; sometimes it would take longer than others. I worked at different times until ten o'clock, sometimes maybe only an hour's time.

Q And do you know how much actual money you received in your envelope each week? 30 A Actual money?

Q Yes. What I mean is, after deducting everything Mr. Balch deducted, what did you receive? A Well, if I worked all day Saturday, I generally got—

*The Court.* The time book will show, won't it?

*Witness.* —$22.20.

40

*Re-cross examination* by Mr Smith.

Q You said that you drew plans, every one of these houses that were built They had a set of plans furnished by the architect, didn't they? A No, sir.

10 Q Do you mean to say that you drew a whole set of plans for any house? A I drew floor plans for that part of the house. Mr. Balch would find some house and we would go in an automobile, and he would tell me to draw it like that.

Q You mean the floor plans; you would make the floor plans on a piece of beaver board—(holding up beaver board). A That is what you call it, yes.

20 Q That is the kind of plans you sat up nights to do? A No, I did that on the job.

Q What kind of plans did you sit up nights to make? A These plans were different; I made some of them on paper; part of them I made—

Q Were these plans drawn to scale? A They were drawn so we could work them up.

Q That's a sample of the plans you did? (Indicating beaver board with plan drawn on

30 it.) A That's some of them, some of them, yes, sir.

Q Can you name one house for which you drew the plans, other than the floor plans like we have here? A All I claim, I drew the floor plans; yes, sir.

Q Only the floor plans like that? (Indicating.) A Yes, sir; so we could—

Q You drew no working plans like that? (Indicating.) A That came from out West.

40

Q These were plans you built the houses from? A There was one or two houses we built from that, yes.

Q And as I understand it, you would change the floor plans—you and Mr. Balch or someone else, and make a little different lay-out, and it would be worked out like that? A Sometimes we would change the floor plans; we had none of these plans; no, sir.

Q Your floor plans that you drew on these boards were taken—were copied from other floor plans and blue prints with what suggestions there might be made— A No, sir; the plans we generally had was a little bit of a place; places or plans that would come in the Ladies' Home Journal or like that, and I would have to make it to a scale, and he would make the suggestions and I would make some other plans.

Q You said you hired a plumber. Do you mean one plumber? A I hired the first plumber that came there; yes, sir.

Q Any others? A I hired Mr. Tanner; I gave plumbers orders to take away—

Q Outside of that, your hiring was among carpenters and laborers? A Carpenters and laborers; yes, sir.

*Mr. Tyacke.* I have two time books. I don't suppose you object to these going in evidence; time books on this job—on this house.

*Mr. Smith.* Are these offered for the purpose of showing he kept the time book?

*Mr. Tyacke.* To show he kept the time book for the carpenters.

Time book which begins February 20, 1914, will be marked Exhibit C-3 for identification.

Time book which begins October 17, 1912, marked Exhibit C-4 for identification.

10 Q I show you a book marked Exhibit C-3 for identification, and ask you if you will tell me what that is? A Well, it is a time book for Mr. Balch—different trades, laborers, etc.

Q And who wrote these names in the time book in here? A I did.

Q And what were you to do with the time book each week? A I took it to Mr. Balch's residence or else I gave it to Mr. Balch if he was around the job, at the time.

20 Q And then what would become of it after that? A Why, it was taken I suppose by his son to New York, and the time was made up and the money we brought back to Mr. Balch's place.

Q And then what became of the book? A The book came back with the money.

Q I show you a book marked Exhibit C-4 for identification, and ask you if you can identify that and tell me what it is. A Yes, 30 sir; this is one of the books we had on the different jobs.

Q For the same purpose as the other? A Yes, sir.

Q And who made the writing in it? A I did.

*Mr. Smith.* I don't object to the books if they are in for the purpose of showing that he kept the time, but I object to them 40 for any other purpose.

*The Court.* They are in evidence for whatever they show; whatever they may be worth.

*Mr. Smith.* I should like now to make the request of Mr. Smith to permit these books to be returned to Mr. Balch; they are a part of his records and are not properly in the possession of Mr. Smith. 10

*Mr. Tyacke.* After the case is ended, we have no objection to their going to Mr. Balch.

Q What became of the rest of the time books? A The rest of the time books? Mr. Balch has those.

Q I show you another book and ask you if you can tell me what that is? A Well, this is a book we had to make charges in and write down different things. 20

Q In whose handwriting is that? A That is my handwriting.

Q And is that the original or a carbon copy? A This is a carbon copy.

*Mr. Smith.* I object to that on the ground that it is leading.

Q Is that the original? A This is the original like what was in there is torn out; this is the original book, yes. 30

Q Who wrote that? A I did.

*Mr. Tyacke.* I offer that in evidence.

*Mr. Smith.* I object to it on the ground that it has not been shown that it had a thing to do with this case.

Q Is that an order book?

*Mr. Smith.* I object on the ground that it is leading. 40

A It is an order book.

*Mr. Smith.* I ask to have that stricken out.

*The Court.* It will be stricken out.

Q What kind of a book is it? A It is a
10 book to make memorandums in of any business that we done that had to go to New York.

Q Now, I show you an item marked "April 3, 1916," and ask you what that is; read it all. A "April 3, estimate on Mr. Small's porch, $120. This includes mason, carpenter's and painting work. Edward Balch per F. L. S."

Q Who is F. L. S.? A Frederick L. Smith.

Q Has that anything to do with Mr. Balch's work? A Yes, sir; I was in the employ of Mr.
20 Balch, and it was for him; I went there and made an estimate.

Book admitted in evidence and marked Exhibit C-5.

Q How long did one of these books last? A Sometimes they last months, according to the business, and sometimes one would last two weeks, sometimes a month, sometimes maybe more, according to what business we done.

30

*By Mr. Smith.*

Q Where is this Small job located? A In Wyoming.

Q What street? A Grand street.

Q Grand? A Yes, sir.

Q Mr. Smith, this entry of April 3rd represents an estimate on Mr. Small's porch; did Mr. Balch do the work? A No, sir.

Q Who did it, do you know? A Nobody.

Q Never was done? A No, sir.

40

*Frederick L. Smith, re-cross.*

Q Didn't Mr. Small ever give the contract? A It wasn't given out.

Q Has not been done yet? A No, sir, not to my knowledge.

Q You didn't see Mr. Small respecting this job on behalf of Mr. Herrick or yourself? A No, sir; that was before I left Mr. Balch; before I thought of leaving him. 10

Q Then you didn't go to see him to get the job for Mr. Herrick? A No, sir; I did not.

*By the Court.*

Q Mr. Smith, as I understand it, you said you had an arrangement with Mr. Balch by which, first, you were to share equally in the profits from the houses that he built, and that later on, he told you that instead of that, he would give you $100 for each house? A Yes, sir. 20

Q And still later, he cut that down to $50? A Yes, sir.

Q That was about the time, as I recall it, that the first ten houses were completed; is that so? A Well—

Q That last arrangement? A They were not all completed, of course; they were standing up—some were completed and some were entirely completed. 30

Q We will say that they were in course of construction? A Yes, sir.

Q Did you say anything to him or make any protest after the reduction of your interest at the time that he made this reduction? A I made no protest. I didn't know what I was going to get, first off, you know, and he told me to get started, and we started, and then after we got started, I asked him for a written contract, so I would know— 40

Q I remember what you said about that, but that was in relation to $100 a house, wasn't it? A That is what I thought I was going to get, first off.

Q What made you think you were going to get that? A That's what he told me.

10 Q He told you you were going to get $100 a house? A Yes.

Q When he reduced that to $50 a house, as you said, did you make any objections to that reduction, or did you say anything to him about it? A When he made the reduction, "well, if I am going to get $100 for ten houses, all right," and if he wants to make—he says, "After this, I am not going to give only $50 bonus besides your wages," and he made an agreement right 20 there, and of course, we worked right on through the whole business.

Q Then it is my understanding that your contention is that you are entitled to $100 apiece for the first ten houses, and $50 apiece for the remainder? A Well, that's what I thought I was going to get, first off.

Q I want to know if you thought you were going to get that or by virtue of your agreement, you would receive that? A Yes, sir; 30 that's what I thought I was going to receive; yes, sir.

Q Now, houses were finished, I think you said, at the rate of 12 to 15 a year? A Yes, sir.

Q And meantime, you had purchased a house of Mr Balch—had purchased a house in which you live? A Yes, sir.

Q And he was deducting from your wages each week a certain amount—first $5.00 and 40 later on, $4.20? A Yes, sir.

Q For how long a time did he deduct $5.00, do you remember? A That was until the next payment on the house was made.

Q That was a reduction of $750? A Yes, that was a reduction of $750 on the mortgage.

Q Now at the time of that reduction, did you have any conversation with him in relation to it? A. Why, I took it for granted— 10

Q No, no; I don't want that. I don't want to know what you took for granted; what was said? A What was said?

Q Yes, by Mr. Balch to you? A What was said was this: He said, "After this I have made up my mind that I will pay only $50 per house," and I agreed with him.

Q You misunderstand me. First he deducted $5.00? A Yes. 20

Q And later on, $4.20? A Yes.

Q And when the change was made from $5.00 to $4.20, did he say anything to you, or did you say anything to him about it? A Yes, I asked young Mr. Balch about that, so I could have a little more money in my envelope, you know.

Q You requested that the reduction be made? A Yes, that just about covered what it came to each year. 30

Q Did you figure out what it came to each year? A Mr. Balch's son figured for me.

Q He figured for you? A Yes.

Q And did you see the figures? A Why, he figured in front of me and showed me that it would be that, if it was made.

Q Well, what did he include in that calculation, do you remember? Did he include the taxes? A The taxes, insurance and interest. 40

Q That is, interest on the mortgage covering the property? A Yes, $3,000, and the taxes, water, and the insurance for three years.

Q Well, you according to your idea, were entitled to the credit on the purchase price of that house of $50 for every house that you finished, were you? A That was the understanding, yes, sir.

Q Was there ever any understanding as to when this $50 should be paid you? A No. I don't think so.

Q Nothing was ever said about that? A It was to be applied to the reduction of the mortgage; that was the understanding.

Q Well, now, the first year, you bought the house in 1909? A Yes, sir.

Q And you were entitled then to at least $500, according to—at least as soon as you finished those ten houses, you were entitled to that? A Yes, sir.

Q So then in 1910, you had finished some more houses; how many more? A Why, I think—well, I know we ran a little over, you know.

Q Fifteen houses? A Fifteen or eighteen houses, yes, sir.

Q So you would be entitled to at least $750? A Yes, sir.

Q And in 1911, you would have been entitled to say $500 or $600 more? A Yes, sir; I imagined that was the way it was going to be.

Q And so on, each year, you would be entitled to approximately $600? A According to the number of houses built.

Q Well, why wasn't the amount that was deducted from your wage reduced to correspond with the balance which was remaining to be paid

by you? A That's what I was trying to find out.

Q When did you try to find that out? A Well, I asked Mr. Balch's son nearly every year about—whether there was nothing more credited to me than on the purchase price, and he said, "no," he said all that was credited to me was the $1,250 that had been paid. 10

Q What did you do then in regard to that? A I kept—the next year I asked the same question.

Q I know, but did you ask the defendant for any explanation of why you were not credited with the amount to which you were entitled for the finishing of these houses? A Well, I didn't ask him until the last year.

Q Why did you wait until then? A Well, I thought I had enough money to pay for it; that was all. 20

Q But you were paying interest money you didn't owe them, weren't you? A Yes, sir.

Q Why did you do that? A I thought that when the thing was settled up, I would have a little money left over, to fix my house up, and have the house free and clear.

CHARLES R. REEVE, of full age, being duly sworn on his oath, according to law, testifies as follows: 30

*Direct examination* by Mr. Tyacke.

Q Where do you live? A Wyoming.

Q What is your business? A Real estate and insurance business.

Q Do you know Mr. Balch? A I do, yes.

Q Do you know Mr. Smith? A I do.

Q Do you know the property where Mr. Smith lives? A Yes. 40

Q Do you know who was the agent in the negotiations for the sale of that property? A I was.

Q Did you have any conversation with Mr. Balch about it? A Yes, sir.

Q Did you ever have any conversation with
10 Mr. Balch about—regarding Fred Smith? A Why, at the time he was going to buy the house; he was going to buy one for a home for Fred; getting it for Fred.

Q What did he say about that? A Why, took Mr. Lord—that was the man that had charge of the cottage, went down there and showed him around there; they had a mortgage on the property, and he said he was going to get a home for Fred. He was giving him $100 for each house he
20 turned out for him; that was the only way Fred could get a home.

Q Who did he tell this to? A In front of Mr. Lord.

Q He told you this? A He mentioned that he was going to get a home for Fred.

*Cross examination* by Mr. Smith.

Q Just say that again. A He was going to give him $100 on each home—sort of agreement—
30 on each home he turned out.

Q Tell us as near as you can the conversation. A Why, the way it started, Fred—he was going to get this home for Fred; he said Fred couldn't save the money, and he was going to start a home for him this way, and he was going to give him $100 for each house he turned out for him, and he was going to credit it in some way with Fred, and give him the house.

Q Where did this conversation take place? A Why, I think that was the night we went down.
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Q Where? A On the road from Wyoming to Madison—

Q Walking, were you? A No, sir; in a horse and wagon.

Q Whose horse and wagon? A Mine, or my father's. I was there with it.

Q And who else was present? A Mr. Lord. 10

Q What Mr. Lord? A Mr. B. F. Lord; he has since passed away.

Q Just as nearly as you can, tell us what he said? A That was about the drift of the conversation.

MRS. FLORENCE L. SMITH, of full age, being duly sworn on her oath, according to law, testifies as follows:

*Direct examination* by Mr. Tyacke. 20

Q Are you the wife of Fred L. Smith? A I am.

Q Where do you live? A 79 Chestnut street, Wyoming.

Q Do you know Mr. Balch? A Yes.

Q Where did you live prior to the house you are living in now? A The old house in Ridgewood road, Maplewood.

Q Did you ever see Mr. Balch there? A Oh, 30 yes; very often.

Q And do you remember any particular occasion when he came there? A Oh, yes; I remember when he came there when we asked him to do something for us about a house, and after Mr. Smith had been there about a year with him. Yes, I remember Mr. Balch coming there, and I told Mr. Smith that I thought we had better tell him what we found in the way of a home, so we walked over to where he was, and told him about 40

it, and he said that—I believe he said there were ten houses, and that after this, he could only let us have $50 on a house instead of $100 that he promised. After this, he had gotten it down to $100.

*Cross examination* by Mr. Smith.

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Q You had decided at that time, Mrs. Smith, upon the Wyoming property? A Yes; Mr. Balch had told Mr. Smith to look around for something, and he had looked at this Wyoming property—

Q That suited you? A That suited us, and within our means, and we so told Mr. Balch—

Q Mr. Balch was doing this for the purpose of getting you folks so that you would own your own home? A Paying Mr. Smith, of course, what he had earned. Mr. Smith had earned that much towards a home, and it was paid, most assuredly.

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ADJOURNED TO 1:30.

AFTER RECESS.

*The Court.* It is represented by counsel for the complainant that Mr. Andrew Reingar was duly subpoenaed to attend this hearing at this place, and on this date, and the witness' fee has been paid him. I certify that he has not appeared.

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*Mr. Tyacke.* Plaintiff rests, with the rights reserved that he may have to introduce further testimony of the aforesaid witness later.

*Mr. Smith.* I move that this action be dismissed on the ground; first, that the agreement set up in the pleadings, to wit, an agree-

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ment made by the defendant with the complainant that defendant should pay the complainant besides his weekly wage, "the sum of $50.00 for each house or building erected under complainant's supervision, to be paid upon the completion of said house or building," was not in writing, and therefore void, as being within the Statute of Frauds, or that provision of the Statute of Frauds which requires that contracts which are not to be performed within one year be in writing.

The second ground is that this action be dismissed on the ground that the agreement should be introduced by the complainant is void because it is not in writing, and within the provisions of the Statute of Frauds which requires that trust agreements, excepting resulting trusts, be in writing, and

Third, I move that the action be dismissed on the ground that the complainant is in laches. That he has not used proper diligence in endeavoring to fasten this alleged liability upon the defendant.

One other motion, or rather, this is in the form of an objection, that I wish to have upon the record, that this case must first have in it decided the question whether or not there was an agreement between the parties, and it should not now be heard by the Special Master upon the order made in this cause, because there are questions of law to be decided, and questions other than matters of account to be determined before the question of the account it raised.

EDWARD C. BALCH, recalled, as a witness by Mr. Smith, testifies as follows:

*Direct examination* by Mr. Smith.

Q Mr. Balch, you are the defendant, are you? A Yes.

10 Q When did you first become acquainted with the complainant? A About, oh, I guess nearly a couple of years before he was employed by me.

Q Will you state to the Court the circumstances under which his employment arose? A Why, he was an assistant foreman under a man named Fred Swineburg which was the foreman for Wolfe and Jilson, and this Mr. Swineburg used to give Fred charge of some of the work on 20 my jobs, and of course, naturally, I was on the job all the time, and became quite well acquainted with Mr. Smith long before he was employed by me, and I think Wolfe and Jilson built some forty some houses for me before Mr. Smith—in fact long before Mr. Smith was on the Wolfe and Jilson job, they had been building these houses for me, and towards the end, I only gave a few houses out, towards the end of the time that Mr. Smith was there, and Mr. Smith 30 came to me one day and said, "Now, the work is getting cut down," he said, "and I am going to be out of a job before long," and of course, as I said, I was very well acquainted with him, and talked to him, and he had told me how anxious he was to get a home for his family, and all those things, and I said, "Fred, don't worry." In fact, he was very much worried; he does worry over small things, let alone great ones like that, and I said, "Don't worry about 40 that, Fred," I said, "I will fix something for

you." So it was on the strength of that that I closed up with Wolfe and Jilson their last house.

Q What do you mean by closing up with them? A I mean when they built their last house that I had given them.

Q For you? A For me, yes. I told Mr. Smith that I would fix a place for him. 10

Q Were you building houses yourself at the same time they were building them for you? A You know, although of course, I gave them out because I was in New York most of the time, I always spent half a day out on the jobs when I was contracting to Wolfe and Jilson, so they finished these houses up, and Fred seemed to be very happy to think that he was not going to lose a job, and I asked him what he was getting, and he told me on account of the slackness of the work, that he had been cut down 40 cents a day. Well, and I said, "Fred, I will put you back on the basis that you originally was on." So he told me it was either $4.00 or $4.20, or something like that—of course, my son can tell better about the details. He has all that figured, and it was either $4.00 or $4.20 a day that I paid him on the basis of, and we got along fine together, and I told him, I said, "Fred, —" this house business would come up every once in a while— 20 30

Q What do you mean by "house business?" A His home, you know. I said, "Now, Fred, if things go all right this year, why, I am going to give you a little bonus towards getting this house." This was some time afterward; the agreement—he was to work as I engage every man that is on the job, and I never hired a man in my life, only so much per day, and this other agreement was only voluntary on my part—had 40

nothing to do with any agreement at all. I had never made any agreement in my life—

Q You started to give a conversation about his home. A I told him I would give him a little bonus if I made out this year—I thought I would help him get this home; I was in the habit of doing that. I had helped others to get homes; then everything went along nicely until he was going to move; I wanted to tear the house down he was living in at the time—an old house; it was a valuable lot, but it had an old house on it—the assessor, Mr. James Black, right on the corner of Ridgewood terrace and Ridgewood road, and I told him he had moved away off somewhere—Mountain View or somewhere, and I told him he might have that house to live in, and I wouldn't charge him only just a little—mere pittance to help pay the taxes on the place—I think he agreed to pay $10 a month, and I never got but three payments on that house all the time that he was there. He paid $10—he gave it to me, a ten-dollar bill at different times, three times while he lived in that house; then I told him to go and look around. He was very anxious to go to Wyoming—and I said, "Go over the ground, Fred, and see what you can find that will be within reason, that you can handle," and he came back with this report of this house in Chestnut street—wanted me to go up and see it, which I did. I said, "Fred, are you positive that this location and this house will suit you in every respect?" He said, "That's just the thing, just the thing for my family." I said, "All right then; go ahead and see Mr. Reeves." He was the agent. "See Mr. Reeves about the terms that can be made, and I will help you with the house." And he got the house, and I was to pay $500 down as a first

payment, and then I had to obligate myself in this agreement to pay $750 more within—I think it was three years, and in that way, the thing started. He moved up into the Chestnut street house and seemed to be very happy up there.

Q When the title to the Wyoming property was taken, was it taken in your name? A Yes. 10

Q And who gave the mortgage? A I did.

Q How much was that mortgage for? A Well, I only paid $500 on it first—I figured—it was $4,250 for the price of the house in the first place.

Q Why was the sum of $500 paid down? A Why, of course, in the first place, it was paid because that was the lowest he would take.

Q Who do you mean by "he?" A Mr. Lord. 20

Q He was the owner? A He was the owner of the house, and that was the lowest he would take.

Q What were the terms of the mortgage? A That I was to pay the $750 inside of three years, and I got the rate of 5%.

Q These terms were presented to you, and you knew that these payments were to be made by you; is that true? A Yes, sir.

Q Well, now, when you came to take title, did you pay the $500? A Oh, yes. 30

Q To whom did you make that payment? A I have forgotten just whether it was made through—I think it was made through Mr. Reeve; I am not quite sure about that.

Q And did you execute a bond and mortgage? A Yes.

Q Now, have you told us all of the conversation had with Mr. Smith respecting this alleged agreement for bonus? A Yes, sir. 40

Q You have told us all of the conversation. Did you agree at any time prior to his employment or subsequent thereto, to give him half of your profits in building? A No, sir; never.

Q Had you any conversation to that effect with him at any time? A No, sir. Never.

10 Q Had you any arrangements with him or any conversation with him respecting the payment of any bonus of $100— A Never; no, sir.

Q —per house? A Never; no, sir.

Q Was the sum of $100 ever mentioned? A Never mentioned in my hearing.

Q Was there any mention of the sum of $50 per house from him? A No, sir.

Q What was meant when you said that the bonus—you told him you were to give him a 20 bonus, so you would help him to buy a house. Was there anything ever—was there a statement like that by you? A No, sir; just simply as I said, it was a voluntary thing that I am very apt to do with my men—for instance, if a man in my employ wants to own a house, or garage, and they are not saving or economical, I say, "If you break the record on that, you know, you get a little extra on that." I have 30 done that a good many times—paid them extra when I thought they were working faithfully on a thing, and getting it done on time.

Q What was the salary of Mr. Smith when he was employed? A I think it was $4.00 a day when he first came there, Mr. Smith, if I remember right. Of course my son can tell you all these things—these little details. I cannot remember figures exactly, but he had it all down there in his books, and he can tell you accurately.

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Q What was your arrangement then with Mr. Smith about the carrying of this house? Tell us that. A Why, after making this first payment, now, he said, "I want you to take out so much per week." That was to pay the interest and taxes and the insurance, and he had my son figure it out just what it would be, and we took that out at his request, so much per week.

Q Do you remember how much that was? A Why, I think it was $4.00 or $5.00—something like that, Mr. Smith. As I said, the figures are all there, and you can— I think it was $5.00, or something like that first.

Q You have heard the testimony of Mr. and Mrs. Smith respecting the alleged conversation with you at their home, or near their home, in which you are alleged to have stated, or they said you stated that from that point on, they would have $50 per house. Do you remember the occasion of talking with Mr. and Mrs. Smith about this arrangement? A I remember talking with Mrs. Smith; I remember her leaning out of the window when I was out in the yard, because they had a very nice little vegetable garden there, and Fred occasionally would give me a few tomatoes or a boquet that was raised on the place there, or something of that kind, and Mrs. Smith—and I said, "Well, we are getting along very nicely with this, and," I said, "I am going to give Fred a little something extra on this thing, and," I said, "any house this year that I make anything on—that there is anything in, why, I am going to give him $50." There is where the $50 story originated.

Q When was that conversation? A I couldn't tell you exactly, but it was a long time after Mr. Smith was employed by me.

Q Have you since that time, Mr. Balch, had any conversation or made any other arrangements with Mr. Smith respecting the payment of additional money to him? A Why, of course, as I said, I obligated myself for the $750 I met at the time it was due.

10 Q He had nothing to do with that, as I understand? A No, he had nothing to do with it.

Q You paid the $750 on the mortgage when it fell due? A Yes.

Q I want to know whether you have had any other conversation or arrangement with him, with Mr Smith, since the house was purchased, respecting any bonus agreement or arrangement? A No, sir; none whatever, until this notice was served on me to appear in court.

20 Q You mean the subpoena in this suit? A The subpoena in this suit; yes, sir.

Q What happened then? A I took it to him, and I said, "Fred, what does this mean?" "Well," he said, "I have been advised to do this." He said, "My home has been a regular h— for the last six months."

Q Did he say "h—"? Tell us what he said. A Well, I tell you, Fred never swore in my presence. I have heard him swear, but he never

30 swore in my presence, and I knew what he meant right away. He said, "They are at me continually at home, and it has been a regular h—, my home has been," and he said, "I was obliged to do it."

Q Had there been any other conversation between you at any other time about this payment? A No, sir.

Q That you remember? A No, sir; none whatever. He seemed to be perfectly happy, and

40 told me on many and many occasions, that I

was better to him than his own father, and it breaks my heart to think a man that I have done as much as I have done for him could do such a thing of this kind. I have treated him like my own children—I gave him just the same as them. When I got a turkey for my family, I gave him just the same. I clothed him in rubber from head to foot. He never would take any physical care of his condition at all. I did everything I possibly could, same as I look after my own children.

Q What were Mr. Smith's duties in your employ? A Foreman of the carpenters. He was the oldest man—that is, the first man engaged, and therefore he started the first, the same as the man who is foreman to-day is the next oldest, and he is foreman.

Q What are the foreman's duties? What does he do more than an ordinary journeyman? A As I said, I had implicit confidence in Fred, and I used to let him do lots of little things.

Q What did he do on this job? A He was foreman of the carpenters.

Q We are not carpenters, and Mr. Reed would like to know what that means. A For instance, Fred had charge—his particular part was attending to the framing of the buildings—putting up the frames.

Q Who hired the men? A I did sometimes—in this way, now: Mr. Smith would come to me, and I would say, "All right, Fred, take them on," but I engaged every man that came on on that job. That was my own system. I was there from seven o'clock in the morning until the last Italian went home at night.

Q Did Mr. Smith draw plans for the construction of these buildings? A Mr. Smith

never drew a set of plans in his life, except these little floor plans that has been shown in my suit case, that I copied from other places; I had Mr. Joseph Harch draw me about five plans; I had Mr. Englis draw me two or three plans; I had—what is over here in Montclair, that architect—Mr. King draw up one plan, and Mr. Lucius Main draw up place for me, and then we had some plans from the West.

Q You had plans for your buildings? A Yes.

Q Were any of these plans used for more than one building? A Oh, sometimes a dozen; we just simply made little changes that I would suggest to Mr Smith.

Q I show you a couple of pieces of beaver board; what are these? A Those are the plans that I spoke of.

Q We have been speaking of plans by another architect; what are those? A They are changes from some plans we have built from.

Q Who did this work? A I think this is Mr. Smith's own drawings here.

Q Did he make any other plans besides that kind? A No, sir.

Q How were they; did he ever draw any plans on paper? A Oh, he has drawn these—some of these on paper, as well as this (indicating beaver board). The reason we substitute the paper with the beaver board is because they would not tear so quickly on the building.

Q What is the purpose of plans like that? A That is just to show the changes; you see we were to design the houses from the same plans, with just a little alteration here and there that I would suggest.

Q Did Mr. Smith's duties take him on any other work besides carpentry work? A Yes; if I would send him to do certain things, he would do certain things, you know, but that was his work—just the foreman of the carpenters.

Q Now, Mr. Balch, you mentioned a moment ago something about Mr. Smith doing work for himself; tell us about that, please. A As I said, I tried every way that I possibly could to put every dollar in his pocket I could. I tried to put every dollar in his way, and I let him take these outside things, and he took two or three jobs outside—let him have credit down in the yard, furnished the lumber; I knew it was $2.00 or $3.00 profit for him, and I let him go ahead at the work that he was doing. Wolfe would come down two or three times and had quite a talk with him, and I never objected to that, or Fred going up there; things would happen and he would come after him, and he would go up and straighten these things out; he had lots of little chances, and I let him go on his own work; I never refused him a thing while he was on the job.

Q You don't know, Mr. Balch, of your own knowledge about the payments of interest and the bookkeeping charges against Mr. Smith's account and the payment of taxes upon that property? A No, my son attended to all that.

Q Do you know that the payments were made? A Yes.

*Mr. Tyacke.* What payments do you mean?

*Witness.* Interest and taxes and on the mortgage, and so on. In looking over the time book the other day, I noticed many a

place where the charge is marked, four days and a half, in his own handwriting, and my son figured it out as six days, or five days as six days; holidays, I paid him for holidays, and he would go over to work for the milkman, and take a gang of my men over there; he was getting paid by me. I knew it all the time—I suppose he didn't know I knew it. He took those people from their work on those sheds for the work over there, and I was glad of it. I didn't care.

Q Now, Mr. Balch, what is the present status, if you know, with respect to this real estate occupied by Mr. Smith? A I couldn't tell you anything about it, Mr. Smith. As I said, I have been in it, I think, once or twice in the last several years.

Q Mr. Reeve you heard testify this morning, didn't you? A Yes.

Q Mr. Reeve stated that you said in his presence on an occasion driving from Millburn to Madison that you had paid Mr. Smith, or he said you said something about having paid Mr. Smith $100 a house; do you remember that occasion? A I remember the occasion Mr. Reeve and Mr. Lord—

Q Just tell us about that. A I don't remember anything of that kind. I am not in the habit of publishing my business to outsiders.

Q Tell us what happened. A I told him I was getting that home for Fred. Mr. Reeve told me about how happy Fred seemed to be over the transaction; but as far as mentioning any of the details of the thing I never mentioned it to anyone.

Q Did you say to Mr. Reeve or any of—or in his presence, anything about having paid the complainant a bonus of $100 per house? A No, sir; no, sir. I never mentioned $100 in my life.

Q Did you say anything about any arrangement that was made with the complainant, to Mr. Reeve at any time? A No, sir; I said nothing at all. I knew the only interest he had in there was the commission end of the job; I didn't know Mr. Reeve; I think that was the first time I met him; I wouldn't be very apt to tell anything like that to an entire stranger, if there was anything in it at all.

Q Did you at any time, Mr. Balch, ever tell Mr. Smith that there was any amount coming to him on account of this alleged bonus agreement? A No, sir.

*Mr. Smith.* I move to reserve the right to recall this witness after I have proved this account by his son, because I want to ask him about some of the items of it after the account goes in.

*The Court.* The rule is to exhaust each witness at the time, but if it is a matter of convenience—

*Mr. Smith.* Then I would like to withdraw this witness and put Mr. Balch, Jr. on the stand.

EDWARD C. BALCH, Jr., being recalled, having already been duly sworn, testifies as follows:

*Direct examination* by Mr. Smith.

Q You are the son of the defendant in this case? A I am.

Q I think you have testified that you took care of the financial part of the defendant's business, so far as the erection of buildings is concerned? A I do.

Q Are you familiar with the account kept with Mr. Smith? A Yes.

10 Q Will you produce your book in which that account is contained? A (Witness produces book.)

Q This is the whole business? A This is the book, all we paid and charge accounts—all of that.

*Cross examination* by Mr. Tyacke.

Q What is this book? A That's a ledger.

Q And whose handwriting is that? (Indi-
20 cating.) A Mine.

*Mr. Tyacke.* I object to any loose leaf ledger going in evidence, or used as a memorandum, even.

*The Court.* On the ground that it is loose leaf?

*Mr. Tyacke.* Loose leaf, yes.

*The Court.* I don't think it is objectionable on that ground. Of course, a ledger is
30 merely an index, as a rule; if this is a book of original entry, it is admissible.

Q Is this a book of original entry? A That particular one is, yes.

Q What do you mean, "that particular one?" A That one you have in your hand.

Q And what are these entries? A They are various charges against Mr. Smith.

Q And what are these items? (Indicating.)
40 A They are his credits.

Q Have you any other book showing any credits or anything? A As I explained, this is an original, but this is a continuation (indicating two books). This only goes up to a certain date, and this (indicating second book), went from that time on, and this is not the book of original entry. This is a ledger to which the items have been posted from the books of original entry. 10

Q Where is the book of original entry that these items are taken from? A From various books, journals, cash books—

Q Why is it you have one book of original entry and one is not? A This (indicating) is as we started; this is a system that has been started at a later time, from that book to this (indicating).

Q Where does this book start from? A From what date to what date? A July 17, 1909, to December 31, 1913. 20

Q That is the book of original entry? A Yes.

Q And then the ledger which is not a book of original entry takes it from that later date to the present time? A From that later date to the present time, yes, sir.

*Mr. Tyacke.* I object to the second book, of course. 30

*Re-direct examination* by Mr. Smith.

Q Have you the original entry that that book is posted from? A Yes, we have.

Q Get those out. A (Witness produces book).

*Mr. Smith.* We have vouchers for almost all of these large items, and we will produce all these vouchers, and that will get away with this book business. 40

Q Take the first item of your account, Mr. Balch. Have you any checks in connection with the transfer of the property to Mr. Smith—any vouchers?

*The Court.* Items of charge or items of credit?

10 *Mr. Smith.* Items of charge.

A $4,250, July 17, 1909.

Q What does the first item represent, Mr. Balch? Read it and explain it. A That is the house and lot, Chestnut street, $4,250.

Q What does that mean? A That is the purchase price of that house and lot.

Q And what does the entry mean? A It means that Fred Smith is indebted to my father

20 $4,250 for house and lot.

Q Next item? A Insurance, three years, means that there was a three years' insurance policy, placed on the house, amount $18.75.

Q Who paid that? A I did.

Q Have you any voucher for that? A Unfortunately, I have not.

Q What is the next item? A Taxes, 1909, $44.29.

30 Q Going back to the insurance item, was the policy issued upon that property? A It was.

Q And was it in force for three years? A It was.

Q That policy was where? A It was in the possession of the mortgagee, as usual. You could not put a mortgage on the property without the insurance policies.

Q Now, the taxes—

*Mr. Smith.* Do you object to that—1909?

40 *Mr. Tyacke.* No.

Q What is the next item? A Y. Headley, search, $68.20.

Q What does that mean? A It means Mr. Headley searched the property to see if the title was clear, and other searches in connection with the transfer.

Q Who paid them? A My father paid them. 10

Q Have you got the voucher for that? A Yes.

Q Produce that. A (Producing paper.) Here is Mr. Headley's check.

Q That is your check. A It is a bill; that is more than one item.

Q What is the next item? A Six months' interest.

Q How was that computed? A Six months' interest, January 15, $37.50.

Q At how much per year? A At 5%. 20

Q $3,750 was the amount of the mortgage? A $93.75—

Q Was $3,750 the amount of the mortgage at that time? A $3,750 was the amount of the mortgage at that time.

*Mr. Smith.* Is there any question about that?

*Mr. Tyacke.* No.

30

Q Now, the next. A July 15, 1910, six months' interest, $93.75.

*Mr. Smith.* Do you object to that?

*Mr. Tyacke.* No.

Q September 23, cash $25. Have you got a voucher for that? A No, I have not.

Q What was that? A It was a loan to Fred, then; I remember the occasion. Somebody died, and he wanted some money to buy a new 40

suit of clothes, and he came to me, and wanted to know if I would let him have $25.

Q It was a time a child was born? A That I cannot recall; these are two $25 items.

*Mr. Tyacke.* There is one item of $50 we allowed credit for.

10 *Mr. Smith.* That makes $50 altogether, these two items?

*Mr. Tyacke.* $50 we allowed. There is one item of $50 allowed.

Q Now, the next one. A "December 8, taxes for 1910, $44.60."

*Mr. Smith.* Is that admitted?

*Mr. Tyacke.* Yes.

20 Q Next. A "January 15, 1911, six months' interest, $75.00." That's on $3,000.

Q That was after the $750 was paid? A Yes.

Q So that you charged him reduced interest? A Reduced interest.

*Mr. Tyacke.* All right.

Q Go ahead. A "July 15, six months' interest, $75."

30 *Mr. Tyacke.* Admitted.

*Witness.* October 11, radiator fittings, $133.94.

*Mr. Tyacke.* Admitted. Hereafter you will consider the items admitted unless I object to them.

*Witness.* Taxes, 1911, $39.15. January, 1912, six months' interest, $75.00. There is an item of cash, "John O'Rourke Company, coal, $54.09." I have a bill here, with a

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memorandum of an item on John O'Rourke Co.'s books, showing that detail, and a paid check to the order of John O'Rourke Company for that amount, paid by Mr. Balch—Mr. Balch's check.

July 15, 1912, six months' interest, $75.00. September 23, 1912, insurance, $18.75. That's the end of the three-year period. Taxes 1912, $40.32. January 15, 1913, six months' interest, $75.00. January 15, 1913, six months' interest, $75.00. December, taxes for 1913, $51.84; total debits, $5,461.43.

Q Now, give the credits. A Giving the credits, we have July 17, 1909, by commission, $500. Then there are various items of deduction from this weekly wage. You want me to give those?

Q Yes. A By 4 payments at $5.00, $20.

| | |
|---|---|
| 4 in September, | 20. |
| 5 in October, | 25. |
| 4 in November, | 20. |
| 5 in December, | 25. |
| 4 in January, 1910, | 20. |
| 4 in February, | 20. |
| 4 in March, | 20. |
| 5 in April, | 25. |
| 4 in May, | 20. |
| 4 in June, | 20. |

July 30, 1910, by commission, check to Lord—that's the payment of the mortgage, $750. Five payments at $4.00, $20.

| | |
|---|---|
| 4 in August, | 16. |
| 5 in September, | 20. |
| 4 in October, | 16. |
| 4 in November, | 16. |
| 5 in December, | 20. |

| | |
|---|---|
| 4 in January, 1911, | 16. |
| 4 in February, | 16. |
| 5 in March, | 20. |
| 4 in April, | 16. |
| 4 in May, | 16. |
| 5 in June, | 20. |
| 4 in July, | 16. |
| 4 in August, | 16. |
| 5 in September, | 20. |
| 4 in October, | 16. |
| 4 in November, | 16. |
| 5 in December, | 20. |
| 4 in January, 1912, | 16. |
| 4 in February, | 16. |
| 5 in March, | 20. |
| 4 in April, | 16. |
| 5 in May, | 20. |
| 4 in June, | 16. |
| 4 in July, | 16. |
| 5 in August, | 20. |
| 4 in September, | 16. |
| 4 in October, | 16. |
| 5 in November, | 20. |
| 4 in December, | 16. |
| 4 in February, 1913, | 16. |
| 4 in March, | 16. |
| 4 in April, | 16. |
| 5 in May, | 20. |
| 4 in June, | 16. |
| 4 in July, | 16. |
| 5 in August, | 20. |
| 4 in September, | 16. |
| 5 in October, | 20. |
| 4 in November, | 16. |
| 4 in December, | 16. |

Q What is the total of these credits? A The total of credits were $2,217.

*Edward C. Balch, Jr., re-direct.*

*By Mr. Tyacke.*

Q I understand that you said at the start $5.00 and then $4.20? A Yes, per week.

*By the Court.*

Q Now, was there a balance from the old book carried forward—of how much? A $3,-244.43 and the balance on the new book appears as $3,304.33. That was an error corrected at a later date to $3,244.43. 10

*By Mr. Smith.*

Q Now, we are down to December 31, 1913; the new book is January 2, 1914. A Taxes, 1914, $46.56.

Q What is the date? A It was paid December 2; it was charged December 2nd. December 31, interest for the year ending 12/3, $165.22. 20

Q How do you get that item? A The interest for that year has been figured on the balance as it appeared on the books, $3,304.43.

Q So that you gave him credit— A I charged him $165.22.

*Mr. Tyacke.* I object to any items of interest being charged on the balance due, as there were earnings by the complainant during that time which would reduce the net indebtedness, and also that he had been paying interest on the mortgage. 30

*The Court.* It is a matter of argument, I think, Mr. Tyacke.

*Witness.* The payments were supposed to take care of interest on this balance.

*Mr. Tyacke.* This item of $165 is improper.

40

*Mr. Smith.* I want it shown that you don't question that we paid the interest on the mortgage?

*Mr. Tyacke.* No, we do not.

*The Court.* That interest is calculated on a false balance, anyway.

10 *Witness.* Yes, it is calculated on the balance as it appears on the book.

Q Go ahead. A You want the credits of what year?

Q December 31, 1913. A Credits. These are by payments, February—he was credited on February 27, $32. That is 8 payments.

| | |
|---|---|
| March 20, | $12. |
| March 27, | 4. |
| 20 April 3, | 4. |
| April 10, | 4. |
| April 17, | 4. |
| April 23, | 4. |
| May 2, | 4. |
| May 8, | 4. |
| May 16, | 4. |
| May 22, | 4. |
| May 29, | 4. |
| June 5 | 4. |
| 30 June 26, | 12. |
| December 36, | 104. |

making these payments from that date at $4.00 a week, you can readily see, making all the entries at $4.00 a week is too tiresome. At the end of December, 1914, the total deposits were $3,516.21; no, the total credits were $204, carried a balance of $3,312.21.

Q Go ahead; take up the next charge item. A August 4, 1915, insurance, $18.28. December 31,

40

taxes for 1915, $44.40. December 31, interest for one year to 12/31, $165.64.

*Mr. Tyacke.* That item I also object to.

*Witness.* The credits for that year; June 30, 26 weeks at $4.00, $104; December 31, 26 weeks at $4.00, $104. The total charges at the end of the year, $3,541.13; total credits, 208, leaving a balance of $3,333.13.

May 15, 1916, there is an item marked "jobbing" for $92.95, which doesn't appear in the statement at all because it was paid.

Q What was that? A It was material he used on some work on one of these outside jobs he was finishing, and he got stuff from some of father's buildings, for which I rendered a bill and which he paid.

Q You charged that and he paid it? A Yes; June 30, six months' interest, $83.32.

*Mr. Tyacke.* That item I object to.

*Witness.* August 23, check sent to John O'Rourke Company for coal bill, $148.13. December 6, taxes, 1916, $47.28. December 30, six months' interest, $81.29.

*Mr. Tyacke.* I object to that item of interest.

*Witness.* Total charges, $3,786.10. Credits: January and February, $32.00. There is a cash item of $92.95 dated May 4th. April 30,—March and April payments, $36.00.

Q What does that mean? That is $4.00 a week. June 03, May and June, $36.00. June 30, an entry was made to correct this error, $60.60.

Q When was that error made? A That was an error we brought forward this balance in the new book, and the 60 cents here, (indicating), June 03, 1916, bonus, $183.13.

Q Why was that? A Father told me to pay a coal bill, and he was going to pay it out of his own pocket, and it was not to be charged to his account, and I wanted something to show this—

Q All right; go ahead. A December 30, 12 payments, at $4.00, September 16, $48.00. Total credits, $453.68, leaving a balance due as of January 2, 1917, $3,332.42.

Q That's the balance that is still due on your books? A Yes. The books specify that.

*Mr. Smith.* I offer the pages referred to in evidence.

Received in evidence and marked Exhibit D-6.

OLIVER J. BROWN, being duly sworn on his oath, according to law, testifies as follows:

*Direct examination* by Mr. Smith.

Q You are employed by Mr. Balch? A Yes sir.

Q In what capacity? A I am Mr. Balch's foreman just at present.

Q How long have you worked for him? A Since 1910.

Q Do you know Mr. Smith? A Yes sir.

Q How long did you work for Mr. Smith, for Mr. Balch? A Up to September 15th.

Q What was Smith's job?

*Mr. Tyacke.* I don't think there is any dispute regarding that, Mr. Smith. Mr.

Smith said he was foreman, and we understand he was foreman.

Q What were Mr. Smith's duties with Mr. Balch while you were there?

*Mr. Tyacke.* I object. How can a subordinate tell what were the duties of his superior? 10

*The Court.* He can tell what he did, what duties he performed.

Q What duties did he perform? A Outside construction.

Q What kind of construction? A Putting up houses, the construction end of it; none of the inside or finishing end.

Q What trade? A Nothing more than a carpenter. 20

Q What did he have to do in the mason work if anything? A Nothing that I know of.

Q What did he have to do in the way of plastering work? A Nothing that I know of.

Q How about the steam fitting, steam heating and the roofing? A The roofing was all shingle, anyway.

Q You know of Mr. Smith's duties, so far as drawing the plans were concerned, did you? A Floor plans, if you call that a plan. 30

Q What did he do with respect to drawing the floor plans? A Just nothing; he made floor plans, that's all. No elevations, if that is what you call plans,—(indicating), a piece of board,—a piece of beaver board, or whatever happened to be handy.

Q Did Mr. Smith ever, to your knowledge, upon leaving, try to get men to leave Mr. Balch? A Yes.

Q Tell us about that. A. 40

*Mr. Tyacke.* I object. I don't see what that has got to do with it; not that it makes any difference, but what's the use of cumbering the record with something that is immaterial?

*The Court.* It may possibly be material. The question was asked of Mr. Smith, and I suppose this is for the purpose of contradicting or perhaps to show an animus, and for either of these, if that is the purpose of it, I will admit it.

Q Tell about it, Mr. Brown. A About the men leaving?

Q Yes. A Well, he wanted the men to leave, that was all; if he did not get what was coming to him,—he claimed he had some money or something coming to him from Mr. Balch.

Q Do you now perform the duties formerly performed by Mr. Smith? A Yes, sir.

Q You have his job, have you? A Practically, yes sir.

*Cross examination* by Mr. Tyacke:

Q Who did he try to get to leave? A Myself.

Q What did he say to you? A Well, he wanted to know if he left,—something—if the men would leave with him when he left,—if he left, would they stick with him and leave Mr. Balch in the lurch.

Q Was that all he said? A That was practically all.

Q Do you hire men? A Under Mr. Balch, —I tell Mr. Balch I want men, and Mr. Balch and I see a man come along and ask for a job, and he tells me on the side to hire him.

Q Do you keep their time? A I keep their time.

Q Do you set their rate of employment? A Not exactly, no.

Q Do you pay them off? A No.

Q Did you ever order any goods? A Yes.

Q How? A By telephone, or slip to Mr. Eddie Balch, either one. 10

Q Do you put in a requisition? A What?

Q You know what I mean by requisition? A No, I do not.

Q You put in an order? A Yes, in the order book.

Q If you want goods from the hardware store, do you order them without consulting Mr. Balch? A Little odds and ends.

Q You have that authority? A Not exactly; I just simply take it. 20

Q Do you ever figure on work? A Yes.

Q You do? A Yes.

Q How many years' experience have you had as a contractor? A Well, as a contractor, of you come down to a contractor, I have worked in the business since I was eighteen.

Q How many years' experience have you had? A Well, perhaps you can do it a little quicker than I could; I have been in the business since eighteen and I am now thirty. 30

Q Have you ever figured on any big contracts? A No.

Q Have you ever figured on any houses? A No.

Q Did you ever draw plans for houses? A Yes.

Q What kind of plans? A Elevation and floor plans.

40

Q Did you ever see Mr. Smith drawing plans in his home? A No, never in Mr. Smith's home.

Q Then you don't know whether he drew plans or not in his home? A Not in his home. The only thing I ever saw Mr. Smith doing was
10 building up, the construction; he was Mr. Balch's construction man six or seven years.

Q And that is a specialty by itself, isn't it? A Yes.

Q You know that Mr. Smith drew floor plans, though? A No, Mr. Balch would say he wanted a certain thing and they would both get together, and they would say, "We will have a room here and there" and then they would get hold of a piece of beaver board and it would be
20 rubbed out and changed around the same as Mr. Balch and myself now.

Q You saw all that going on? A What I said, but not all.

Q You didn't see it all? A How could I see it all? I wasn't with Mr. Smith all the time.

Q You are testifying what he did there. A I am testifying what I seen him do.

30 Q You are still foreman for Mr. Balch? A Yes.

Q A good job? A Yes.

Q Mr. Balch was around to these places every day? A Yes.

Q All day long? A Yes.

Q Did he use to do that with Mr. Smith? A Yes.

Q All day long? A Yes.

Q Was there more than one house going up
40 at one time? A Quite a number of them.

Q Were you on all the houses at the same time? A That's an impossibility. How could I be on all the houses at the same time?

Q Were you? A I was in one house, and after I was through with that house, I would go on another house.

Q At one time, you were only at one house? A At one time. 10

Q And Mr. Balch was at that house you were in? A Oh, no; Mr. Balch was around on all the jobs.

Q How do you know? A Because our jobs were on the place; I could see.

Q Then you would keep a watch out for Mr. Balch, and keep track of the boss? A Not necessarily.

Q How would you know where Mr. Balch was? A Would a person be around looking at the wall, or would he look out of the windows once in a while? I don't know what Mr. Balch did. 20

Q You saw him there occasionally? A Yes, I saw him there.

Q Occasionally? A Yes.

*Re-direct examination* by Mr. Smith.

Q Did you ever draw any plans for Mr. Smith when he was there, Mr. Balch? A Yes, if you want to call it plans. 30

Q Did he ask you to do it? A Yes.

JOSEPH J. TURNER, being duly sworn on his oath, according to law, testifies as follows:

*Direct examination* by Mr. Smith.

Q Mr. Turner, what is your business? A Licensed plumber. 40

Q Where do you work? A All over, anywhere I can get it.

Q Are you employed by Mr. Balch? A Yes, sir.

Q In what capacity? A Doing all his plumbing and the heating.

10 Q How long have you been doing that? A About six years.

Q Did you come into Mr. Balch's employ while Mr. Smith was there as an employee? A I came into Mr. Balch's employ under Mr. Yale, by Mr. Yale.

Q Was Mr. Smith employed by Mr. Balch at the time? A Yes, sir.

Q Mr. Smith has testified that he hired you—

20

*Mr. Tyacke.* Is that proper direct examination?

*The Court.* I will admit it.

Q Mr. Smith has testified that he hired you, Mr. Turner; is that true? A No, sir.

Q Who hired you? A Mr. Balch, as far as doing that plumbing was concerned.

Q What were the duties performed by Mr. 30 Smith while he was in Mr. Balch's employ, so far as you observed them?

*Mr. Tyacke.* I object; how can he tell?

*The Court.* He can tell what he saw him do.

A He oversaw all the carpenter work; as far as the rest of his work is concerned, he has always had different heads to it.

Q Did he have anything to do with the 40 plumbing work? A No, sir.

Q Just tell us about how the plumbing work was done. A Of course, I would go ahead and draw my plans, and file them to conform with the Sanitary Laws of the Board of Health, and of course, I would have to go to Mr. Balch to find out the style fixtures and other things he wanted in the house, and of course I would purchase them and install them. 10

Q What had Mr. Smith to do with your branch of the work, if anything? A Nothing.

Q Nothing? A No, sir.

Q Do you remember the occasion of Mr. Smith quitting Mr. Balch's employ? A Yes, sir.

Q Did he say anything to you at the time about your leaving and your men? A Why, yes; he spoke to me one day. He asked me if I was going to leave with him, and I told him "no." 20

*Cross examination* by Mr. Tyacke.

Q You still do Mr. Balch's work? A Yes, sir.

Q And you hope to continue to do so? A Yes, sir.

Q Naturally; and you said you drew plans also? A I draw all my plans. 30

Q And what do you do, what work for Mr. Balch? A I furnish Mr. Balch with labor and materials.

Q What's that? A I furnish Mr. Balch with labor and materials.

Q And drew your own plans? A Why, certainly.

Q And who was it gave you the levels? A Why, Mr. Balch.

Q Mr. Balch? A Yes, sir. 40

Q And every time you wanted to get any levels or anything, you went to Mr. Balch? A Why, certainly, as far as the fixtures are concerned.

Q You know Mr. Balch is a practical builder? A Mr. Balch is the man I have to
10 go to, as far as my knowledge of the work is concerned.

Q Did you ever receive any order from Mr. Smith, signed with Mr. Smith's initials? A No, sir; all the orders I got were from Mr. Balch.

Q You never received any order for materials or making any estimates from Mr. Smith? A No, sir; the only thing, if anyone needs an estimate of my plumbing work, I would give it
20 to Mr. Balch.

Q Did Mr. Smith ever give you any instructions or any orders for any material? A To buy material?

Q Yes. A No, sir.

Q And he never estimated on any work for you? A No, sir; the only time I ever had any dealings with Mr. Smith was one time I done a house for him, which he took contract for when he was working for Mr. Balch; I had to do what
30 he said,—I gave him his price.

Q Mr. Smith never asked you to figure on any work for Mr. Balch? A No, sir, because any work I figured on for Mr. Balch, I would go to Mr. Balch for. He had nothing to do; he would tell me to get a price on it.

Q Mr. Smith never asked you to do that? A No.

Q You are sure of that? A No; I figured, —I never had anything to do with Mr. Smith.
40 If Mr. Smith told me to go to Morristown and

get a price for Mr. Balch, I wouldn't do it; Mr. Balch was the man I was working for; I wasn't working for Mr. Smith.

GEORGE ROBERTS, being duly sworn on his oath according to law, testifies as follows: 10

*Direct examination* by Mr. Smith.

Q What is your trade, Mr. Roberts? A Carpenter.

Q Who do you work for? A Edward C. Balch.

Q How long have you worked for him? A Four years.

Q Were you employed by Mr. Balch while Mr. Smith worked for him? A Yes, sir. 20

Q Yes? A Yes.

Q And you worked under Mr. Smith, did you? A No, sir.

Q What was Mr. Smith's performance of duties, so far as you observed it, during his employment? A I know he had no jurisdiction over me.

Q Now, what did he do? What were his duties? What did he do? A His duties were to come and tell me what I should have to do. 30

Q Do you know anything about his duties respecting any other branch of the work besides the carpenter work? A No, positively.

Q How long have you been a carpenter? A About 42 years.

Q Had considerable experience in carpentry work? A I have done nothing else. 40

Q Would you be willing to give your opinion as to Mr. Smith's ability as a carpenter?

*Mr. Tyacke.* I object.

*Mr. Smith.* The reason for that question, your Honor, is, here is a man who is suing upon an agreement which he has alleged to be, not only an actual one, but a very just one, not only because of the duties that he performed, but the ability that he had. The purpose of that question is to show you by a man who has had 40 years' experience, that the complainant was a very mediocre workman.

10

*The Court.* The point is whether a certain agreement was made. It doesn't make any difference what class of workman he is, if the agreement was made. Of course if the agreement was not made,—that's really the vital question. The only way this could be material at all would be to show the probability of such a contract having been made.

20

*Mr. Smith.* So far as his ability, as the ability of the complainant is concerned, if he was such an extraordinarily able man, they would pay a great deal more—

30

*The Court.* I don't believe it is going to be of a particle of weight, but I will receive it; it might be considered material. I will receive it, subject to the objection.

Q (Last question read as follows): Would you be willing to give your opinion as to Mr. Smith's ability as a carpenter? A Why, yes.

Q Give it. A I should not consider Mr. Smith a first-class carpenter.

40

*George Roberts, cross.*

*By Mr. Tyacke.*

Q What is that? A I should not consider Mr. Smith a first-class carpenter.

Q Should not? A No, sir.

*By Mr. Smith.*

Q Who hired you? A Mr. Balch. 10

Q Were you hired into Mr. Balch's employ more than once? A Yes, sir.

Q On each occasion, who hired you? A Mr. Balch.

Q Did you ever see Mr. Balch around the jobs? A Yes, sir.

Q How much did you see him? A I always saw him, any time; practically there all the time, in one place or another. 20

*Cross examination* by Mr. Tyacke.

Q You are still working for Mr. Balch? A Yes.

Q You say Mr. Balch hired you? A Yes.

Q And Mr. Balch fired you; is that the idea? A I suppose so.

Q And you have been 42 years a carpenter? A Yes, sir.

Q Are you a foreman? A I have been. 30

Q Are you a foreman now? A No, sir.

Q And Mr. Smith is a foreman? A I don't know what he is.

Q But he was foreman there? A Yes.

Q But he was not a carpenter 42 years? A I don't know anything about Mr. Smith.

Q And you don't think he was a first-cless carpenter? A No.

Q You are the gentleman that said you would color your testimony? A I did not. 40

Q Didn't you say you would hurt him with your testimony if I would subpoena you? A I did not. I said perhaps I would not help him, help Mr. Smith if I was on his side, but I should tell the truth.

Q And you said you should color your testimony? A I did not.

Q I don't think that a man that has been 42 years a carpenter, and hired and fired—A So far as that, I was not fired; simply no more work. I guess Mr. Smith knows what that means.

Q They kept the best workmen when their work was slack?

*Mr. Smith.* I object.

*Mr. Tyacke.* He has qualified as an expert.

Objection sustained.

*Re-direct examination* by Mr. Smith.

Q Mr. Roberts, you were subpoenaed in this case when it was up before the Vice Chancellor, by Mr. Smith? A Yes, sir.

*By Mr. Tyacke.*

Q Why didn't you appear? A I did appear.

Q And why did you say, in answer to that subpoena, about not wanting to testify?

*Mr. Smith.* To whom?

*Mr. Tyacke.* To me.

*Mr. Smith.* Did you serve it?

*Mr. Tyacke.* He was present. He was present in Court that day. What did you tell me in the presence of Mr. Smith and Mr. Balch?

*Witness.* I said I did not think I would be any use to Mr. Smith; that's what I said.

Q And that you would hurt us by your testimony? A I did not say I would hurt you.

Q And didn't you say you would color your testimony if I insisted upon calling you? A I did not say I would. I said a person could do so if they wanted to, and you said, "You would?" and I said, "I would not." You misunderstood that. 10

THOMAS FITZSIMMONS, of full age, being duly sworn on his oath, according to law, testifies as follows:

*Direct examination* by Mr. Smith. 20

Q Mr. Fitzsimmons, what is your trade? A Mason.

Q Who do you work for? A Mr. Balch.

Q How long have you been working for him? A Three years and two weeks, or three years and three weeks.

Q What is your particular job in the mason work? A My particular job, I take charge of plastering, and when contract jobs come in, I figure on them and run them. 30

Q Are you what is known as a mason foreman? A Yes, sir.

Q Were you employed by Mr. Balch while Mr. Smith was there? A Mr. Balch hired me.

Q Did you work on the same job with Mr. Smith? A I plastered.

40

Q What did Mr. Smith have to do with your work, if anything? A When I went there, why, he told me I would have to take the end of the mason work now, and it was up to me, if anything went wrong, I was the one that put up with it.

10 Q Did he have anything to do with the way your work was done? A Why, no, he never had anything to do with my work.

Q What did he do, so far as you observed his actions? A He ran around to the carpenters, went around the different jobs,—maybe came in once a day, maybe a week, I wouldn't see Mr. Smith.

Q Who hired the masons? A I did.

Q Did Mr. Smith ever hire any masons? A

20 Not while I was there.

Q Did you ever see Mr. Balch around the jobs? A Why, yes; I saw Mr. Balch in the mornings, and I saw Mr. Balch, he would come in the house once a day, and might not come in for two or three days, where I was.

Q Did Mr. Smith ever come to you for estimates on mason work? A Yes; I have to take home plans and figure up the contracts for Mr. Smith; Mr. Smith asked me to figure up this

30 here work.

Q On the Balch job? A There were two jobs on Euclid avenue; I took plans home and I drew them, the next day on the Wanamaker job, I took the plans of that home and figured them up.

Q Do you remember the occasion of Mr. Smith's leaving Mr. Balch? A Why, yes.

Q Did you have any conversation with him about that time and about that subject? A

40 Why, yes, I believe I did.

Q What was that conversation? A Why, I asked Mr. Balch to let me off for a few days to build a chimney and plaster a house for Mr. Herrick, and in the mean time, why, this Fred, —Mr. Smith was about going to leave, and I was building a chimney outside, and Mr. Herrick sent for me and told me to come to his bungalow and figure up a job for them, and I said, Mr. Smith was going to leave at noon time. I said, "What?" He said, "Fred is going to leave this afternoon. Didn't you know it?" I said, "If I know he is going to leave, the boss don't know it." He said, "Don't you think he is foolish?" I said, "I don't know." We figured up the job and I left there quarter to twelve.

Q Have you given your conversation with Mr. Smith or in his presenec? A I told Mr. Herrick, "Mr. Smith is going to leave." He said, "Yes; my lawyer advised me to leave; the boss don't know it," he said; "I will send my resignation in with Nicholas."

Q What was said, if anything, by Mr. Smith about anyone else leaving? A He didn't ask me to leave; when we were figuring on this work, he asked me if I would take up the end of the mason work with him and Herrick partners, and so did Mr. Herrick. I figured up a couple of—

Q Did he ask you to leave? A He didn't ask me to leave Mr. Balch, but he asked me if I would take up the end of the mason work, their mason work.

EDWARD C. BALCH, JR., recalled:

*By Mr. Smith.*

Q Mr. Balch, you heard Mr. Smith's testimony this morning respecting his request to

you regarding this amount due him, did you? A I heard it in a general way; I didn't get all of it.

Q Mr. Smith's testimony, as I recall it,—correct me if I am wrong,—was that he asked you each year as to how much was due him,—I think it was that he asked you each year as to how much was due him, and whether a statement could not be had. Did you at any time since 1908, during the past nine years, have any conversation with Mr. Smith about any amount that might be due him?— A Only once.

Q —from your father? A Only once.

Q Now, tell us about that. A It was when they were building some house on Mountain avenue, and he at that time, owed us, or John O'Rourke Company, some money, and I went up there to see if he could not arrange to pay it,—it had been standing quite a while, and the answer he gave me, he asked me if there wasn't something coming to him. I told him I didn't know there was anything coming to him, but if he thought there was, he had better see father right away. That's the only time.

Q When was that? A That was—I couldn't tell you without referring to the records, but when they were building the house on Mountain avenue.

Q Approximately when? A I should say it was about 1915.

Q Can you refer to your records? A Yes.

Q Please determine it from your records, as far as you can. A I have a memorandum here that I made when I looked it up some time ago.

*Mr. Tyacke.* What memorandum is that?

*Witness.* It is just a memorandum of when this house was built, Mountain avenue.

*Mr. Tyacke.* Why did you make that memorandum?

*Witness.* Because I recalled him speaking to me about this, and I knew probably something would come up. 10

Q Referring, Mr. Balch, to the original memorandum that you refreshed your recollection from—A That was from my books, when these houses were being built.

Q Look that up; tell us as near as you can when that conversation took place. A July 1914,—I should—I said it was the summer of 1914.

Q That was the only conversation that you have had with Mr. Smith on that subject? A That's the only one. 20

Q Do you know anything about the original agreement upon which this suit is brought? A Absolutely nothing.

Q Mr. Balch, have you taken from your records a list of the houses which have been built between July 1908 and July 1916? A I have.

Q I show you some sheets of paper; are these the records? A They are. 30

Q Are these correct, to the best of your knowledge? A They are.

Q And what do they show? A They show the house numbers—every house that we started, we gave a number arbitrarily, one right after the other. It shows the location, the approximate date it was started, and the approximate date it was completed; also whether or not it was sold, and to whom it was sold. 40

*Mr. Smith.* I offer these in evidence.

*Mr. Tyacke.* I don't think there is any objection.

*The Court.* Book of account from 1909 to 1913 will be marked Exhibit D-1.

Book of account from 1913 to date will be marked Exhibit D-2.

List of houses erected from July 1908 to September 1916 which is admitted by consent will be marked Exhibit D. 3.

*Cross examination* by Mr. Tyacke.

Q Are you employed by your father? A No, I won't say I am employed by him.

Q You work for him? A I work for him.

Q And he pays your salary? A No, I get no salary from him.

Q You get no salary from him? A No.

Q You work for nothing? A No; I get remuneration, but no salary.

*Mr. Smith.* I object to this line of examination.

*The Court.* It may show interest.

*Mr. Tyacke.* What's the difference between remuneration and salary? I don't know.

*By the Court.*

Q You mean one is money consideration, and the other is not necessarily so? A I get some money consideration and some other things.

Q You do your father's work? A I take care of his accounts.

*By Mr. Smith.*

Q You are employed by him? A If you put it that way.

Q And he pays you either remuneration or salary or wages? A Yes, that's the idea.

*By Mr. Tyacke.*

Q Where did you get the items on these slips to make the charges in these books? A What slips have you reference to? 10

Q To make these charges in D-1 and D-2? A Very few of these are made from slips.

Q Now, for instance, on July 17, 1909, you credited Mr. Smith by commissions, $500. How did you get that item? A My father told me to make out a check for $500, and it was to be applied on that house he was buying for Fred.

Q You made an entry July 17, 1909, "By Commissions, $500." How did you come to make an entry like that in the books? A Because the money had been paid out. 20

Q Then when you paid money out, you credited Mr. Smith; is that the way you do bookkeeping? A No.

Q Why did you credit Mr. Smith with that item, "By Commissions $500?" A Because it was to apply on his house; father made him a present of it. 30

Q Made him a present of— A So I understand,—buy a house for him,—made him a present of $500.

Q Why didn't you say, "By present, $500?" A I don't know.

Q Who told you to say, "By commissions, $500?" A Nobody.

Q You simply wrote in here, "Credit by commissions," without any instructions? A Absolutely. 40

Q Simply a notion out of your mind? A If you put it that way.

Q July 13, the year 1912, "By commissions, $750." How did you come to make that entry?" A Same reason as the other. Didn't know what to call it.

10 Q Had to call it something. A Had to call it something.

Q So you called it "Commissions?" A Yes.

Q What is your idea of a commission—what is your understanding of what a commission is? A Why, I don't know what the dictionary definition is. I understand it is something, it is remuneraton paid to somebody for what they have done.

20 Q Something earned? A Yes.

Q And didn't your father tell you to make that entry that way? A No, he did not.

Q He did not? A Absolutely not.

Q You had no instructions about making that entry? A No instructions whatever.

Q And you had no instructions about making the entry of $750? A No.

Q How did you happen to get these two items
30 of $750 and $500? A $500 was the first payment on the house; $750 was the amount called at the end of that year, June 30, I think, on the mortgage.

Q Why didn't you make any other entries of commissions in here? A Why didn't I?

Q Yes. A Because there were not any.

Q How do you know? A Well, if I had known them, I would have put them in.

Q And did your father ever say anything to
40 you that there were other items? A No.

Q He only told you these two? A That's all, absolutely.

Q Why didn't you get some items of commission on this other book? A That coal bill he paid for him, I had to do something with it, as I understood that was a present. It was not to be charged on his account. I had it charged to the account, but he told me he was going to pay for it. 10

Q Who? A Father.

Q What did he say? A He asked me about Fred's coal bill; I had told him he had owed us a coal bill for quite a while.

Q Us? A John O'Rourke a coal bill for some time, and he told him about it, and he called me up and said to charge it to his account. 20

Q And did he say any reason why he wanted it charged to his account? A No.

Q And he never told you about crediting him with any other bonus or commission? A No.

Q Why did you use the word "bonus" then? A The same reason I used the word "commission." Didn't know what to call it.

Q You remembered what you called the other. A Yes. 30

Q Why didn't you say that was commission? A I said I remember, I never thought of looking.

Q You said he only asked you once about the account. A Mr. Smith?

Q Yes. A Only once.

Q And what did he say at that time? A Do you want me to tell you his actual words?

Q As near as you recollect. A I went up there where I told you about, this house on Moun- 40

tain avenue, to see if I couldn't collect this bill, and when I was asking him, he wanted to know if there wasn't something coming to him. I told him I didn't know if there was anything coming to him, if he thought so, he ought to see father.

Q Did he ask you after that about it? A Never again.

Q Have you got all of the books here that have his account in? A I have.

Q You remember that charge book you pulled out and showed one night—you have got a sort of panel in the desk, you can't see, and you took that out, and you take this book out? A I haven't a panel to my desk.

Q You haven't this account in that book? A No books except these.

Q Don't you remember one time after he spoke to you about the bill that had been paid, and you showed him another book? A No.

Q And you looked at that charge book and said it was all right? A I have no recollection of anything of that sort.

Q Now who gave you the slips to make these charges in these books against him? A If you mean this, repair work—

Q Yes. A Mr. Smith.

Q Did your father ever give you any of these items? A Very often.

Q Who sent the items of pay roll? A Mr. Smith kept the time and he marked it in, the days present and absent.

Q Then who figured up the amount? A I did myself, and my assistant.

Q And how often did your father make out these slips? A These charge slips?

Q Yes. A Very seldom made any out; he used to tell me and I would make them out myself.

Q All the requisitions were made out by Mr. Smith? A The requisitions on the repair work, repair slips, yes, these are the only slips he ever made out. 10

Q You know Mr. Smith used to estimate the work? A Little jobs, repair work.

Q And signed your father's name to it, per F. L. S.? A I don't know about that—no, because as a matter of fact, he would simply tell father what he would figure up it would come to.

*Re-direct examination* by Mr. Smith.

Q Mr. Balch, you have vouchers for many, if not all of the payments shown upon the debit 20 side of that account? A I have.

Q You have them here? A Right here.

Q Ready to be produced to the Court? A Yes.

Q In the form of notes? A Checks and receipted bills.

*By the Court.*

Q Now, Mr. Balch, this correction you made here of the credit of this $60.60, did that cor- 30 rect the interest—A No, it did not; it corrected the transfer of the previous amount from one book to the other. This error—I don't know how it was made, but I discovered it at a very much later date.

Q You didn't correct the interest charges? A No, I did not. There will eventually be a credit for it.

Q I want to get it clear in my mind about these items of $500 and $750; at whose direc- 40

tions did you make those entries? A Nobody's directions. That $500 was the amount that was paid on the house when it was bought.

Q That was paid on the house your father was purchasing for Mr. Fred Smith? A Yes.

Q And you credited the amount of $500 to
10 him? A Yes; I understood he was to be credited with that $500.

*By Mr. Tyacke.*

Q How did you get that understanding? A I can't remember; it was a present to him.

Q From whom, who told you about it? A I presume my father.

Q You have no recollection about it? Of any conversation about it? A No, I can't recall
20 any conversation about it.

Q You can't recall what was said to you about it? A No.

Q All that you do recall is the fact that that $500 entry was made as it is here. A Yes.

Q And that is the same—that is true of the $750? A Yes; that was the amount father was obligated on that mortgage; the mortgage called for a payment of $750 on this date.

Q And he made it. A He met it.

30 Q And you credited it to Smith? A Yes; I understood it was to be credited to his account; that is, he was credited with that amount at the time, he was virtually making him a present of it.

Q How did you get that understanding? A Simply that was the amount due at the time.

Q What did he say, anything about it? A I cannot recall that he did.

Q Can't recall anyone saying anything about
40 it? A No.

Q And you can't recall how you got the idea that it was to be a present? A No.

Adjourned to Thursday, April 26, 1917, at ten o'clock in the forenoon.

IN CHANCERY OF NEW JERSEY. 10

| | |
|---|---|
| *Between*<br>FREDERICK L. SMITH,<br>*Complainant,*<br>*and*<br>EDWARD C. BALCH,<br>*Defendant.* | *On Bill, Etc.* |

20

Continuation of hearing before Hugh B. Reed, Esq., Special Master, at his office, No. 810 Broad street, Newark, N. J., on Thursday, April 26th, 1917, at ten o'clock in the forenoon.

Appearances: Mr. William Tyacke, for complainant. Mr. Frederick W. Smith, for defendant.

EDWARD C. BALCH, previously sworn, recalled. 30

*Direct examination* by Mr. Smith.

Q Mr. Balch, I show you a sheet in your account book which has been marked Exhibit D-1, and call your attention to the item "By Commission $500;" are you familiar with these books? A Not very, because I don't keep the books; my son keeps the books. I am familiar with that item.

40

Q Tell us what you know about that item and how it came to be entered, if you know? A Why I think I went over that before.

Q I am only referring to the entry in the book? A Simply that at that time $500 was the lowest that Mr. Lord would take, so I gave
10 him the $500.

Q I want you to explain about the entry now in the book, how that came to be entered; who did it? A My son.

Q Why did he do it? A I don't know why he did it—why he put it down as commission—I suppose simply to find a word or something of that kind.

Q I am not referring to the words. How did he come to put it down? A Why simply that
20 I told him I would give Fred $500 to start his home.

Q You told him? A Yes, I told him I would give him $500.

Q Now referring to the item of $750 on the same account, what about that? A That, you see, I had to pay; I was obliged to pay that under the agreement—that at the end of the year I would have to pay $750 more. That will show in the mortgage.

30 Q The mortgage will speak for itself. Just tell us about this item? A And in order to do that I was able to get a note at five per cent. in place of six, and I thought that would cost that much, and I agreed to assume that.

Q What do you know about this entry in this book? A The same as the first exactly.

Q Now go down to the item of the coal bill? A Mr. Smith said if I would give him this $500, that he would want me to take out five
40 dollars a week to cover his interest and taxes,

and at his own suggestion I took this five dollars out for all this number of years.

Q I call your attention to the entry on the sheet marked D-2 under date of June 30th, 1916. Tell the court what you know about that item and entry. A The coal bill—Mr. Smith wanted some coal that year— 10

Q I don't want to know what he wanted. I want to know how that entry came to be written so far as you know. The item is $148.13. A That is for coal that he owed down there for a long time.

Q Do you know how long? A Probably a couple of years.

Q I show you a bill of John O'Rourke Company to Mr. Smith; will you look at that and tell me whether that is the account that you refer to? A Yes. 20

Q Tell us, if you will, Mr. Balch, what do you know about the account of $148.13 which had been standing for sometime? How long had it been standing? A I couldn't say exactly.

Q Look at the bill? A About two years.

Q Look when it starts? A March 1912.

Q What payments were made on account of it? A If you will give me the figures, Mr. Smith, I don't know anything about the figures 30 because I never kept these accounts here. There is a date that he paid. He paid $50.

Q What date? A January 22nd, 1913.

Q And when was the other payment? A July 22nd, 1913, $23.81.

Q Tell us why this entry was made and why the credit was given of $148.13 as testified to by your son? A Well, I spoke to Mr. Smith about that bill; it had been standing there owing to the O'Rourke Company for a long 40

time. That is the company that I am the president of. I only go there once a year—at the directors' meeting. My attention had been called to it—

Q Tell us about your transactions with Mr. Smith in this matter? A And I asked him
10 about it, and I told him the company had spoke to me so many times about this and we can't afford to carry these accounts so long because we have to borrow money down there and have got to pay six per cent. at the bank for money to carry the notes through the season and if we have hundreds of customers like that we are in trouble. He said he was going to pay something on to it and he finally didn't pay after and my son kept talking to me about it and
20 finally I said he could—I telephoned him not to worry about it; to charge it up to me.

*Mr. Tyacke.* If the Court please, the point was how the entry came to be made. He didn't see it made. He can only testify as to his direction with reference to it.

Q Now, do you know whether or not anything was done subsequent to that direction by your son on the books of the O'Rourke Com-
30 pany. A Yes, my son told me so.

Q And I refer you again to that entry. Do you know whether that is the entry you have been talking about, the balance of it? A Yes, sir; the balance of the bill.

Q And that is credited to Mr. Smith? A Yes.

Q I show you the record marked Exhibit D-3, Mr. Balch, a list of houses as completed; you are familiar with all those jobs are you? A
40 Yes, sir; I am.

Q When were they started and when completed? A I couldn't remember just the exact date.

Q And does that record contain anything about who the houses were sold to? A Yes.

Q Have all the houses been sold? A All of these have been sold except one. Sometimes we have to take the houses back— 10

Q Are you talking about these? (Indicating an exhibit). A Yes, on the first sheet.

It is admitted on behalf of the complainant that the statement therein as to the sale of the houses, to whom they were sold, etc., is approximately correct. The date they were completed and when they were started.

Q What did you say about taking back houses? A I have to take back a number of them. I have taken back twenty houses. 20

Q Of these? A Two of them on the first page.

Q And what is the reason you have taken them back? A Well, they have fallen down on their interest and taxes.

Q How do you sell these houses? A Sell all of them on very easy terms. Of course, a few we have a little better terms on. As I say, we have got to take back some of them. We have taken back twenty of these houses. 30

Q All of those houses represent a profit? A No, sir, some of them represent a loss.

*Mr. Tyacke.* I object. What has that got to do with it.

*Cross examination* by Mr. Tyacke.

Q First, I would like to get at this item of $148.13 and which you have given him credit for and marked "bonus." A Yes, sir. 40

Q Why did you have that marked "bonus?" A Why simply I have a habit of saying to my men "You get this through on time and I will give you an extra bonus." I have done that with several of them.

Q Why did you make it $148.13? A That
10 was the amount of his coal bill.

Q And then at the time you paid the coal bill you gave him a bonus, is that the idea? A It wasn't paid for nearly two years after that but I had the company charge it up to me.

Q And before you charged it to him? A I told him to credit him so as to make their books clear and put it on my books here.

Q You have a charge of $148.13? A Yes.

Q Why is that? A That was the amount of
20 his coal bill.

Q But then you charged it to him? A Yes, he got his coal there.

Q And then you turn round and credit him with that amount as a bonus? A Yes.

Q Why was it that the bonus was credited on June 30th, 1916, and you charge him August 23rd, 1916? A With regard to that entry, I don't know. I told my son at the time he spoke to me to take it off the books and charge
30 it against me.

Q So he gave him credit on June 30th and charged it up to August 23rd? A The dates I don't know anything about. I am not familiar with the exact dating of those because I never keep the books.

Q What is your business, Mr. Balch? A My business, as I explained before, for the past 15 years has been the building business. I have several different businesses that I am interested
40 in, but I spend my entire time at the buildings.

Yes, sir, I haven't had a vacation for twenty years, only three days, giving all my time right there.

Q What other business are you in besides the building business? A I am interested in the John A. O'Rourke Lumber & Coal Company, which my son has charge of. Also of the Orange Screen Company, of which my younger son has charge, and my New York place; my middle son is there. That is where I made my money.

Q What business is that? A Tailoring business and designer. That was my profession.

Q That is where you made your money? A Yes, sir.

Q That is your main business? A No, sir, that was my main business.

Q And when you started to build houses in Maplewood, did you know anything about building houses? A I built my first house twenty-five years ago. I knew very little at that time when I built my first house.

Q Then you are not a practical builder? A I am a practical builder, not a carpenter.

Q What is the distinction? A The distinction is, as I understand it, the same as in my other business. I couldn't sew a button on, I was in the costume business, but I couldn't sew a button on. I did the designing, that end of it. I couldn't sew a button on, but I could get some fine work out there.

Q When you started to build Wolf Jolsen managed it for you? A No, sir, they did not.

Q You managed them yourself? A No, sir, they were kind of large contracts and under-

takings, but through them once before we got the contracts.

Q So you think you are fully competent to build a house? A Yes, sir, with the corps of men I have. I have men, seven experts, that know enough of that kind of work to draw plans.

10 Q So that you rely upon the corps of experts to do your work? A Yes, sir, with my knowledge of designing.

Q And is there any difference between designing a skirt and designing a house? A You wouldn't know the difference when you started to draft the pattern unless you were an expert. The crude drawings are exactly the same—the lines are the same. But I give everything to my men in the rough, because I have

20 people at the screen factory—draftsmen to copy these things—five or six men on the building who know enough of that kind of work to draw plans.

Q I notice you have charged Mr. Smith for $4,250? A That was the price of the house.

Q But you didn't pay $4,250 out? A No, I didn't pay what was required. To start the thing he needed $500.

Q Why didn't you simply charge Mr. Smith

30 with $500 that you disbursed for him? A I don't understand the methods of bookkeeping. I simply gave him $500, that he wanted to start his home.

Q Why did you charge him with that $4,250? A You will have to ask my son about that. That was the price of the house.

Q Don't you run your office as well as the practical end of the business? A No, my son knows about that part of it. I just dictate the

40 things to him.

Q Why did you dictate a $4,250 charge against him? A That was the price of the house.

Q But you didn't pay $4,250 out? A I was to give him $500 and he was to pay for it himself through me; I went his security on it.

Q You didn't pay $4,250 on July 17th, 1909, did you? A No, sir. 10

Q Why did you charge him with $4,250?.

*Mr. Smith.* I object to that.

*The Court.* As I understand it, he became obligated to pay $4,250 for the house about that time, and that was a proper charge against Mr. Smith. The question would be did Mr. Smith receive proper credits as against that $4,250. 20

Q How many houses were completed when you made that credit there on July 17th? A I couldn't tell you without looking at this. (Looking at exhibit D-3). I know those because they were the first nine houses we built.

Q Now wait, how many were completed on July 17th, 1909? A I couldn't tell you that.

Q The record shows when they were completed? 30

*Mr. Smith.* I object to it because the record shows. I don't see any reason why he should answer it.

*The Court.* He can answer from the record if it agrees with his recollection.

A Most of these were completed I believe. They were all in different stages. I don't remember if the finishing touches were put on. We leave one house and go to the next. 40

Q You have a record showing when these houses were completed. Tell me from that record how many were completed before July 17th, 1909? A They must be completed, but I can't remember just what stages I left these houses in.

10 *The Court.* He means to look at the record on the first page. These houses appear to have been completed on this first page —were completed before July, 1909, that is, they were completed according to this record.

A Yes, according to this.

*The Court.* Were there any others? From what appears on the record, there ap-
20 pears to have been nine houses?

A Yes, sir. I think there was about eight or nine houses.

Q Now when Mr. Smith came to you about getting a house, what did you tell him? A I told him that I would assist him. I said, "Fred, go ahead and look around and if you see anything that suits you, come and tell me and then I will go up and look it over and we will see if
30 we can't make some arrangement to start this little home of your own."

Q Was this house, 79 Chestnut avenue, finally decided upon? A Yes, sir, he said that was exactly what he wanted. It was his selection not mine. I said, "All right, if it suits you, I am satisfied and I will help you to get it."

Q And you paid $500 down? A Yes, sir.

Q How much was due Mr. Smith at that
40 time? A Not a cent.

Q So that the $500 was a voluntary offer on your part? A Yes, sir, purely so.

Q And how much was due Frederick Smith a year later? A Not one cent.

Q The $750 was a voluntary offer on your part? A Yes, sir. I was obligated to meet that according to the terms of the mortgage. 10

Q And there is a $3,000 mortgage on the property? A Yes, sir.

Q Have you paid that off? A No, sir.

Q Why not? A Because why should I pay it off when Mr. Smith left there. I wanted to help him out, of course, but he certainly didn't act like a man.

Q Now, Mr. Smith, didn't leave for a number of years after, did he? A No.

Q But you charged him $4,250 for that house? A I think your Honor has explained that. That is the price of the house, and I was trying to help this man pay for his house. 20

Q And there was a $3,000 mortgage on that house? A I was interested in him in every way.

Q And you charged him $4,250? A Yes, sir.

Q And you have credited him only with this $50? A Yes. I went over that, before. 30

*Mr Smith.* We have gone over that before. There is no sense of going over it all again.

*The Court.* I will permit him to go on.

Q And you have allowed that mortgage of $3,000 to stand all this time without paying it off? A Yes, sir.

Q In other words, that makes the price of the house $7,250, does it not? A I can't figure the thing out without— 40

*The Court.* I don't see that there.

*Mr. Tyacke.* He has sold a man a house for $4,250 and charged him for it and there is a $3,000 mortgage that he has never paid off.

*The Court.* In whose name does the house stand?

*Mr. Tyacke.* In defendant's name.

*The Court.* Well, there is a charge against Mr. Smith and he has obligated to buy the house; when he turns it over to Mr. Smith, if he does, he will have to clear it and then lay out the balance of the purchase price.

Q I think you said the interest was paid up to last December or January? A I think it is all paid up.

Q Did you get a letter from Riker & Riker? A Yes, sir.

Q Calling your attention to the fact that six months' interest was due? A Yes, sir.

Q And did you reply to that letter? A I told my son about it and he said it had been paid.

Q And also said they were going to foreclose the mortgage for the principal sum? A This man came to me; I didn't know him and I told him any information that you want you just go to my attorney, Mr. Frederick Smith, and whatever he says is right I will do.

Q In other words, that demand was made on you for the principal sum of the mortgage? A Yes.

Q Why did you take title in your name to that house? A Because, Mr. Tyacke, I was just simply assisting Mr. Smith to get a home

and he was to pay for this house himself you know, and he told me if I would loan him this money that he would let me take it out of his salary, and I did everything there to enable him to build it. I employed everyone of his family, almost. I employed his brother, that wasn't a mechanic. I kept him going all one winter on anything I had to do and paid him for holidays whether he was there or not; had him doing work that I could have had a boy do for less—much less than I paid him. I can safely say I paid him for a hundred days he never worked.

Q What I want to get at is, why didn't you get the title in his name if you wanted him to get a home? A It was his own proposition. That was his own proposition just that way.

Q What was? A That I was to loan him $500 in that way and instead of loaning it I gave it to him.

Q You haven't answered the question yet. Why did you take the title in your name instead of Mr. Smith's name? A Because if I was loaning him $500 trying to secure a home for him, why wouldn't I take the mortgage in my name.

Q Did you loan him this $500? A Yes, sir.

Q A little while ago you said it was a gift? A I turned it over to him. I gave it to him, but this was the understanding. He said he wanted a home and I said, "Look around and see what you can do and when you see one come to me," and when he found what he wanted he came to me. I said that I would help him.

Q Then you deducted an amount each week for the taxes, insurance, etc.? A At his request.

Q You never asked him to pay the balance, did you, on that house? A No.

Q Never asked him? A No.

Q And did you ever tell him that the mortgage ought to be paid off? A No, I didn't. He kept telling me all the time that his expenses
10 were big and things of that kind and I was trying to throw extra things in his way, but he never saved a cent.

Q Then he kept telling you all the time he needed more money? A No, he told me that his expenses are big and how he used to turn over every cent to his wife. She used to send a boy there; I paid Saturdays; she used to send a boy down for his money every Saturday morning and he would give it to him.

20 Q And he kept asking you all the time—telling you he wanted more money? A Never told me he wanted more money in his life. He had a steady job there with me. I had seven men working for me and I had a hard job taking care of them one winter. I carried him all one winter when he was only doing a boy's job, which would pay two dollars a day, running a little gas engine, in order to keep him on the job. That was the year of 1913 and 1914, when I had only one
30 house all winter and I planned to keep these men. I panelled every room downstairs, the library, the dining room and the hall and the living room. It took me all winter, and I planned to keep my men going. I felt he couldn't do that kind of work and I let him run that gas engine. His brother couldn't do it.

Q You say you never promised him a bonus? A No, purely voluntary. I gave him these things afterwards. Why, that is all there was to
40 it. I would say, "Fred, now if this thing turns

out all right, why I will give you a little bonus on this house or that house. I never in my life thought of such a thing, because I lost money on some of them. For a business man to say, "I will give you fifty dollars on a house or a hundred dollars" is perfectly absurd. I have lost $3,000 on some. Why on Margaret E. Sangster's house—her son wasn't able to meet the notes—I lost $3,000. I had to take the house back and I could name several of those kind.

Q Now, Mr. Balch, on what particular houses did you promise him a bonus? A I didn't promise him. On one or two houses, I said, "Now Fred, if I make anything, I will give you a little extra." I have got men that I do the same with today. I tell them I will give them four dollars extra that week if they do anything on time. I say, "I will give you an extra bonus"—a two and a half gold piece. Purely voluntary. I never promise anything, Mr. Tyacke.

Q So that you do occasionally promise a bonus? A Yes.

Q And are you apt to forget that you promise that bonus? A No, sir, I am not.

Q Do you remember telling Mrs. Smith that you were going to pay Mr. Smith a bonus? A I told Mrs. Smith if things went all right I would give him a little bonus.

Q Did you tell her how much it was? A There was no amount stated at all.

Q You don't know why your son put in the word "commission" there, do you? A Simply to have a name to call it by. That is all. He called it "bonus" in some places and "commission" in others, just simply to have a name. He didn't know what to put.

Q And he asked you if he would credit it or charge it up to you? Did he ask you? A No.

Q He simply did it of his own volition? A You mean, what word to use there?

Q Yes. A No, he didn't ask me what word to use there.

10 Q So that he put down the word "commission." Just put it down. A Yes, merely used "bonus" in some places and "commission" in others.

Q Have you any idea what these houses cost to build? A Yes.

Q What? A Some of them cost $5,000, and some of them cost $6,000, and some of them cost $10,000.

Q And the house that cost $5,000, what would you sell it for? A It all depends on the cus-
20 tomer entirely. I told you I made a fair profit on some and others I lost money on some. I never could tell exactly what I made on a house because as I say, I have taken twenty of them back. Sometimes after ten years I have to take the house back, or something of that sort—some would die. I have never foreclosed a mortgage in my life. I would take them back where there were widows to help them out.

30 Q Now, you spoke about the John O'Rourke Company; that you went to Mr. Smith and told him that the O'Rourke Company had hundreds of his kind and needed the money; that they were borrowing money at six per cent. A Yes, I told him that. That they couldn't afford to carry this account along.

Q That they were borrowing money from the bank at six per cent? A Yes.

Q And at the same time that you personally, Mr. Balch, owed them several thousand dollars?
40

A Oh, yes, sometimes it would run up to two or three thousand dollars, and then I would pay them as the loans came in. I would borrow from the Fidelity Trust Company and get the money in my name. My money was tied up in second mortgages.

Q So while you were asking Mr. Smith for $148.13 you owed the O'Rourke Company several thousand? A I might not have owed them a cent at that time. My son kept the thing straightened out in that way. 10

Q Did you or your son ask Mr. Smith for this money? A My son did and I know I did.

Q You are speaking now of this item of $148.13, that is the one? A Yes.

Q And you had your son charge it up to your personal account? A Yes, I told him to cross it off the books and charge it up to me. 20

Q And did you tell him what to do with it on the Frederick Smith account? A I just simply said to charge it. He knew that. He knew to put it on the book here.

Q You mean to charge it to Frederick Smith? A Charge against his account so much.

Q How did he come to make the credit item? A I can't tell all the details of his bookkeeping. 30

Q You didn't tell him to give him credit for $148.13? A Yes, I think I did afterwards. I didn't care anything about it. My object was to help that man and if he had tried to help himself, I would have done anything for him.

Q After you told your son to charge $148.13 to Frederick Smith, then you told him afterwards to credit him that amount as a bonus so 40

that the books would balance, is that right? A Yes.

Q Why was the credit slip made in June and the debit slip in August? A I don't know anything about it.

Q You remember this factory that Mr. Smith built for you? A I remember the factory that I built.

Q Mr. Smith had charge of it? A Mr. Smith was the foreman of the carpenters on the job.

Q And there are big timbers there? A Yes, sir.

Q And you had no mechanical power there to saw those timbers? A Yes, block and fall.

Q Man power? A Yes, sir.

Q Mr. Smith superintended that job? A Yes, sir.

Q And what was that factory worth? A Probably cost $8,000.

Q What is it worth? A The building and the land?

Q The job itself; the building and the land and all; if you were going to sell it, what would you get on the market for it?

*Mr. Smith.* I object.

*The Court.* I don't see that that is important.

Q What is the average price of these houses?

*Mr. Smith.* I object to that on the ground that we have gone over that sufficiently to get all the information we want respecting price.

*The Court.* Your claim, Mr. Tyacke is, that Mr. Smith was to receive a certain amount per house regardless of the price,

and that is denied. That is the issue; I don't think there is any claim made on the basis of cost or value.

*Mr. Tyacke.* Not at all. But he has testified that he lost money on them.

*The Court.* Does that make any difference to your claim? 10

*Mr. Tyacke.* I don't see that it does. It isn't important.

*The Court.* Mr. Balch did say that one year he told Mrs. Smith that if everything went well that year he would pay Mr. Smith something in the way of bonus, I think, and with respect to that year and those houses, it might be perhaps pertinent to find out how well things went that year.

*Mr. Smith.* If the Court please, that 20 wasn't testified to on direct examination. There is no record of any conversation with Mrs. Smith; no conversation Mrs. Smith had with Mr. Balch. The conversation was with Mr. Smith at the time this house was purchased. That was the conversation and the only conversation testified to—in June, 1909.

*The Court.* But Mr. Balch did say this morning in answer to a question of Mr. 30 Tyacke that he had made a similar statement to Mrs. Smith. I think I will permit him to inquire about that if he wishes.

Q What was the average price of these houses? What were they sold for?

*Mr. Smith.* I object to that, if the Court please, if he is going into the question of any specific time as to the average price of houses.

40

*The Court.* I think it ought to be confined to the houses; the houses in the course of erection in the year in which the conversation took place. I can't see, Mr. Tyacke, how, under your theory it makes any difference whether the houses—

10 *Mr. Tyacke.* Except for this reason—according to this man's statement, he claims that he didn't make a general contract that way and there may be something lingering in the Court's mind to substantiate that. I want to show that these houses were valuable houses.

*The Court.* We will assume that they were valuable houses.

*By the Court.*

20 Q Now, Mr. Balch, I understand that you said that you never made any agreement which Mr. Smith testified to, any agreement about any specific amount on any house or for the completion of any house? A The only agreement that was made, your Honor, was that he was to receive forty cents a day more than he was getting.

Q And you paid him full wages at all times?
30 A Yes, sir.

Q And the time he worked for you, I think you said was in 1908? A Yes, sir; in the summer of 1908.

Q When you purchased this house for him, did you testify that was about a year later? A Yes, sir.

Q And at the time you bought it you paid down $500? A Yes, sir.

Q And you gave that to him? A Yes, sir.
40 First I was going to loan it to him. He made

all kinds of arrangements to take care of it. Thought that he would be able to take care of the house after that, and then, as I say, I done very well that year and I just made him a present of the $500, bonus as I call it there.

Q When you decided to make that contribution to him, did you speak to your son about it? A I might have. I generally speak to him about all those things, your Honor. I can't remember just what I said. 10

Q Don't remember what you said at all? A No, sir; I said I was going to help him to get a home.

Q And you say on this specific house, you put down $500? A Yes, they wouldn't take any less than $500.

Q Tell us about your conversation with him? A That amount was established. 20

Q What did you say to him? A I told him I would help him get a home.

Q Your son, I mean. A I don't just remember. I told him the circumstances of the whole thing.

Q Told him you were giving it to Smith? A Yes.

Q And told him to enter it in the book? A I didn't tell him. He knew that himself. He knew that he would have to enter anything of that kind. 30

Q You had some conversation with him about it? A Yes.

Q You don't recall what was said? A I don't recall the words that were used.

Q You don't remember whether he said anything about commission? A I generally call these things "bonuses." I don't say to put them in as commission or anything. 40

Q $500, of course, was a considerable amount for a man who had been working for you for only a year to receive. Did you advance that amount to a man that had been working longer than a year? A No, sir; he was the first man.

Q He was the first man? A Yes, sir.

10 Q And had you any other men who had been working for you approximately the same length of time? A They came on later.

Q How much later? A We started to take on men about two or three weeks later.

Q Do you remember whether the men—other men that you employed had been working for you nearly the same length of time that Mr. Smith had? Did you make any contribution among the men generally, or was it only to Mr.
20 Smith? A Only Mr. Smith.

Q Did you talk to Mr. Smith about that $500 that you were going to give him? Remember any conversation you had with him? A We had considerable conversation about it. He seemed so delighted to get this thing started—a home of his own.

Q What did you say to him about the gift of $500 to him, if anything? A I think I told him at that time I would loan it to him, but
30 I am not quite clear on it—whether I said I would loan it or I would help him get that home. That was the first time.

Q Did you say you would give that to him at that time or later? A I can't remember.

Q You can't remember whether you had a conversation with him about it at all? A We had a lot of conversation about the house, and I told him I would help him.

Q Nothing more specific than that. You
40 didn't state that you had given him or would

give him $500? A I told him that I would give him $500 to give to Mr. Lord. I would make that first payment.

Q A moment ago you said that you were loaning it to him. I want to know whether you told him that you were going to make him a present of it? A I don't remember. 10

Q At any time since then have you told him? A Yes, I told him several times since that.

Q What did you say about it when you spoke of it to him? A I think I told him that I did pretty well that year.

Q Remember when that conversation took place? A Around the time that he was looking about at the houses. I told him to go ahead and look around and if he saw what he wanted 20 and made up his mind, I would stand back of him and help him to get this home.

Q You had done well the year previous to the time that you purchased the house? A Yes, sir.

Q What did you say to him—about the gift to him of this $500? A I can't just remember the drift of what I said.

Q Very well. From that time on you charged him the interest and taxes on the house? 30 A That interest business—I know that he said at the time if I would loan him this $500 that he would take care of this and he requested me to be sure and take out the five dollars, I think that was the figure; that five dollars was to cover the interest.

Q You charged him interest on the balance of the purchase price; that would be $3,750? A Yes, sir.

Q Not on the $500? A No, sir. 40

Q And when you came down to June, 1910, that was eleven months later, you again gave him $750? A Yes, sir.

Q Which was paid on the house? A That I was obligated to do.

Q You weren't obligated to pay it to him?
10 A No, on the house.

Q You had to pay on the house? A Yes, to the mortgagee.

Q What set of circumstances induced you to give him $750 at that time? A I didn't give it to him at that time. I knew I had to meet that.

Q It is entered in this book as a credit to him; June 30th, 1910, that was about the time you paid it, wasn't it? A I think so; around
20 that time.

Q Did you instruct your son to enter it as a credit to him? A No, I didn't tell him to enter it. Of course, he had his own method of bookkeeping.

Q He credited it to him? A Yes, sir.

Q He wouldn't have credited it to Mr. Smith unless you told him? A I think, your Honor, that he knew what ideas I had in mind. My son is my confidential man and he knew what
30 idea I had in mind; that I was going to see that man get that home.

Q Did he know your mind as to the extent to which you were to help him? A Only that was the amount that I had to pay, and I think I told him afterwards to enter it any way. I did pretty well that first year.

Q This is the second year? A I did very well also.

Q Was that the reason for your gift to Mr.
40 Smith of this $750 only eleven months after

this $500? A Yes, sir, that was what I had in my mind. Purely to assist him in this thing.

Q Turn to the statement there and tell me how many houses you finished up to that time—the second year? A Twelve.

Q Some of the houses that you built, took more than a year to build practically? A Yes, sir. 10

Q You had a number of houses in June, 1910, which had been started sometime before, which were uncompleted, in addition to those houses which had been completed? A Yes

Q Have you figured the amount that you were going to give Mr. Smith to any extent on the number of houses? A No, sir.

Q No relation to that? A Had nothing to do with that at all. As I stated before I was just anxious to help him. 20

Q You say, that your son knew what you had in mind with regard to it. He knew the extent of your plans to help Mr. Smith in obtaining this home? A Yes.

Q Do you intend to suggest that was the reason why he had entered this payment of June, 1910, of $750 as a credit to Mr. Smith? A Yes, sir. 30

Q You had talked to him, had you? A I suppose I had, as we do over those things.

Q What do you mean? In regard to that he would understand how far you intended to go in getting this property for Mr. Smith? A It would be hard to tell the way that I felt towards Mr. Smith at that time.

Q I want to know your specific intention with regard to that house? A I wanted to see him get that home. 40

Q Were you going to do the same thing each year? A I couldn't tell what years I was going to do that. Some years I had to take back so many houses; on some of these houses I lost and some I made at the end of the year. These first years I had everything pretty nearly my own
10 way in Maplewood. People would come and order houses—

Q From 1910 to 1911, what kind of a year was that? A For two or three years, I had fairly good years.

Q 1910 and 1911 was a good year? A I think it was.

Q You didn't make any contribution to him then? A I think it was a fairly good year. I can't just remember. I know some of those
20 years I had bad times. 1914 and 1913 I had an awful time that winter. I had all I could do to keep the men employed. I planned this house to keep these men going.

Q You still hold title to this house, I understand? A Yes, sir.

Q Who occupies it? A Mr. Smith.

Q After this payment of $750 of course you reduced the charges of interest? A Yes, sir.

30 Q Did you have any conversation with Mr. Smith about this $750 item? A I don't remember.

Q You don't know? A No, sir.

Q Rather a large sum to give a man without saying anything? A The only thing I said, it was there and had to be paid.

Q You kept a charge against him, of course? A Yes, sir.

Q Instead of that, you just gave him the
40 money practically? A Yes, sir .

Q Did you say so to him? Did you tell him they were giving him that amount? A I don't know whether I did or not.

Q At any time? A I can't recollect.

Q Ever have any conversation with him about that $750? A I can't remember having said anything about it. Just that time was the time that he made the remark, as he testified himself, that I was better to him than his own father, and I know I tried to treat him as a son. 10

Q This other item of $148.13; did you talk to him about that? A Yes, I did.

Q You told him you wanted it paid? Did you tell him you would give him the money to pay it? A No, sir, I didn't. I just simply told my son when they were bothering me so much to wipe it off the books—to charge it up to me. 20

EDWARD C. BALCH, JR., recalled.

*Further cross examination* by Mr. Tyacke.

Q Referring to Exhibit D. 2 on February 27th, 1914, there is a credit memorandum there and one word is written over another. What is the first word that is written there? A That I cannot say. I think the word is deduction. I am not sure. It appears to be deduction. 30

Q And the ditto marks, what were those meant to mean? A They represented the same thing.

Q As the original item? A Whatever that is.

Q Now isn't that word "commission"? A No, it is not. For January there were eight weeks at four dollars, makes thirty-two dollars. 40

Q What was erased there? A Nothing erased there (referring to Exhibit D. 1).

Q At the last line where it is written in red December 31st, 1913? A Nothing. The original balance was in lead pencil and it was written over in red ink.

10 Q You have items, Jan. 30th, 1911; Jan. 30th, 1912, and Jan. 30th, 1913, evidently been filled in afterwards or written over? A Written over the dates in lead pencil.

Q Is it customary to make original entries in lead pencil or ink? A Those entries were put in without the dates originally because at the time they were represented by the months following.

Q You say they were put in without any 20 dates? A Except the dates following.

Q What was written under that if there were no dates there? A That was Jan. 30, 1912.

Q When did you make the item in ink? A That I can't say.

Q Why wasn't this made in lead pencil? A I couldn't say.

Q And these other items? A That is the date of the entry, June 30th.

30 Q Have you got a receipt for the last $75 interest paid? A I have. I presume you mean the interest on the mortgage?

Q May I see it?

(Receipt produced.)

*By the Court.*

Q The difference between these dates. Do you recall anything about that? A Last June, father called me up and told me about this coal 40 bill of $148.13 and told me to charge it to him.

Q Told you to charge it to him? A Yes, and in order to charge it to him, I have got to credit it to someone else.

Q You credited it to the O'Rourke Company? A I credited it to Frederick Smith.

Q You credited it to Smith? A Yes.

Q It appears there on the item, "Credit to Fred Smith $148.13, June 30th," as if it had been written over something that looks like August. Have any recollection about that? A I haven't.

Q Do you think that looks like "A u" and the tail of a "G"? A Yes, it does. The only thing I can say is where it shows the letter "J" it also appears to be a "C" under that.

Q Beside the same item showing the place where it was posted? A Yes.

Q That appears to be a "C." You have no recollection about the change in the date? A Except the cash item was posted on August 23rd when it was paid.

Q Your father paid it on August 23rd? A I paid the coal bill by check on August 23rd as he had previously told me to.

Q Under those circumstances, why should you have entered the item as a credit to Smith as of June; why should you change the date there. The item didn't come up in question in this account until August when it was paid by your father? A Because he told me to charge it to him.

Q He told you in June to charge it to him? A Yes, sir.

Q And you transferred it on the books of the O'Rourke Company, from Smith to your father? A Yes.

Q And that was in June. Now, then, you have practically the same thing to Smith on his account in August? A That was when the payment was made and the cash was paid.

Q Then if you didn't pay it at that time and you credited the Smith account with $148.13 then and the account had been closed before the bill had been paid, it would appear that you owed Smith $148 entirely independent of any other item? A If I had charged it to him, then why he would have owed it.

Q If your father paid the bill, the Smith bill, you should have charged Smith up in his account with money that your father had paid on his behalf? A That is what I did.

Q No you credited it? A That was to transfer the accounts; when I paid cash out, then I charged him with it. I was to pay this coal bill to clear it off.

Q You didn't pay it in June? A So far as he was concerned.

Q Can't you see in June you gave him credit of $148 because you credit his account instead of charging it.

*Mr. Smith.* It seems to me that probably the reason I don't understand it is, I don't agree with Mr. Balch's method of bookkeeping. My method would be that the credit item should not have been made until the debit item was made. In other words, they should have been made at the same time.

*Mr. Tyacke.* Simultaneously.

*Mr. Smith.* But according to his theory, as I understand it, as soon as his father told him to credit Smith, he credited Smith.

*The Court.* That would be all right if it was all in the same set of books—double entry bookkeeping.

*Witness.* My father paid his coal bill; he was giving him a present of $148.13. Therefore it should not be charged against it—the sum total of the whole business. 10

*By the Court.*

Q Your father told you to make the charge? A I knew I was going to pay it.

*By Mr. Smith.*

Q Did you advise Mr. Smith by letter? A Yes, sir, and this is a copy of the letter.

*Mr. Smith.* I offer it in evidence.

(The letter from J. O'Rourke Company to Fred Smith, dated July 3rd, 1916, is offered in evidence and marked Exhibit D. 4.) 20

*By the Court.*

Q Mr. Balch, the first item upon the account on D. 1 is $4,250 and that has been discussed; will you tell us why this entry was made? A Because that was sold to Fred Smith; that house and lot.

Q And why did you make such an entry? A When you sell something— 30

Q How did you know anything about it; how did you get your information? A Why from father.

Q Your entry was made from what your father told you? A Yes, sir.

DEFENDANT RESTS.

40

CARL HOFFMAN, called by complainant, being sworn, testified as follows:

*Direct examination* by Mr. Tyacke.

Q Where do you live? A 76 Chestnut street, Wyoming, N. J.

10 Q And you know Mr. Smith, the complainant? A I do.

Q Do you know Mr. Balch? A Yes, sir.

Q Did you buy a house from Mr. Balch? A Yes, sir, my wife.

Q Who had the negotiations; who made the negotiations? A I did.

Q Who made the negotiations with Mr. Balch? A My wife and myself.

Q When you saw Mr. Balch, what happened? 20 A Why, I was looking at two houses Mr. Balch built on Wyoming avenue and I liked one enough to suggest to Mr. Balch to build a smaller one to meet my ideas and also suggested it might be built on the lot in the rear, which is 76 Chestnut street. So my idea was to cut down the size of one of those houses there, which I took more or less as a model. Mr. Balch told me that he would refer—that he would take up my suggestions and agree with Mr. Smith to have plans 30 made up—sketches—and see whether after he had gone over the matter with Mr. Smith he could build a house to meet my ideas for the cost I wanted to expend.

Q And then what? A And then at a later day I saw Mr. Balch when he had the sketches which I understood Mr. Smith had drawn up and he explained to me what it would cost, and I suggested some minor changes which he told me to think over and I took the sketches along with me home and returned them later to Mr. Smith 40

with those wishes which I suggested and he redrew the original sketches to make them meet my ideas and also see whether they could be incorporated in the plans and still remain within my ideas with reference to the cost of the construction.

Q And did Mr. Balch say he was doing the figuring to make the plans? 10

*Mr. Smith.* I object on the ground that it is leading.

*The Court.* You must accept the witness's recollection of what was said.

Q What further was said about the plans or the drawings? A I simply agreed after discussing those plans with Mr. Balch which I had in the presence of Mr. Smith, to accept the proposition as it stood and to arrange for the further details of the plans, that is, the laying out of partitions, windows and radiators, etc., with Mr. Smith which I did. 20

Q And when you went to inspect the building during construction with him, did you take up the matter or talk about it? A With both Mr. Smith and Mr. Balch.

*Cross examination* by Mr. Smith. 30

Q Did you see Mr. Smith draw any plans? Answer my question, did you? A I seen him make the changes which I suggested in the plans.

Q On a blue print? A On a pencil drawing. That was all the plans we had, I believe.

Q What was the drawing made on? A On egg shell or ordinary drawing paper; yellow paper.

Q Did you see Mr. Smith draw the plans that he made the changes on? A No, I did not. 40

Q But you did see Mr. Smith make changes that you suggested in the floor plans, etc., with his pencil? A That is all work I saw him do.

Q Your negotiations as to price and the figures, as I understand it, were had with Mr. Balch? A As to the final price, with the exception of certain changes which I figured with Mr. Smith as to whether they could be put into the plans to meet my ideas.

Q That was change of size? A Change of size and the arrangement of the partitions.

Q What do you mean, partition of rooms? A Yes, and lay out.

Q Mr. Smith's conversation was with respect to the carpenter work, was it, and the partitions? A No, it was with respect to all of the work.

Q As to the size of the building? A The lay out of the plumbing and the mason work as well.

Q Did you see Mr. Balch around the building when you were there as well? A Yes.

Q He was there too, was he? A On two occasions, I am sure I went with Mr. Balch.

EDWARD C. BALCH, recalled.

*Direct examination* by Mr. Tyacke.

Q Mr. Balch, I will show you a photograph and ask you if you recognize that? A Yes, sir.

Q And what is that? A That is the building that I referred where I kept the men all winter long. This is the very building. The only building I had that winter.

Q You had a picture made of that? A Yes, sir.

Q I show you another photograph and ask if you recognize that? A Yes.

*Mr. Tyacke.* I will offer the first photograph.

(First photograph mentioned is marked Exhibit C. 6.)

*The Court.* You say you recognize this, Mr. Balch, and this is a photograph of what house? 10

A The house on Clinton avenue.

(Photograph offered in evidence and marked Exhibit C. 7.)

Q And this was one of the houses that you put up? A Both of these. (Referring to Exhibits C. 6 and C. 7.)

Q And these are photographs of houses erected by you in Maplewood on which Fred Smith was the foreman in charge? A Foreman of the carpenters. 20

ANDREW RENIGAR, called by complainant, being sworn, testified as follows:

*Direct examination* by Mr. Tyacke.

Q Where do you live, Mr. Renigar? A Cranford, N. J.

Q And for whom do you work? A I work for Mr. Balch. 30

Q And how long have you been working for Mr. Balch? A I think the first of January.

Q And after you had been working for him a few weeks did you have any conversation or did Mr. Balch make any statement regarding Frederick Smith? A Only the day I got work from him he mentioned $50 on the houses.

Q And what did he say about fifty dollars? A He said he would give him fifty dollars. 40

*Andrew Renigar, cross.*

Q Give who fifty dollars? A Smith.

Q Fifty dollars for each house? A Fifty dollars on the houses that was how he said it.

*Cross eramination* by Mr. Smith.

Q You say that he said he gave Smith fifty
10 dollars? A That he would give him.

Q That he would give him fifty dollars on the houses? A Yes.

Q That was what he said? A Yes.

Q This was in January of the present year? A Yes.

Q You are Mr. Smith's brother-in-law, aren't you? A Yes.

Q You are the man that was subpoenaed last time and didn't come, aren't you? A Yes.

20 *By Mr. Tyacke.*

Q Did he say he was giving fifty dollars or had given fifty dollars?

*Mr. Smith.* I object on the ground that he is trying to put words in the witness's mouth and the witness has already testified as to what he said. I don't think that question is proper because he is attempting to tell the witness what to say.

30 *The Court.* He can tell all that was said or that he recollects.

*Mr. Tyacke.* You must remember that he is placed in an embarrassing position as well.

*Mr. Smith.* That does not require that you tell him things.

*By the Court.*

Q Where were you and what were the cir-
40 cumstances? A It came up when I went to

look for work. I went over there and asked him for a job.

Q You are speaking now of Mr. Balch? A Yes.

Q You went over where? A Maplewood.

Q And saw him? A Yes, where he was putting up some houses. 10

Q And you talked about getting a job from him? A Yes.

Q Did he employ you? A Yes.

Q How was the conversation brought up about Mr. Smith? A It was brought about—he simply brought it up that was all.

Q Tax your recollection and tell us just what he said about it. Did you mention Smith first or did he? A No, he did.

Q Did he know you were related to him? 20 A I suppose so.

Q Did you tell him? A Yes.

Q You told him? A Yes.

Q Have you told us all that he said about it? A That is all I know of.

Q Repeat again what he did say? A He told me he would give him fifty dollars on the houses.

Q That is all? A Yes. 30

Q Nothing further? A No.

*By Mr. Tyacke.*

Q. You worked for him before, did you not? A Yes.

Q And how long a time? A About two years ago, I think.

40

SAMUEL DAY, called by complainant, being sworn, testified as follows:

*Direct examination* by Mr. Tyacke.

*Mr. Tyacke.* This is rebuttal of what defendant testified as to Mr. Smith being foreman. I don't think it is material, and I don't think the other was except as rebuttal of the other testimony. I don't think that it enters into the question, but I think in justice to us that it ought to go on the record.

*The Court.* Ask your question.

Q What is your business, Mr. Day? A Mason and builder.

Q And where do you live? A 45 Nelson place, Newark, N. J.

Q Do you know Mr. Balch? A Yes, sir; I do.

Q Do you know Mr. Smith? A Yes, sir.

Q Did you ever do any work on Mr. Balch's houses? A I did.

Q And who employed you? A Mr. Smith called at my house.

Q Who gave you orders after that? A Well, I took orders from Mr. Smith because Mr. Balch was there early in the morning and during the day he went away and he was back again in the afternoons, and if I wanted any orders I got them from Mr. Smith; naturally I would go to Mr. Balch if he was around.

Q And how many houses did you work on? A I couldn't just tell you. I suppose some thirty odd.

Q And if you wanted any material what would you do? A Well, I would speak to Mr.

Smith that we had run short and he would see I got it.

*Cross examination* by Mr. Smith.

Q Who made the arrangements, Mr. Day, with you for your actual hiring, your price and every thing? A Mr. Balch. 10

Q And the orders which you took from Mr. Smith were with reference to the plastering of changed partitions or lay-out, were they? A Sometimes there would be a little discrepancy in the plans. The drawings were in pencil, and I would have to take the matter up with Mr. Smith because he would leave it open so as to make it a little larger or smaller. That would have reference to a chimney or fire place.

Q With reference to the lay-out of the building? A Yes, exactly. 20

Q You took your orders from him? A Yes, sir.

Q You hired the masons, in fact, didn't you, with Mr. Balch? A I hired the masons; yes, sir.

Q Smith hired no masons? A I would have to consult with Mr. Smith.

Q What for? A Whether we thought we could get along with what we had or whether we neded more. 30

Q Did you need more men while there? A Yes, sir.

OSCAR YAHLE, called by complainant, being sworn, testified as follows:

*Direct examination* by Mr. Tyacke.

Q Mr. Yahle, what is your business? A Plumber. 40

Q Do you know Mr. Smith? A Yes, sir.

Q Do you know Mr. Balch? A Yes, sir.

Q Have you worked on any of Mr. Balch's houses? A Yes, sir.

Q And whom did you take your orders from? A Well, as a rule, I took them from Mr. Smith.

10 Q Do you know a man named Turner? A Yes, sir.

Q And do you know how he came to be hired to work on the house? A Yes, sir.

*Mr. Smith.* I object.

*The Court.* It is only a preliminary question.

Q Who hired him? A Mr. Smith told me to go and get him.

20 *Cross examination* by Mr. Smith.

Q The orders that you took from Mr. Smith, Mr. Yahle, were with respect to the lay-out of your plumbing work, where you should put the outlets and where you should put the fixtures in the bath rooms, etc? A Well, the houses were different.

Q Answer my question, please. The orders that you took from Mr. Smith were with refer-
30 ence to the lay-out of the building and where you should put the plumbing fixtures, weren't they? A Yes, sir.

Q Who did you make your arrangements with respecting your salary and your actual hiring? That was with Mr Balch, wasn't it? A Mr. Smith told me to see Mr. Balch and Mr. Balch told me he would give me so much a day.

Q Mr. Balch discharged you, didn't he?
40 A No, sir; he did not.

Q Did you leave yourself? A I went away on my own accord. I never was discharged. To tell the truth, I was feeling good and I went away and never went back.

Q What do you mean by feeling good? A I had a little too much to drink.

10

CHARLES WITKOP, called by complainant, being sworn, testified as follows:

*Direct examination* by Mr Tyacke.

Q What is your business, Mr. Witkop? A Stair builder.

Q Do you know Mr. Smith? A Yes, sir.

Q Do you know Mr. Balch? A Yes, sir.

Q Have you ever worked on any of the Balch houses? A Yes, sir.

20

Q And with whom did you do business? A Why, with Mr. Smith and Mr. Balch, both.

Q And who generally gave you the orders for the stairs? A Why, Mr. Smith as a rule.

Q Who O. K.'ed your bills, do you know? A Why, they were mailed to Mr. Balch first off and Mr. Smith put an O. K. on them.

Q Do you know O. J. Brown? A Yes.

Q Do you know where he is working? A Yes.

30

Q And where is he working now? A Why, I suppose he is working for Balch

Q Do you know why he came to work for him in the first place? Why he started to work for him in the first place? A I guess it was through my laying him off. I sent him to Mr. Smith.

*Cross examination.*

Q You don't know about that, do you, Mr. Witkop, of your own knowledge? A Why, I

40

was the man to introduce this Brown to Mr. Smith.

Q That is all you know about it? A That is all I know.

Q You say Mr. Smith gave you orders for stairs, that is, he told you where the stairs
10 were to go in a certain building? A Yes, and order for material.

Q Smith had nothing to do with the building of the stairs, had he? A No, sir; where I had contracts for them.

Q Do you know that Smith O. K.'ed your bills? A Mr. Smith had spoke to me about where to send the letters.

Q Do you know that Smith O. K.'ed the bills? A He gave his O. K.

20 Q Did you see him? A No, I didn't.

Q How do you know he put it on? A I think he marked his initials

Q How do you know? A I can't say positively.

Q You don't know, as matter of fact? A Well, he put his initials on it.

Q You don't know whether he O. K.'ed them from your own knowledge? A Well, he
30 was superintendent.

Q Well, tell us whether you know of your own knowledge whether Smith O. K.'ed any of your bills or not? A No, I can't say.

Q When you said that a moment ago, you said something deliberately false so far as your own knowledge is concerned, because you don't know anything about it? A I didn't see him do it.

Q You don't know whether he O. K.'ed any
40 bills or not. All that you know is that they

sent your bill to Mr. Balch and it was paid, isn't it? A Yes, sir.

*By Mr. Tyacke.*

Q Do you know whether Mr. Smith ever took up any of the items in any of the bills? A Yes, he has. 10

PETER CHIOVARO, called for complainant, being sworn, testified as follows:

*Direct examination* by Mr Tyacke.

Q What is your business? A Mason.

Q Do you know Mr. Smith? A Yes.

Q Do you know Mr. Balch? A I do.

Q Have you ever worked for Mr. Balch? A I have, yes. 20

Q Who hired you? A Mr. Balch hired me and I worked under Mr. Smith.

Q When you first went to work, whom did you see? A I seen Mr. Balch.

Q And what did he say? A To come to work and go to Smith and see what he wanted done. He laid out cellars for me, foundations.

Q Who laid out cellars? A Smith. He was supposed to give me orders, the height of the cellars and where to lay windows and how big and where he put the cellar door. 30

Q If you wanted any material to whom would you apply? A To Mr. Smith.

*Cross examination.*

Q How long did you work for Mr. Balch? A About four years ago; about a year and a half altogether.

40

FREDERICK L. SMITH, recalled.

*Further direct examination* by Mr. Tyacke.

Q I show you two photographs marked Exhibits C. 6 and C. 7. Can you tell me about these? A Yes, sir.

10 Q What about it? A One of them, Exhibit C. 6, is a house that was built over on Center street in Orange and that was taken as a kind of model for this house referred to in Exhibit C. 7.

Q What do you know about this photograph marked Exhibit C. 6? A Mr. Balch's son took that picture and Mr. Balch gave it to me.

Q What did he ask you to do with it? A Build a house as near as I could like it.

20 Q And did you? A Yes, sir, I built this (Exhibit C. 7). That sets up on a bank and that sets down.

Q So that the house (Exhibit C. 7) was built from the picture of a house marked Exhibit C. 6? A Yes, sir.

Q Is C. 6 a smaller house than C. 7? A Yes, sir.

Q Mr. Balch stated that you told him you were having an "H——" of a time at home. Will 30 you tell us what you meant by that? Did you say that to him? A Well, I told him, I was having pretty hard times home. It seems that my wife kept at me for the last year to have a settlement with Mr. Balch so we knew where we stood, and she being a better business woman than I was a business man and she kept at me—in case something would happen to Mr. Balch or me so the thing would be settled, so we knew where we were standing. That is what started 40 it.

*Frederick L. Smith, cross.*

Q And you told him you were having a hot time with the place by not having a settlement of what? A By not keeping the interest and taxes up and know where we stood.

Q When you paid off, did you hand the envelopes to the men individually? A I handed them the pay envelopes—to the majority of the men with the exception of the plumbers and he claimed that the Union required him to have the money in his pocket and he took the envelopes and opened them all and paid his men.

*Further cross examination* by Mr. Smith.

Q This conversation, Mr. Smith, that you have referred to with Mr. Balch, that is the conversation that you mention having just before the settlement was made? A Yes, sir, I believe so.

*The Court.* I would like to ask this witness about his recollection of the items of credit on his account. I don't think that has been touched upon by either one. But it seems to me it is a matter of some importance. Have you any objection?

*Mr. Tyacke.* None whatever.

*By the Court.*

Q Mr. Smith, when this house of yours that you are occupying was purchased, it appears on the books of Mr. Balch there is a credit to you of $500. Did you have any conversation with him about that time or at that time concerning that credit of $500? A Well, the conversation was I had a number of houses built and therefore I had a credit coming to me.

Q Who said that? A Mr. Balch told me.

Q When Mr. Balch made that statement where were you? A On Ridgewood terrace.

Q How many houses did you say you had finished? A I had in the course of erection ten houses at that time. There were ten houses standing up; part of them were finished and part were not.

Q Just what did he say about that? A I
10 told him I wanted to buy a house in Wyoming and he said, "Go ahead and buy it," and I went to Mr.—

Q What did he say about this $500? A I had a number of houses built and I had a credit coming to me.

Q Did he say how much? A We didn't mention at that time, as I remember, how much it was.

Q When was there any conversation about a
20 further credit, if ever? A Why the only conversation about a further credit was when he told me that $750 had been paid.

Q What did he say about that? A He says, "I have just paid $750 on the house." He just told me he paid $750 on the house. That was practically all that was said about it.

Q That was all that was said about it? A Yes, sir, at that time.

Q What was said at any other time? A The
30 idea was—

Q Not the idea—what was said about it? A He told me that $750 had been paid on the house further reducing the mortgage to $3,000.

Q Was that all? A That was all that was said as I can remember it.

Q And when did that conversation take place? A That was a year or so after the house was bought.

Q Well, you continued to build houses, did
40 you not? A Yes, sir.

Q And you continued to pay him interest? A Yes, sir.

Q And according to your theory as you finished each house you were entitled to at least fifty dollars? A That was why we were having that time home.

Q According to your theory, each house you finished, you were entitled to fifty dollars? A Yes, sir. 10

Q I understood you to say you never received it? A Well, I received this $500 and this $750.

Q That covered the houses up until the summer of 1910. But you built houses in 1911. A Yes, sir.

Q Did you ever ask for any credit? A I asked young Mr. Balch how we stood.

Q What was preventing you from demanding what was coming to you in 1911, 1912 and 1913? A I thought when Mr. Balch had the money he was going to pay just the same as he did when he paid the $750. When he had some money on hand I supposed, of course, I was going to get credit on the house. 20

Q You had finished the first year nine and the second year 21. It would appear from this account, Exhibit D. 3, that by the end of 1913 you would have been entitled, according to your own account, to $4,250; that would be 85 houses at 50 dollars each? A Yes, sir. 30

Q That is three or four years ago? A I know it.

Q Notwithstanding that you kept on paying interest, etc., to Mr. Balch? A I did, yes, sir.

Q But according to your contention you had completely paid for the house by that time? A That is the reason we had so much trouble at home. 40

Q Did you have any trouble with Mr. Balch? A No.

Q Never asked him about it? A I thought it would be paid right along.

Q About the time 1914 you must have commenced to suspect that it was not going to be paid? A That was when I began to get worried.

*By Mr. Tyacke.*

Q Why didn't you speak to Mr. Balch sooner?

*Mr. Smith.* I object to that. We have gone over that very thoroughly with what the Court has asked.

*The Court.* I will have to let him put the question in his own way.

A I knew Mr. Balch would pay when he had money to pay and I kind of left it to him to pay at his convenience. That was my idea of it, and things went along until we thought that the house ought to be paid for, and then I told my wife that Mr. Balch would pay for the house—

*Mr. Smith.* I object to what you told your wife.

A (Continuing.) Anyhow, I thought that Mr. Balch would settle up after a while and I would have some money left over to have the house repaired which it needs badly and kept on, and I didn't get anything and in the end I wanted to find out where we stood.

Q You say that was the cause of the trouble at home. What do you mean by that? A My wife was forever nagging at me because I didn't go to Mr. Balch and demand that the mortgage

be paid off the house and why I have no more work.

Q Why didn't you go then to Mr. Balch? A I asked Mr. Balch last summer about it and he said he thought I was well enough away and so I was.

10

EDWARD C. BALCH, recalled.

*Further direct examination* by Mr. Smith.

Q You remember the Carl Hoffman house. What sketches of that house were made by Mr. Smith? A It was copied from another house.

Q What about the sketches? What sketches did Mr. Smith make for that house? A It was simply the same kind of house; copied from another house. It naturally had to be smaller; it sold for $5,500.

20

Q Did you have any conversation with Andrew Renigar in January of this year in which you stated to him anything about the payment of fifty dollars per house to the complainant? A I certainly did not. I am not in the habit of talking to my mechanics about my private affairs.

Q Did you ever talk to Mr. Renigar about this matter at all? A Not to my knowledge. Don't remember saying anything about it to him, I am sure of that.

30

Q Do you remember Mr. Yahle, the man who said he felt pretty good once? A Yes, sir. He was our plumber who was in charge of the plumbing work.

Q How did he lose his job? A Because he was drunk most of the time.

Q Did he leave or was he discharged? A I can't remember, but I know that he was dis-

40

charged because we found him in the cellar paralyzed drunk this time.

Q These two pictures offered in evidence, Mr. Balch, tell us briefly how the picture shown upon Exhibit C. 7 was a model for the picture of the house shown on Exhibit C. 6 and who did the
10 remodelling so far as the plans were concerned. A Well, of course, I am a designer and I stayed there on the job all the time. Mr. Smith, of course, had charge of the carpenter work, but as you notice these are brick houses and the foreman mason had charge of the mason work.

Q Who did the remodelling? A They were both taken from other houses that I built; the only changes are in the exterior.

Q There is no change in the inside? All
20 taken from other plans.

Q Who planned the inside of the two houses; how did you get the plan for the inside of this model house? A Took it from another house.

Q Did you use a new set of plans? A No, used the same plans. It is exactly the same size house as we had built before.

Q You used the same plans for the inside of these two houses? A No, sir. This (referring
30 to Exhibit C. 6), I have made the inside of this house, the layout, I made that at least six times.

Q You have used that in six different houses? A Yes, sir.

Q How about this one, Exhibit C. 7? A I think we made that nearly ten times, with slight alterations.

Q Had Mr. Smith anything more to do with the copying of this house than he had to do on any other job? A No, sir; only the roof was
40 a little different and he had to call Mr. Roberts,

who is an expert on those things, and he helped him on that roof there.

*Further cross examination* by Mr. Tyacke.

Q You gave Mr. Smith the photograph and told him to build a house from the photograph? A I don't think I told him that. I showed him the photograph, and I said, "Now, Fred, this is to be like this house. We haven't made this before."

*Mr. Tyacke.* I wish to move to amend paragraph 2 of the bill to read as follows: "Amend paragraph 2 of the bill to read as follows: 2. On or about June 10th, 1908, one Edward C. Balch, the owner of a large tract of land in Maplewood, N. J., entered into an agreement with complainant to take entire charge of the construction of certain houses to be erected by the said Edward C. Balch upon the site and other tracts of land, and that the said Edward C. Balch would pay the said complainant the sum of $23.10 per week, and the further sum of $100 for each house or building erected under complainant's supervision, to be paid upon the completion of said house or building; and after ten houses had been built by complainant for defendant, defendant informed the complainant that he could only pay the sum of $50 for each house instead of $100 as originally agreed upon, and which the said complainant agreed to accept."

*The Court.* You mean to amend it before I report?

*Mr. Tyacke.* It can be amended any time even after it has been submitted to the Court.

*The Court.* I will have to deal with the pleadings as they exist though. If it makes any difference—

10 *Mr. Tyacke.* I have simply made the amendment $100 for each house and after ten houses had been built $50.

CASE CLOSED.

20

30

40

# EXHIBIT D. 1.

FRED SMITH.

| | | |
|---|---|---|
| July 17/09—House & lot, Chestnut St. | | 4,250 |
| Ins. 3 yrs. | | 18.75 |
| Taxes 1909 | | 44.29 |
| Headley search | | 68.20 |
| Jan. 20/10—6 mo. int. to 1/15— 37.50 | | 93.75 |
| July 15/1—6 " " | | 93.75 |
| Sept. 23—Cash | | 25 |
| Oct. 14— " | | 25 |
| Dec. 8—Taxes 1910 | | 44.60 |
| Jan. 15/11—6 mo. int. | | 75.00 |
| July 15— " " | | 75 |
| Oct. /11—Labor | 27.75 | |
| Radiator & fittings | 97.63 | |
| Fit. & Cty. | 8.56 | 133.94 |
| Taxes 1911 | | 39.15 |
| Jan. 15/12—6 mo. int. | | 75 |
| Cash J. O. R. Co., coal | | 64.09 |
| July 15—6 mo. int. | | 75 |
| Sept. 23/12—Insurance | | 18.75 |
| Taxes 1912 | | 40.32 |
| Jan. 15/13—6 mo. int. | | 75 |
| July 15— " " | | 75 |
| Dec. 25—Taxes 1913 | | 51.84 |
| | | 5,461.43 |

| | | | |
|---|---|---|---|
| July 17/09—By commission | | | 500 |
| Aug. 27—4 payments to date, Inc. $5.00 | | | 20 |
| 4 " | Sept. | | 20 |
| 5 " | Oct. | | 25 |
| 4 | Nov. | | 20 |
| 5 | Dec. | | 25 |
| 4 | Jan., | 1910 | 20 |
| 4 | Feb. | | 20 |
| 4 | Mch. | | 20 |
| 5 | Apr. | | 25 |
| 4 | May | | 20 |
| 4 | June | | 20 |
| June 30/10—By Com. ck. to Lord | | | 750 |
| 5 payments @ 4.00, | July | | 20 |
| 4 | Aug. | | 16 |
| 5 | Sept. | | 20 |
| 4 | Oct. | | 16 |
| 4 | Nov. | | 16 |
| 5 | Dec. | | 20 |
| Jan. 30/1911—4 | Jan. | /11 | 16 |
| 4 | Feb. | | 16 |
| 5 | Mch. | | 20 |
| 4 | Apr. | | 16 |
| 4 | May | | 16 |
| 5 | June | | 20 |
| 4 | July | | 16 |
| 4 | Aug. | | 16 |
| 5 | Sept. | | 20 |
| 4 | Oct. | | 16 |
| 4 | Nov. | | 16 |
| 5 | Dec. | | 20 |
| Jan. 30/1912—4 | Jan. | /12 | 16 |
| 4 | Feb. | | 16 |
| 5 | Mch. | | 20 |
| 4 | Apr. | | 16 |
| 5 | May | | 20 |
| 4 | June | | 16 |
| 4 | July | | 16 |
| 5 | Aug. | | 20 |
| 4 | Sept. | | 16 |
| 4 | Oct. | | 16 |
| 5 | Nov. | | 20 |
| 4 | Dec. | | 16 |
| Jan. 30/13 —5 | Jan. | /13 | 20 |
| By 4 payments @ 4 | Feb. | /13 | 16 |
| 4 | Mch. | | 16 |
| 4 | Apr. | | 16 |
| 5 | May | | 20 |
| 4 | June | | 16 |
| 4 | July | | 16 |
| 5 | Aug. | | 20 |
| 4 | Sept. | | 16 |
| 5 | Oct. | | 20 |
| 4 | Nov. | | 16 |
| 4 | Dec. | | 16 |
| Dec. 31/13 by Balance | | | 3,244.43 |
| | | | 5,461.43 |

# EXHIBIT D. 2.

NAME, SMITH, F. L. ADDRESS, CHESTNUT ST., WYOMING.

| Date | Items | Fol. | Debits | Balance |
|---|---|---|---|---|
| 1914 | | | | |
| Jan. 2 | To Balance Acc't | | 3,304.43 | |
| Dec. 2 | Taxes 1914 | J 41 | 46.56 | |
| 31 | 1 yr. int. to 12/31 | J 43 | 165.22 | |
| | | | 3,516.21 | |
| Jan. 2/15 | To Balance | | 3,312.81 | |
| Aug. 4 | Insurance | J 69 | 18.28 | |
| Dec. 31 | Taxes 1915 | J 86 | 44.40 | |
| " " | 1 yr. inter. 12/31 | " | 165.64 | |
| | | | 3,541.13 | |
| Jan. 3/16 | To Balance | | 3,333.13 | |
| May 15 | Jobbing | J 108 | 92.95 | |
| June 30 | ~~Amount~~ 6 mos. int. | J 113 | 83.32 | |
| Aug. 23 | Ck. Jo. R. C. coal here | C 101 | 148.13 | |
| Dec. 6 | Taxes 1916 | J 132 | 47.28 | |
| 30 | 6 mo. int. | J 136 | 81.29 | |
| | | | 3,786.10 | |
| Dec. 31 | Fwd | | 3,786.10 | |
| | | | 3,786.10 | |
| Jan. 2/17 | To Balance | | 3,332.42 | |

| Credits | Fol. | Items | Date |
|---|---|---|---|
| | | | 1914 |
| 32 | 6 | By Cash | Feb. 27 |
| 12 | 8 | " " | Mch. 20 |
| 4 | 8 | " " | " 27 |
| 4 | 12 | " " | Apr. 3 |
| 4 | 12 | | " 10 |
| 4 | 12 | | " 17 |
| 4 | 12 | | " 23 |
| 4 | 16 | | May 2 |
| 4 | 16 | | 8 |
| 4 | C 16 | | 16 |
| 4 | C 18 | | 22 |
| 4 | C 18 | | 29 |
| 4 | C 20 | | June 5 |
| 12 | C 22 | " " to date | June 26 |
| 104 | C 40 | " " " " | Dec. 26 |
| 3,312.21 | | Balance | Dec. 31 |
| 3,516.21 | | | |
| | | | 1915 |
| 104 | J 64 | 26 wks. @ 4.00 to 7/2 | June 30 |
| 104 | J 86 | " " 12/30 | Dec. 31 |
| 3,333.13 | | Balance | |
| 3,541.13 | | | |
| | | | 1916 |
| 32 | C 84 | Jan. & Feb. | Mch. 1 |
| 92.95 | C 92 | | May 4 |
| 36 | C 90 | Mch. & Apr. | Apr. 30 |
| 36 | C 96 | May & June | June 30 |
| 60.60 | J 114 | To correct error of Jan. 1 | June 30 |
| 148.13 | J 114 | Bonus | June 30 |
| 48 | C 112 | 12 payments to Sept. 16th | Dec. 30 |
| 453.68 | | | |
| 453.68 | | Fwd | Dec. 31 |
| 3,332.42 | | By Balance | Dec. 31 |
| 3,786.10 | | | |

*Exhibit D. 3.*

# EXHIBIT D. 3.

HOUSES COMPLETED BETWEEN JULY, 1908, AND JULY, 1909.

| House No. | Location | Started | Completed | | |
|---|---|---|---|---|---|
| 41 | 1 Ridgewood Terr., M. | July 1908 | Dec. 1908 | sold | H. E. A. Gibbs |
| 42 | 3 " " " | " " | Mch. 1909 | " | F. Williams |
| 43 | 5 " " " | Aug. " | May 1909 | " | Chas. Bellinger |
| 44 | 7 " " " | Sept. " | Apr. " | " | F. N. Rodman |
| 45 | 9 " " " | Oct. " | June " | " | C. Harrison |
| 46 | 17 " " " | " " | May " | " | G. L. Karch |
| 47 | 19 " " " | " " | " " | " | R. H. Isman |
| 48 | 13 " " " | Nov. " | June " | " | L. Harcourt |
| 49 | 11 " " " | " " | May " | " | R. J. Welzmiller |

HOUSES COMPLETED BETWEEN JULY, 1909, AND JUNE 30, 1910

| | | | | | |
|---|---|---|---|---|---|
| 50 | 15 Ridgewood Terr., M. | Nov. 1908 | Nov. 1909 | sold | A. T. Muir |
| 51 | 24 " " " | Jan. 1909 | " " | " | H. A. Bonn |
| 52 | 21 " " " | " " | Aug. " | " | J. M. Stoll |
| 53 | 22 " " " | " " | Sept. " | " | R. A. White |
| 54 | 23 " " " | Feb. " | Nov. " | " | H. E. C. Rainey |
| 55 | 25 " " " | Apr. " | Apr. 1910 | " | T. A. Barton |
| 56 | 27 " " " | " " | Apr. " | " | C. E. Wilson |
| 57 | 26 " " " | " " | Mch. " | " | W. B. Patterson |
| 58 | 28 " " " | " " | " " | " | W. B. Gilbert |
| 59 | 30 " " " | June " | Apr. " | " | V. S. Beam |
| 60 | 29 " " " | July " | " " | " | G. M. Stoll |
| 61 | 31 " " " | " " | " " | " | E. W. Earl |

HOUSES COMPLETED BETWEEN JUNE 30, 1910, AND SEPTEMBER 16, 1916.

| | | | | | |
|---|---|---|---|---|---|
| 62 | 32 " " " | Sept. 1909 | Oct. 1910 | sold | W. E. Selph |
| 63 | 33 " " " | " " | Mch. " | " | F. H. Taylor |
| 64 | 34 " " " | Oct. " | May " | " | J. H. Kottman |
| 65 | 36 " " " | Nov. " | May " | " | J. P. Wilver |
| 66 | 38 " " " | Dec. " | July " | " | R. H. Muir |
| 67 | 37 " " " | " " | May " | under contract | H. H. S. Phillips |
| 68 | 40 " " " | Jan. " | June " | sold | G. H. Bird |
| 69 | 35 " " " | " 1910 | Aug. " | " | R. H. French |
| 70 | 42 " " " | Feb. " | Aug. " | " | J. A. Dupont |
| 71 | 12 Mountain Ave., " | Apr. " | Aug. " | under contract | T. A. Hazard |
| 72 | 10 " " " | Apr. " | Oct. " | sold | Wm. Auchterlonie |
| 73 | SWS Winthrop Pl., " | May " | Sept. " | under contract | L. P. Bremer |
| 74 | " " " " | June " | Dec. " | " " | W. H. Tennyson |
| 75 | " " " " | June " | Nov. " | " " | W. C. Andrews |
| 76 | " " " " | July " | Sept. 1911 | sold | L. V. & A. V. Oakes |
| 77 | 8 Mountain Ave., " | " " | June " | " | D. M. Cook |
| 78 | SES Ridgewood Rd., " | Aug. " | Feb. " | " | G. H. Stevenson |
| 79 | NES Winthrop Pl., " | Sept. " | May " | " | J. M. Beach |
| 80 | SES Ridgewood Rd., " | " " | Jan. " | " | P. A. Bremer |
| 81 | NES Winthrop Pl., " | " " | May " | " | J. S. de Hart |
| 82 | SWS " " " | " " | June " | " | W. C. Dickson |
| 83 | NES " " " | Oct. " | Oct. " | " | Chas. McIntyre |
| 84 | NES " " " | " " | Apr. " | " | C. W. Soulleyet |
| 85 | SES Ridgewood Rd., " | Nov. " | Apr. " | " | J. E. Denton |
| 86 | NES Winthrop Pl., " | Nov. " | July " | " | H. A. Curtis |
| 87 | SES Ridgewood Rd., " | " " | May " | " | H. M. Jones |
| 88 | NES Winthrop Pl., " | Dec. " | Oct. " | " | Oakes (Barker) |
| 89 | SWS Lenox Pl., " | Jan. 1911 | Aug. " | " | A. F. Carter |
| 90 | SWS Winthrop Pl., " | Jan. " | June " | " | S. A. McConnell |
| 91 | SWS Lenox Pl., " | Feb. " | Jan. 1912 | " | F. T. Ellithorpe |
| 92 | NES Winthrop Pl., " | Mch. " | Sept. 1911 | " | O. S. Baketel |
| 93 | 6 Mountain Ave., " | " " | Oct. " | not sold | |
| 94 | NES Winthrop Pl., " | " " | Sept. " | under contract | E. L. Carson |
| 95 | 2 Mountain Ave., " | " " | Apr. 1912 | " | V. A. Schwartz |
| 96 | Kermit Road " | Apr. " | Sept. 1911 | " | J. A. Hyde |
| 97 | 4 Mountain Ave., M. | May 1911 | Sept. 1911 | under contract | F. A. & M. W. Moore |
| 98 | NWS Maplewood Ave., " | " " | Aug. " | sold | Chas. Kress |
| 99 | SWS Winthrop Pl., " | June 1911 | May 1912 | " | W. H. Wall |
| 100 | SWS Lenox Pl., " | " " | Dec. 1911 | not sold | |
| 101 | SES Ridgewood Rd., " | Sept. " | Mch. 1912 | " " | |
| 102 | 24 Clinton Ave., " | Sept. 1911 | May " | sold | M. C. Heine |
| 103 | 28 " " " | Oct. " | Sept. " | under contract | R. G. Williams |
| 104 | 23 " " " | Nov. " | May " | " " | S. E. Nelson |
| 105 | 30 " " " | " " | Sept. " | " " | A. E. Merriam |
| 106 | 25 " " " | " " | May " | " " | E. Bethel |
| 107 | 27 " " " | Dec. " | Dec. " | sold | R. D. Brown |
| 108 | 26 " " " | Mch. 1912 | Jan. 1913 | " | S. L. Gedney |
| 109 | 29 " " " | May " | Oct. 1912 | " | J. D. Wilson |
| 110 | NES Cypress St., " | June " | Dec. " | " | G. T. Ritchings |
| 111 | 31 Clinton Ave., " | Aug. " | Oct. 1913 | " | V. A. Schoepperle |
| 112 | NES Cypress St., " | " " | Jan. " | under contract | R. Thornley |
| 113 | 33 Clinton Ave., " | Sept. " | May " | sold | L. J. Baiter |
| 114 | NES Cypress St., " | Nov. " | Apr. " | " | F. T. Franklin |
| 115 | 35 Clinton Ave., " | " " | May " | " | G. H. Curtis |
| 116 | 37 " " " | Dec. " | Sept. " | not sold | |
| 117 | 39 " " " | " " | May " | sold | E. W. Martin |
| 118 | 41 " " " | Jan. 1913 | Aug. " | not sold | |
| 119 | 36 " " " | Apr. " | Aug. " | sold | L. H. Patterson |
| 120 | 38 " " " | " " | Oct. " | under contract | R. N. Collyer |
| 121 | SWS Laurel St., Wyo. | May " | Sept. " | sold | H. V. Dunlap |
| 122 | " " " " | May " | Sept. " | sold | H. L. Ball |
| 123 | " " " " | June " | Dec. " | under contract | A. Schierkieson |
| 124 | Walton Rd., S.O. | " " | Oct. " | sold | T. R. Fenner |
| 125 | 34 Clinton Ave., M. | July " | Dec. " | " | P. W. Oetting |
| 126 | NES Grand Street, Wyo. | Aug. " | Sept. 1914 | " | J. N. Small |
| 127 | " " " " | Sept. " | June " | " | W. H. Talmage |
| 128 | " Clinton Ave., M. | Oct. " | Apr. " | " | Bertha Hackmann |
| 129 | SWS " " " | Oct. " | Apr. " | not sold | |
| 130 | NES " " " | Dec. " | " " | sold | Dr. W. D. Knecht |
| 131 | SWS Mountain Ave., M. | Feb. 1914 | Sept. 1914 | under contract | E. E. Litz |
| 132 | " " " " | " " | Nov. " | sold | C. W. Dunlop |
| 133 | " " " " | Apr. " | Sept. 1915 | not sold | |
| 134 | " " " " | June " | Aug. 1914 | sold | F. A. Manneheim |
| 135 | " " " " | " " | June 1915 | " | W. A. Pfeil |
| 136 | " Durand Road, " | Sept. " | Sept. " | not sold | |
| 137 | NES Roosevelt Rd., " | Oct. " | May " | " " | |
| 138 | " Ridgewood Ter., " | " " | Aug. " | sold, under contract | J. V. Beam |
| 139 | SWS Hickory Dr., " | Mch. 1915 | Oct. 1916 | " " | R. D. Brown |
| 140 | NES Curtis Place, " | Apr. " | Nov. 1915 | " " | C. M. Van Aken |
| 141 | NES Euclid Ave., " | May " | Nov. " | sold | F. E. Reeve |
| 142 | " " " " | " " | Oct. " | under contract | C. D. Ryan |
| 143 | SWS Curtis Place, " | June " | Nov. " | not sold | |
| 144 | NES Euclid Ave., " | July " | Nov. " | sold | H. D. Folsom |
| 145 | " " " " | July " | " " | " | Frank Stickle |
| 146 | SWS Euclid Ave., " | Sept. " | May 1916 | sold, under contract | J. S. Stoddart |
| 147 | SWS Hickory Dr., " | Oct. " | Aug. " | sold | J. F. McClure |
| 148 | SWS Durand Rd., " | " " | June " | " | H. C. Howell |
| 149 | NES Roosevelt Rd., " | " " | May " | " | L. B. Nichols |
| 150 | SWS Claremont Ave., " | Nov. " | " " | " | C. E. Ambler |
| 151 | " " " " | " " | Aug. " | " | J. T. P. Kenyon |
| 152 | " " " " | Dec. " | Aug. " | " | LeRoy M. La Vake |
| 153 | SES Wyoming Ave., Wyo. | " " | May " | " | J. & C. H. Maybury |
| 154 | " " " " | Jan. 1916 | Aug. " | sold, under contract | C. W. Nichols |
| 155 | SES Maplewood Ave., M. | Feb. " | Aug. " | " " | Dr. Dougal |
| 156 | SWS Euclid Ave., M. | Mch. " | Sept. " | sold | Dr. W. Holmes |

## Master's Report.

Filed August 11, 1917.

Pursuant to an order of this court bearing date February 28, 1917, whereby it was referred to the subscriber, one of the masters of this
10 court, to take account of the money due to the complainant from defendant, and the amount due to the defendant from the complainant, I do hereby report that I have been attended by William Tyacke, Esquire, of counsel with complainant, and by Frederic W. Smith, Esquire, of counsel with defendant, and have taken the depositions of the witnesses produced before me, and which are returned with this my report, and have considered such depositions and the ex-
20 hibits offered in evidence and marked by me;

And I do find and report that in my opinion it is established by the evidence, that about the month of May, 1909, complainant and defendant entered into an arrangement whereby in consideration of the services rendered and to be rendered by the complainant to defendant, defendant agreed to pay the complainant, in addition to his daily wages, the sum of $50 for each house erected, in the course of erection
30 and to be erected for defendant under superintendence of complainant. Complainant contends that it was agreed that the commissions for the superintendence of the first ten houses should be at the rate of $100 a house instead of $50 a house, but a careful inspection of the testimony of complainant and his witnesses on this point in the various places in which it appears, taken in connection with the allegations of the bill of complaint before the amendment thereto,
40 convinces me that the complainant is mistaken

in asserting that there was any binding agreement that the compensation for the first ten houses should be at the rate of $100 per house. As will be noted, the first credit of $500 was made at the time when the nine houses were finished and the tenth in the course of construction and nearing completion, and paragraph (4) of the bill, as amended, alleges that at the time complainant was about to purchase a home, he was informed by defendant that complainant had a credit with defendant "of $500 on account of ten houses which were then completed."

Defendant vigorously denies that any agreement to pay a bonus or commission to complainant was made, yet the circumstances render it probable. Prior to the employment by defendant of complainant, defendant had been building houses through Wolf & Jilson, complainant's employers, and evidently concluding that it would be less expensive to employ complainant directly, severed his connection with Wolf & Jilson and continued his building operations with complainant in charge. Defendant had a business in New York which occupied most of his time, and evidently depended upon complainant for the supervision of the buildings while he was away. In addition to this, the items of credit of $500 and $750 were entered by complainant's son and bookkeeper, in his book of account with complainant, as "commissions." Defendant testified that his son was his confidential man and knew what he, defendant, had in mind. Defendant in explaining the $500 and $750 items claimed that they were gifts to complainant made because of defendant's deep interest in him and of a generous disposition. The fact that the credit of $500 was made

July 17, 1909, approximately one year after the employment, and the credit of $750 on July 30, 1910, taken in connection with the further fact that at the date of the first credit, nine houses had been completed and a tenth one was approximately completed, and that prior to July 30, 1910, more than fifteen additional houses had been completed, makes it seem probable that these were not gifts but payments.

So far as appears from the testimony, no specific date was set for the payment of the commission earned by complainant for the construction and completion of the houses. The implication is, therefore, that the payment of $50 became due upon the completion of each house.

In stating this account I have for convenience calculated the interest on payments and credits to the fifteenth day of July in each year as that appears to have been the date of the deed for the houses and the mortgage thereon, and between July 15, 1909, when defendant purchased the house for complainant, and July 15, 1914, when the account shows a balance in favor of complainant, I have allowed interest at the rate of five per centum per annum, for the reason that it is the rate at which interest on the bond and mortgage is calculated, and it does not seem to me to be equitable that the defendant should be charged at a higher rate of interest than the complainant is charged on the balance of the purchase price.

I therefore state the account between the parties as follows:

| | | | | |
|---|---|---|---|---|
| | Complainant is debited with the following items: | | | |
| July 15/09 | Purchase price of the house..... | | | $4,250.00 |
| | 3 yrs. insurance premium..... | | | 18.75 |
| | Search, etc. ..... | | | 68.20 |
| | | | | $4,336.95 |
| July 15/09 | Complainant is credited with the following items: | | | |
| House No. 41 | Completed December, 1908. | $ 50.00 | | |
| | Int. from Dec. 31/08 to July 15/09..... | 1.62 | $ 51.62 | |
| House No. 42 | Completed March, 1909.... | 50.00 | | |
| | Int. from Mar. 31/09 to July 15/09..... | .87 | 50.87 | |
| House No. 43 | Completed May, 1909..... | 50.00 | | |
| | Int. from May 31/09 to July 15/09..... | .37 | 50.37 | |
| House No. 44 | Completed April, 1909..... | 50.00 | | |
| | Int. from April 30/09 to July 15/09..... | .63 | 50.63 | |
| House No. 45 | Completed June, 1909..... | 50.00 | | |
| | Int. from June 30/09 to July 15/09 ..... | .13 | 50.13 | |
| House No. 46 | Completed May, 1909..... | 50.00 | | |
| | Int. from May 31/09 to July 15/09 ..... | .37 | 50.37 | |
| House No. 47 | Completed May, 1909..... | 50.00 | | |
| | Int. from May 31/09 to July 15/09 ..... | .37 | 50.37 | |
| House No. 48 | Completed June, 1909.... | 50.00 | | |
| | Int. from June 30/09 to July 15/09..... | .13 | 50.13 | |
| House No. 49 | Completed May, 1909..... | 50.00 | | |
| | Int. from May 31/09 to July 15/09 ..... | .37 | 50.37 | 454.86 |
| | July 15, 1909—Debit balance, | | | $3,882.09 |

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|---|---|---|---|---|
| | Interest on $3,882.09 from July 15/09, to July 15/10.. | | | 194.10 |
| | Taxes, 1909 ..... | 44.29 | | |
| | Int. from Dec. 20/09 to July 15/09 ..... | 1.25 | | 45.54 |
| | July 15, 1910—Total debit, | | | $4,121.73 |
| | Credits from July 15, 1909, to July 15, 1910: | | | |
| | Amt. deducted from wages July 15/09, to July 1/10 inclusive ..... | 235.00 | | |
| | Interest ..... | 5.39 | 240.39 | |
| House No. 50 | Completed November, 1909, | 50.00 | | |
| | Int. from Nov. 30/09 to July 15/10 ..... | 1.56 | 51.56 | |
| House No. 51 | Completed November, 1909, | 50.00 | | |
| | Int. from Nov. 30/09 to July 15/10 ..... | 1.56 | 51.56 | |
| House No. 52 | Completed August, 1909.... | 50.00 | | |
| | Int. from Aug. 31/09 to July 15/10 ..... | 2.18 | 52.18 | |
| House No. 53 | Completed September, 1909, | 50.00 | | |
| | Int. from Sept. 30/09 to July 15/10 ..... | 1.98 | 51.98 | |
| House No. 54 | Completed November, 1909.. | 50.00 | | |
| | Int. from Nov. 30/09 to July 15/10 ..... | 1.56 | 51.56 | |
| House No. 55 | Completed April, 1910..... | 50.00 | | |
| | Int. from Apr. 30/10 to July 15/10 ..... | .52 | 50.52 | |
| House No. 56 | Completed April, 1910.... | 50.00 | | |
| | Int. from Apr. 30/10 to July 15/10 ..... | .52 | 50.52 | |
| House No. 57 | Completed March, 1910..... | 50.00 | | |
| | Int. from Mar. 31/10 to July 15/10 ..... | .71 | 50.71 | |
| House No. 58 | Completed March, 1910..... | 50.00 | | |
| | Int. from Mar. 31/10 to July 15/10 ..... | .71 | 50.71 | |

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| House No. 59 | Completed March, 1910..... | 50.00 | | |
| | Int. from Apr. 30/10 to July 15/10 ..... | .52 | 50.52 | |
| House No. 60 | Completed July, 1910..... | | 50.00 | |
| House No. 61 | Completed July, 1910..... | | 50.00 | |
| House No. 63 | Completed March, 1910..... | 50.00 | | |
| | Int. from Mar. 31/10 to July 15/10 ..... | .71 | 50.71 | |
| House No. 64 | Completed May, 1910..... | 50.00 | | |
| | Int. from May 31/10 to July 15/10 ..... | .31 | 50.31 | |
| House No. 65 | Completed May, 1910..... | 50.00 | | |
| | Int. from May 31/10 to July 15/10 ..... | .31 | 50.31 | |
| House No. 66 | Completed July, 1910..... | 50.00 | | |
| House No. 67 | Completed May, 1910..... | 50.00 | | |
| | Int. from May 31/10 to July 15/10 ..... | .31 | 50.31 | |
| House No. 68 | Completed June, 1910..... | 50.00 | | |
| | Int. from June 30/10 to July 15/10 ..... | .11 | 50.11 | 1,153.96 |
| | July 15, 1910—Debit balance, | | | $2,967.77 |
| | Interest on $2,967.77 from July 15/10, to July 15/11.... | | | 148.39 |
| | Sept. 23/10—Cash..... | 25.00 | | |
| | Int. from Sept. 23/10 to July 15/11 ..... | 1.01 | | 26.01 |
| | Oct. 14/10—Cash..... | 25.00 | | |
| | Int. from Oct. 14/10 to July 15/11 ..... | .94 | | 25.94 |
| | Dec. 8/10—Taxes, 1910..... | 44.60 | | |
| | Int. from Dec. 20/10 to July 15/11 ..... | 1.24 | | 45.84 |
| | July 15, 1911—Total debits, | | | $3,213.95 |
| | Credits from July 14, 1910, to July 15, 1911: | | | |
| | Amt. deducted from wages July 15/10 to July 1/11.... | 212.00 | | |
| | Interest ..... | 5.31 | 217.31 | |

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|---|---|---|---|
| House No. 62 | Completed October, 1910... | 50.00 | |
| | Int. from Oct. 31/10 to July 15/11 ..... | 1.76 | 51.76 |
| House No. 69 | Completed August, 1910.... | 50.00 | |
| | Int. from Aug. 31/10 to July 15/11 ..... | 2.18 | 52.18 |
| House No. 70 | Completed August, 1910.... | 50.00 | |
| | Int. from Aug. 31/10 to July 15/11 ..... | 2.18 | 52.18 |
| House No. 71 | Completed August, 1910.... | 50.00 | |
| | Int. from Aug. 31/10 to July 15/11 ..... | 2.18 | 52.18 |
| House No. 72 | Completed October, 1910.... | 50.00 | |
| | Int. from Oct. 31/10 to July 15/11 ..... | 1.76 | 51.76 |
| House No. 73 | Completed September, 1910. | 50.00 | |
| | Int. from Sept. 30/10 to July 15/11 ..... | 1.98 | 51.98 |
| House No. 74 | Completed December, 1910 | 50.00 | |
| | Int. from Dec. 31/10 to July 15/11 ..... | 1.35 | 51.35 |
| House No. 75 | Completed November, 1910.. | 50.00 | |
| | Int. from Nov. 30/10 to July 15/11 ..... | 1.56 | 51.56 |
| House No. 77 | Completed June, 1911..... | 50.00 | |
| | Int. from June 30/11 to July 15/11 ..... | .11 | 50.11 |
| House No. 78 | Completed February, 1911.. | 50.00 | |
| | Int. from Feb. 28/11 to July 15/11 ..... | .95 | 50.95 |
| House No. 79 | Completed May, 1911..... | 50.00 | |
| | Int. from May 31/11 to July 15/11 ..... | .31 | 50.31 |
| House No. 80 | Completed January, 1911.. | 50.00 | |
| | Int. from Jan. 31/11 to July 15/11 ..... | 1.14 | 51.14 |

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|---|---|---|---|---|
| House No. 81 | Completed May, 1911..... | 50.00 | | |
| | Int. from May 31/11 to July 15/11 ..... | .31 | 50.31 | |
| House No. 82 | Completed June, 1911..... | 50.00 | | |
| | Int. from June 30/11 to July 15/11 ..... | .11 | 50.11 | |
| House No. 84 | Completed April, 1911..... | 50.00 | | |
| | Int. from Apr. 30/11 to July 15/11 ..... | .52 | 50.52 | |
| House No. 85 | Completed April, 1911..... | 50.00 | | |
| | Int. from Apr. 30/11 to July 15/11 ..... | .52 | 50.52 | |
| House No. 86 | Completed July 1911..... | | 50.00 | |
| House No. 87 | Completed May, 1911..... | 50.00 | | |
| | Int. from May 31/11 to July 15/11 ..... | .31 | 50.31 | |
| House No. 90 | Completed June, 1911..... | 50.00 | | |
| | Int. from June 30/11 to July 15/11 ..... | .11 | 50.11 | 1,186.65 |
| | July 15, 1911—Debit balance, | | | $2,027.30 |
| | Interest on $2,027.30 from July 15/11 to July 15/12..... | | | 101.37 |
| | October, 1911—Labor..... | 27.75 | | |
| | Radiator & Fittings..... | 97.63 | | |
| | Freight and Cartage..... | 8.56 | | |
| | | 133.94 | | |
| | Interest from Oct. 31/11 to July 15/12 ..... | 4.73 | | 138.67 |
| | Taxes, 1911 ..... | 39.15 | | |
| | Int. from Dec. 20/11 to July 15/12 ..... | 1.12 | | 40.27 |
| | Jan. 15/12—Cash paid J. O'Rourke Co.—Coal..... | 64.09 | | |
| | Int. from Jan. 15/12 to July 15/12 ..... | 1.60 | | 65.69 |
| | July 15, 1912—Total debits, | | | $2,373.30 |

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|---|---|---|---|
| | Credits from July 15, 1911, to July 15, 1912: | | |
| | Amt. deducted from wages July 15/11 to July 1/12..... | 208.00 | |
| | Interest ..... | 5.16 | 213.16 |
| House No. 76 | Completed September, 1911, | 50.00 | |
| | Int. from Sept. 30/11 to July 15/12 ..... | 1.98 | 51.98 |
| House No. 83 | Completed October, 1911.. | 50.00 | |
| | Int. from Oct. 31/11 to July 15/12 ..... | 1.76 | 51.76 |
| House No. 88 | Completed October, 1911.. | 50.00 | |
| | Int. from Oct. 31/11 to July 15/12 ..... | 1.76 | 51.76 |
| House No. 89 | Completed August, 1911.... | 50.00 | |
| | Int. from Aug. 31/11 to July 15/12 ..... | 2.18 | 52.18 |
| House No. 91 | Completed January, 1912.... | 50.00 | |
| | Int. from Jan. 31/12 to July 15/12..... | 1.14 | 51.14 |
| House No. 92 | Completed September, 1911, | 50.00 | |
| | Int. from Sept. 30/11 to July 15/12 ..... | 1.98 | 51.98 |
| House No. 93 | Completed October, 1911.... | 50.00 | |
| | Int. from Oct. 31/11 to July 15/12 ..... | 1.76 | 51.76 |
| House No. 94 | Completed September, 1911, | 50.00 | |
| | Int. from Sept. 30/11 to July 15/12 ..... | 1.98 | 51.98 |
| House No. 95 | Completed April, 1912..... | 50.00 | |
| | Int. from Apr. 30/12 to July 15/12 ..... | .52 | 50.52 |
| House No. 96 | Completed September, 1911, | 50.00 | |
| | Int. from Sept. 30/11 to July 15/12 ..... | 1.98 | 51.98 |
| House No. 97 | Completed September, 1911, | 50.00 | |
| | Int. from Sept. 30/11 to July 15/12 ..... | 1.98 | 51.98 |

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|---|---|---|---|---|
| House No. 98 | Completed August, 1911.... | 50.00 | | |
| | Int. from Aug. 31/11 to July 15/12 ..... | 2.18 | 52.18 | |
| House No. 99 | Completed May, 1911..... | 50.00 | | |
| | Int. from May 31/11 to July 15/12 ..... | .31 | 50.31 | |
| House No. 100 | Completed December, 1911.. | 50.00 | | |
| | Int. from March 31/11 to July 15/12 ..... | 1.35 | 51.35 | |
| House No. 101 | Completed March, 1912.... | 50.00 | | |
| | Int. from Mar. 31/12 to July 15/12 ..... | .71 | 50.71 | |
| House No. 102 | Completed May, 1912..... | 50.00 | | |
| | Int. from May 31/12 to July 15/12 ..... | .31 | 50.31 | |
| House No. 104 | Completed May, 1912..... | 50.00 | | |
| | Int. from May 31/12 to July 15/12 ..... | .31 | 50.31 | |
| House No. 106 | Completed May, 1912..... | 50.00 | | |
| | Int. from May 31/12 to July 15/12 ..... | .31 | 50.31 | 1,137.66 |
| | July 15, 1912—Debit balance, | | | $1,235.64 |
| | Interest on $1,235.64 from July 15/12 to July 15/13.... | | | 61.78 |
| | Sept. 23/12—Insurance premium ..... | 18.75 | | |
| | Int. from Sept. 23/12 to July 15/13 ..... | .76 | | 19.51 |
| | Taxes, 1912 ..... | 40.32 | | |
| | Int. from Dec. 20/12 to July 15/13 ..... | 1.15 | | 41.47 |
| | July 15, 1913—Total debits.. | | | $1,358.40 |
| | Credits from July 15, 1912, to July 15, 1913: | | | |
| | Amt. deducted from wages July 15/12 to July 1/13 | 208.00 | | |
| | Interest ..... | 5.21 | 213.21 | |

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|---|---|---|---|---|
| House No. 103 | Completed September, 1912, | 50.00 | | |
| | Int. from Sept. 30/12 to July 15/13 ..... | 1.98 | 51.98 | |
| House No. 105 | Completed September, 1912, | 50.00 | | |
| | Int. from Sept. 30/12 to July 15/13 ..... | 1.98 | 51.98 | |
| House No. 107 | Completed December, 1912, | 50.00 | | |
| | Int. from Dec. 31/12 to July 15/13 ..... | 1.35 | 51.35 | |
| House No. 108 | Completed January, 1913, | 50.00 | | |
| | Int. from Jan. 31/12 to July 15/13 ..... | 1.14 | 51.14 | |
| House No. 109 | Completed October, 1912, | 50.00 | | |
| | Int. from Oct. 31/12 to July 15/13 ..... | 1.76 | 51.76 | |
| House No. 110 | Completed December, 1912, | 50.00 | | |
| | Int. from Dec. 31/12 to July 15/13 ..... | 1.35 | 51.35 | |
| House No. 112 | Completed January, 1913 | 50.00 | | |
| | Int. from Jan. 31/12 to July 15/13 ..... | 1.14 | 51.14 | |
| House No 113 | Completed May, 1913..... | 50.00 | | |
| | Int. from May 31/13 to July 15/13 ..... | .31 | 50.31 | |
| House No. 114 | Completed April, 1913..... | 50.00 | | |
| | Int. from Apr. 30/13 to July 15/13 ..... | .52 | 50.52 | |
| House No. 115 | Completed May, 1913..... | 50.00 | | |
| | Int. from May 31/13 to July 15/13 ..... | .31 | 50.31 | |
| House No. 117 | Completed May, 1913 ..... | 50.00 | | |
| | Int. from May 31/13 to July 15/13 ..... | .31 | 50.31 | 775.36 |
| | July 15, 1913—Debit balance, | | | $583.04 |

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|---|---|---|---|---|
| | Interest on $583.04 from July 15/13 to July 15/14..... | | | 29.15 |
| | Taxes, 1913 ..... | 51.84 | | |
| | Int. from Dec. 20/13 to July 15/14 ..... | 1.48 | | 53.32 |
| | July 15, 1914—Total debits, | | | $665.51 |
| | Credits from July 15, 1913, to July 15, 1914: | | | |
| | Amt. deducted from wages July 15/13 to July 1/14, | 204.00 | | |
| | Interest ..... | 5.14 | | |
| House No. 111 | Completed October, 1913... | 50.00 | | |
| | Int. from Oct. 31/13 to July 15/14 ..... | 1.76 | 51.76 | |
| House No. 116 | Completed September, 1913, | 50.00 | | |
| | Int. from Sept. 30/13 to July 15/14 ..... | 1.98 | 51.98 | |
| House No. 118 | Completed August, 1913.... | 50.00 | | |
| | Int. from Aug. 31/13 to July 15/14 ..... | 2.18 | 52.18 | |
| House No. 119 | Completed August, 1913.... | 50.00 | | |
| | Int. from Aug. 31/13 to July 15/14 ..... | 2.18 | 52.18 | |
| House No. 120 | Completed October, 1913.. | 50.00 | | |
| | Int. from Oct. 31/13 to July 15/14 ..... | 1.76 | 51.76 | |
| House No. 121 | Completed September, 1913, | 50.00 | | |
| | Int. from Sept. 30/13 to July 15/14 ..... | 1.98 | 51.98 | |
| House No. 122 | Completed September, 1913, | 50.00 | | |
| | Int. from Sept. 30/13 to July 15/14 ..... | 1.98 | 51.98 | |
| House No. 123 | Completed December, 1913, | 50.00 | | |
| | Int. from Dec. 31/13 to July 15/14 ..... | 1.35 | 51.35 | |
| House No. 124 | Completed October, 1913.. | 50.00 | | |
| | Int. from Oct. 31/13 to July 15/14 ..... | 1.76 | 51.76 | |

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|---|---|---|---|---|
| House No. 125 | Completed December, 1913.. | 50.00 | | |
| | Int. from Dec. 31/13 to July 15/14 ..... | 1.35 | 51.35 | |
| House No. 127 | Completed June, 1914..... | 50.00 | | |
| | Int. from June 30/14 to July 15/14 ..... | .11 | 50.11 | |
| House No. 128 | Completed April, 1914 ..... | 50.00 | | |
| | Int. from Apr. 30/14 to July 15/14 ..... | .52 | 50.52 | |
| House No. 129 | Completed April, 1914.... | 50.00 | | |
| | Int. from Apr. 30/14 to July 15/14 ..... | .52 | 50.52 | |
| House No. 130 | Completed April, 1914..... | 50.00 | | |
| | Int. from Apr. 30/14 to July 15/14 ..... | .52 | 50.52 | 929.09 |
| | Balance in favor of complainant July 15, 1914..... | | | $263.58 |
| | Interest on all items from this date are calculated at the rate of 6% per annum. Interest on $263.58 from July 15/14 to July 15/17.... | | | 47.44 |
| | | | | $311.02 |
| | Amount deducted from wages Dec. 26/14 ..... | 104.00 | | |
| | Int. from Dec. 26/14 to July 15/17 ..... | 15.93 | | 119.93 |
| | June 30/15—Amount deducted from wages preceding 6 month ..... | 104.00 | | |
| | Int. from June 30/15 to July 15/17 ..... | 12.74 | | 116.74 |
| | Dec. 31/15—Amount deducted from wages preceding 6 months ..... | 104.00 | | |
| | Int. from Dec. 31/15 to July 15/17 ..... | 9.60 | | 113.60 |
| | Mar. 1/16—Amount deducted from wages January and February ..... | 32.00 | | |

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|---|---|---|---|---|
| | Int. from Mar. 1/16 to July 15/17 ..... | 2.64 | | 34.64 |
| | Apr. 30/16—Amount deducted from wages March and April ..... | 36.00 | | |
| | Int. from Apr. 30/16 to July 15/17 ..... | 2.61 | | 38.61 |
| | June 30/16—Amount deducted from wages May and June ..... | 36.00 | | |
| | Int. from June 30/16 to July 15/17 ..... | 2.25 | | 38.25 |
| | Sept. 16/16—Amount deducted from wages from June 30 to Sept. 16 ..... | 48.00 | | |
| | Int. from Sept. 16/16 to July 15/17 ..... | 2.28 | | 50.28 |
| House No. 126 | Completed September, 1914, | 50.00 | | |
| | Int. from Sept. 30/14 to July 15/17 ..... | 8.38 | 58.38 | |
| House No. 131 | Completed September, 1914, | 50.00 | | |
| | Int. from Sept. 30/14 to July 15/17 ..... | 8.38 | 58.38 | |
| House No. 132 | Completed November, 1914, | 50.00 | | |
| | Int. from Nov. 30/14 to July 15/17 ..... | 7.88 | 57.88 | |
| House No. 133 | Completed September, 1915, | 50.00 | | |
| | Int. from Sept. 30/15 to July 15/17 ..... | 5.38 | 55.38 | |
| House No. 134 | Completed August, 1914.... | 50.00 | | |
| | Int. from Aug. 31/14 to July 15/17 ..... | 8.62 | 58.62 | |
| House No. 135 | Completed June, 1915 ..... | 50.00 | | |
| | Int. from June 30/15 to July 15/17 ..... | 6.13 | 56.13 | |
| House No. 136 | Completed September, 1915, | 50.00 | | |
| | Int from Sept. 30/15 to July 15/17 ..... | 5.38 | 55.38 | |

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|---|---|---|---|
| House No. 137 | Completed May, 1915..... | 50.00 | |
| | Int. from May 31/15 to July 15/17 ..... | 6.37 | 56.37 |
| House No. 138 | Completed August, 1915.... | 50.00 | |
| | Int. from Aug. 31/15 to July 15/17 ..... | 5.62 | 55.62 |
| House No. 140 | Completed November, 1915, | 50.00 | |
| | Int. from Nov. 30/15 to July 15/17 ..... | 4.88 | 54.88 |
| House No. 141 | Completed November, 1915, | 50.00 | |
| | Int. from Nov. 30/15 to July 15/17 ..... | 4.88 | 54.88 |
| House No. 142 | Completed October, 1915.. | 50.00 | |
| | Int. from Oct. 31/15 to July 15/17 ..... | 5.12 | 55.12 |
| House No. 143 | Completed November, 1915, | 50.00 | |
| | Int. from Nov. 30/15 to July 15/17 ..... | 4.88 | 54.88 |
| House No. 144 | Completed November, 1915, | 50.00 | |
| | Int. from Nov. 30/15 to July 15/17 ..... | 4.88 | 54.88 |
| House No. 145 | Completed November, 1915, | 50.00 | |
| | Int. from Nov. 30/15 to July 15/17 ..... | 4.88 | 54.88 |
| House No. 146 | Completed May, 1916..... | 50.00 | |
| | Int. from May 31/16 to July 15/17 ..... | 3.37 | 53.37 |
| House No. 147 | Completed August, 1916.... | 50.00 | |
| | Int. from Aug. 31/16 to July 15/17 ..... | 2.62 | 52.62 |
| House No. 148 | Completed June, 1916..... | 50.00 | |
| | Int. from June 30/16 to July 15/17 ..... | 3.13 | 53.13 |
| House No. 149 | Completed May, 1916..... | 50.00 | |
| | Int. from May 31/16 to July 15/17 ..... | 3.37 | 53.37 |

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|---|---|---|---|---|
| House No. 150 | Completed May, 1916..... | 50.00 | | |
| | Int. from May 31/16 to July 15/17 ..... | 3.37 | 53.37 | |
| House No. 151 | Completed August, 1916.... | 50.00 | | |
| | Int. from Aug. 31/16 to July 15/17 ..... | 2.62 | 52.62 | |
| House No. 152 | Completed August, 1915..... | 50.00 | | |
| | Int. from Aug. 31/16 to July 15/17 ..... | 2.62 | 52.62 | |
| House No. 153 | Completed May, 1916..... | 50.00 | | |
| | Int. from May 31/16 to July 15/17 ..... | 3.37 | 53.37 | |
| House No. 154 | Completed August, 1916.... | 50.00 | | |
| | Int. from Aug. 31/16 to July 15/17 ..... | 2.62 | 52.62 | |
| House No. 155 | Completed August, 1916.... | 50.00 | | |
| | Int. from Aug. 31/16 to July 15/17 ..... | 2.62 | 52.62 | |
| | July 15, 1917—Total credits, | | | $2,194.44 |
| | Debits from July 15, 1914, to July 15, 1917: | | | |
| | Taxes, 1914 ..... | 46.56 | 53.89 | |
| | Int. from Dec. 2/14 to July 15/17 ..... | 7.31 | 53.89 | |
| | Aug. 4/15—Insurance..... | 18.28 | | |
| | Int. from Aug. 4/15 to July 15/17 ..... | 2.14 | 20.42 | |
| | Dec. 31/15—Taxes, 1915.... | 44.40 | | |
| | Int. from Dec. 31/15 to July 15/17 ..... | 4.10 | 48.50 | |
| | Aug. 23/16—Amt. paid J. O'Rourke Company ..... | 148.13 | | |
| | Int. from Aug. 23/16 to July 15/17 ..... | 7.95 | 156.08 | |
| | Dec. 6/16—Taxes, 1916..... | 47.28 | | |
| | Int. from Dec. 6/16 to July 15/17 ..... | 1.73 | 49.01 | 327.88 |
| | | | | $1,866.56 |

I do therefore report that considering the complainant as charged with the purchase price of the house and lot on Chestnut street purchased for him by defendant and held in trust for him as set forth in the pleadings in this case, together with all charges in connection therewith and moneys advanced to him by the defendant, I find that there is due from the defendant to the complainant over and above all of said amounts on this day the sum of $1,866.56.

All of which is respectfully submitted this fifteenth day of July, 1917.

HUGH B. REED,
*Special Master.*

## Defendant's Exceptions to Master's Report.

Filed August 23, 1917.

Exception taken by the defendant in this cause to the report made therein dated July 15, 1917, by Hugh B. Reed, one of the Masters of this Court, to whom this cause was referred by order made herein dated February 28, 1917, touching the matters therein referred to him:

First Exception. For that said Master has reported as follows: "It is established by the evidence that about the month of May, 1909, complainant and defendant entered into an arrangement whereby, in consideration of services rendered and to be rendered by the complainant to defendant, defendant agreed to pay the complainant, in addition to his daily wages, the sum of $50.00 for each house erected, in the

course of erection and to be erected for defendant under superintendence of complainant." Defendant insists that said finding is contrary to law and to the evidence in the case, and also that it does not appear from the evidence that the houses erected by defendant were so erected under the superintendence of complainant. 10

Second Exception. For that the said Master has reported "Prior to the employment by defendant of complainant defendant had been building houses through Wolf & Jilson, complainant's employers, and evidently concluding that it would be less expensive to employ complainant directly, severed his connection with Wolf & Jilson and continued his building operations with complainant in charge. Defendant had a business in New York which occupied 20 most of his time, and evidently depended upon complainant for supervision of the buildings while he was away. In addition to this the items of credit of $500 and $750 were entered by complainant's son and bookkeeper, in his book of account with complainant, as 'commissions.' Defendant testified that his son was his confidential man and knew what he, defendant, had in mind. Defendant in explanation of the $500 and $750 items claims that 30 they were gifts to complainant made because of defendant's deep interest in him and of a generous disposition. The fact that the credit of $500 was made July 17, 1909, approximately one year after the employment, and the credit of $750 on July 30, 1910, taken in connection with the further fact that at the date of the first credit nine houses had been completed and a tenth one was approximately completed and that prior to July 30th, 1910, more than 15 40

additional houses had been completed, makes it seem probable that these were not gifts but payments." Defendant insists that said conclusions of said Master are erroneous and contrary to law and to the evidence in the case.

THIRD EXCEPTION. For that the said Master
10 has reported as follows: "So far as appears from the testimony, no specific date was set for the payment of commission earned by complainant for the construction and completion of the houses. The implication is, therefore, that the payment of $50 became due upon the completion of each house." Defendant insists that said implication is unwarranted and that the finding of the Master respecting the time when said payments fell due is unwarranted and con-
20 trary to the evidence in the case.

FOURTH EXCEPTION. The said Master has allowed interest upon said account in an erroneous manner and has erroneously computed said interest.

FIFTH EXCEPTION. For that said Master finds that a valid binding contract existed between the parties to said action as set forth and stated in said report. Defendant insists that the ar-
30 rangement or contract set forth and alleged by complainant and as found by said Master is void and of no effect because the same was not in writing.

And the complainant insists that the Master's report is contrary both to law and equity and contrary to the evidence in the case.

Whereas, the said Hugh B. Reed, Master as aforesaid, has not reported properly or in accordance with the terms of said order or
40 with the principles of equity.

In which said several matters and respects this exceptant prays the judgment of this court.

FREDERIC W. SMITH,
*Solicitor for and of Counsel with Defendant.*

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## Complainant's Exceptions to Master's Report.

Filed September 10, 1917.

The complainant hereby takes exceptions to the report of the Special Master, for the following reasons:

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Because the Special Master should have allowed one hundred dollars per house for the first ten houses.

Because the Special Master made no allowance for the building of the factory, for house No. 139, house No. 156 and two houses that were almost completed when complainant left the employ of the defendant.

WILLIAM TYACKE,
*Solicitor of Complainant.*

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## Conclusions of Vice-Chancellor.

STEVENS, *V. C.*

I think the conclusions of the Master are warranted by the evidence. In stating the account the Master has, however, charged the defendant with interest on the $50 due upon the completion of each house, from the time it was completed. It seems to me that it was not intended that defendant should pay to complainant each $50 as it became due. He was to hold complainant's commissions until a sufficient sum was accumulated to enable him to pay off the mortgage. Being in no default he was not chargeable with interest. Interest is given only as a matter of contract or because of some default. When the sums earned amounted to $3,000 it would have been defendant's duty to have discharged the mortgage, assuming it to have been due, had complainant so requested. Complainant did not so request. On the contrary, he allowed defendant to deduct sufficient from his wages to pay interest and taxes. Under these circumstances I think the equity of the case will best be met by allowing no interest until demand made, and stating the account as between trustee and *cestui que trust* —that is, charging the defendant with what he received, and allowing him for what he paid out.

It is admitted, as I understand, that two fifty-dollar items were inadvertently omitted by the Master, and that they should be added to the sum due. I do not suppose it will be necessary to re-refer the account. With the aid of the present report counsel can easily agree upon the items.

The decree should direct the defendant to pay off the mortgage, if due, and to convey the property to complainant within thirty days from its date, and to pay the balance owing to complainant within the same time. If defendant should neglect or refuse to do so, then complainant should have leave to apply for further directions and relief. 10

## Final Decree.

Filed January 11, 1918.

This cause coming on to be heard in the presence of William Tyacke, of counsel with the complainant, and Frederic W. Smith, of counsel with the defendant, and it appearing from the pleadings that the defendant holds the premises described in the bill of complaint in trust for the complainant, subject, however, to an accounting, and such accounting having been had before Hugh B. Reed, Esquire, one of the masters of this court, to whom by order dated February 28th, 1917, the matter was referred, and the said Master having filed his report, to which exceptions were taken by the complainant and by the defendant; and the matter now coming on to be heard on the pleadings, proofs taken before the Master, Master's report, and exceptions thereto, and the Court having heard the arguments of counsel and considered the same, and being of the opinion that the conclusions of the Master are warranted by the evidence, and that the complainant is entitled to a conveyance thereof freed and discharged from the lien of the mortgage referred to in the pleadings; and also that there is due to the complainant from the defendant 20 30 40

in addition the sum of eleven hundred and fifty dollars with interest thereon from the tenth day of January, A. D. 1918;

It Is, Thereupon, on this tenth day of January, 1918, Ordered, Adjudged and Decreed by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, and the said Chancellor, by virtue of the power and authority of this Court, doth hereby Order, Adjudge and Decree that the premises mentioned and described in the pleadings in this cause are held in trust for the complainant, and that within thirty days from the date hereof the defendant convey the same to the complainant by a good and sufficient deed, freed and discharged from the lien of the mortgage referred to in the pleadings; and that within the same time the defendant pay to the complainant or to his solicitor the sum of eleven hundred and fifty dollars, with interest thereon at the rate of six per cent. per annum from the tenth day of January, A. D. 1918; and if defendant should neglect or refuse so to do, then complainant shall have leave to apply to this court for further directions and relief.

And It Is Further Ordered, Adjudged and Decreed that the Master's fees and the costs of the complainant, to be taxed, be paid by the defendant, and also that the defendant pay to the solicitor of the complainant a counsel fee of two hundred and fifty dollars, and that execution issue therefor according to the practice of this Court.

E. R. WALKER,
*C.*

Respectfully advised,

Frederic W. Stevens,
*V. C.*

## Defendant's Notice of Appeal.

Filed.

The defendant hereby appeals from the final decree made in the above stated cause and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes. 10

Dated February 5th, 1918.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors for and of Counsel with Defendant.*

I conceive there is good cause for appeal in the above stated cause.

FREDERIC W. SMITH, 20
*Of Counsel with Defendant.*

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## Defendant's Petition of Appeal.

Filed.

# New Jersey Court of Errors and Appeals

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|---|---|
| FREDERICK L. SMITH, *Complainant-Respondent,* *vs.* EDWARD C. BALCH, *Defendant-Appellant.* | *On Bill, &c.* *Petition of Appeal.* |

*To the Honorable, The Court of Errors and Appeals in the last resort in all causes:*

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The appellant in the above stated cause respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 10th day of January, 1918, wherein the said Frederick L. Smith was complainant and the said Edward C. Balch was defendant, in the following particulars, to-wit.:

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1. Because the said decree adjudges that the defendant Edward C. Balch should convey the premises described in the pleadings in this cause to complainant.

2. Because the said decree adjudges that the said conveyances to complainant should be free from the lien of the mortgage referred to in the pleadings.

3. Because the said decree adjudges that defendant should pay to complainant the sum

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of $1,150.00, with interest thereon at six per

centum per annum, from the date of said decree.

4. Because under the pleadings and proofs in said cause, the plaintiff was not entitled to recover upon the contract alleged by him.

5. Because the plaintiff failed in said cause to prove that he was entitled to a conveyance of said premises from defendant. 10

6. Because the plaintiff in said cause failed to prove that he was entitled to the payment of any sum from the said defendant.

7. Because upon the pleadings and proofs, the appellant was entitled to prevail in its suit.

Your petitioner therefore humbly appeals from said decree and from the whole and every part thereof upon the ground that the said decree is erroneous in the particulars hereinbefore stated and set forth. 20

And your petitioner therefore prays that the said decree be reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this honorable Court may seem meet.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors for and of Counsel*
*with Defendant-Appellant.* 30

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## Answer to Petition of Appeal.

Filed February 22, 1918.

The answer of the above named respondent, Frederick L. Smith, to the petition of appeal of the above named appellant.

This respondent, not acknowledging any or all of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a final decree was on the tenth day of January, nineteen hundred and eighteen, made and entered in the Court of Chancery in the cause for that purpose mentioned in said petition as is therein stated, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree, so far as any matter or thing complained of by the appellant is concerned, is agreeable to equity, and he prays that the same may be affirmed in that regard, with costs to be adjudged to this respondent. This respondent, however, having on his part appealed from said decree, prays that it be reformed in accordance with his said appeal herein.

WILLIAM TYACKE,
*Solicitor for and of Counsel with Respondent.*

Service acknowledged this 21st day of February, A. D. 1918.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors and of Counsel*
*with Defendant-Appellant.*

## Complainant's Notice of Appeal.

Filed February 13, 1918.

The complainant hereby appeals from the final decree made in the above stated cause to the Court ef Errors and Appeals in the last resort in all causes, because the Chancellor, in and by said final decree, declined and refused to allow the complainant interest on the several sums ascertained to be due and owing to the complainant from the time such sums became due and owing.

Dated February 11, 1918.

WM. TYACKE,
*Solicitor for and of Counsel with Complainant.*

I conceive there is good cause for appeal in the above stated cause.

FRANK BERGEN,
*Of Counsel with Complainant.*

Service acknowledged February 13, 1918, by

DAY, DAY, SMITH & SLINGERLAND.

## Complainant's Petition of Appeal.

Filed February 19, 1918.

# New Jersey Court of Errors and Appeals

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|---|---|
| FREDERICK L. SMITH, *Complainant-Appellant,* *vs.* EDWARD C. BALCH, *Defendant-Respondent.* | *On Bill, &c.* *Petition of Appeal.* |

*To the Honorable Court of Errors and Appeals of the State of New Jersey:*

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The petition of Frederick L. Smith, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the tenth day of January, 1918, wherein the said Frederick L. Smith was complainant and the said Edward C. Balch was defendant, in this respect, to wit., that the Chancellor, in and by said final decree, ordered and decreed that the defendant should pay the complainant the sum of eleven hundred and fifty dollars ($1,150), with interest thereon from the said tenth day of January, 1918, instead of the sum of two thousand and twenty-eight dollars and eighty-eight cents ($2,028.88), with interest from said tenth day of January, 1918, and so declined and refused to allow the appellant interest on the several sums ascertained to be due and owing

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to the appellant from the time such sums accrued and became owing; and your petitioner humbly appeals from that part of the decree of the Chancellor which fails to allow and decree as aforesaid, upon the ground that the same is erroneous for that the appellant was legally and equitably entitled to said larger sum, thus including interest on said several sums from the time such sums accrued and became owing to the appellant as aforesaid. 10

(See p. 193)

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed and modified, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

WILLIAM TYACKE, 20
*Solicitor and of Counsel with Appellant.*

Service acknowledged this eighteenth day of February, 1918.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors of Defendant-Respondent.*

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## Answer to Petition of Appeal.

Filed February 23, 1918.

The answer of Edward C. Balch, the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto, nevertheless, says and admits. That a decree was, on the 10th day of January last past, made and entered in the Court of Chancery, in the cause for that purpose, mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree in the particulars set forth in said petition of appeal is agreeable to equity and he prays that the same may be affirmed in said particulars with costs to be adjudged to this respondent.

DAY, DAY, SMITH & SLINGERLAND,
*Solicitors for and of Counsel*
*with Defendant-Respondent.*

*Stipulation.*

| | |
|---|---|
| FREDERICK L. SMITH, *Complainant-Appellant,* *vs.* EDWARD C. BALCH, *Defendant-Respondent.* | *On Bill, &c.* *On Appeal from Chancery.* *Stipulation.* |

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IT IS STIPULATED AND AGREED by and between counsel for the respective parties in the above entitled cause that the following paragraph shall be added to the petition of appeal of Frederick L. Smith after line 13 on page 191 of the printed state of case, and shall have the same force and effect as though it had originally appeared in complainant's notice of appeal and petition of appeal and had been covered by defendant's answer to said appeal: 20

> "Your petitioner also finds himself aggrieved in this respect, to wit, that the Chancellor in and by said final decree ordered and decreed that the defendant Edward C. Balch should pay the complainant Frederick L. Smith fifty dollars a house for the first ten houses erected for defendant under complainant's supervision, with interest from the date of said final decree, instead of one hundred dollars a house for the first ten houses so erected, with interest from the time of completion of each of said ten houses."

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Dated May 18, 1918.

WILLIAM TYACKE,
*Solicitor and of Counsel with Complainant-Appellant.*

DAY, DAY, SMITH & SLINGERLAND, 40
*Solicitors and of Counsel with Defendant-Respondent.*