NEW JERSEY

Court of Errors and Appeals

Between ELEANOR P. SHAW, *Complainant-Respondent,* *and* G. B. BEAUMONT COMPANY, *Defendant-Appellant.*	*On Appeal from Decree in Chancery.*

Brief of Collins & Corbin in favor of the Defendant-Appellant.

1.

Statement of the Case.

This is an appeal by the defendant from a final decree of the Court of Chancery filed July 11, 1916 (p. 572).

On April 22, 1915, the complainant exhibited her bill in the Court below wherein she alleged that on February 26, 1913, she was seized of certain lands in Jersey City and that being so seized she entered into an agreement with the defendant to erect an apartment house on a part thereof; that under the terms of the agreement she conveyed the lands to defendant and also gave the defendant certain moneys, the lands to be reconveyed to her on completion of the building and payment therefor, the cost to be ascertained by an accounting to be made by the defendant; that the defendant erected and completed the apartment house on part of the land,

sold and mortgaged other parts, in accordance with the terms of the agreement, retained title to the remainder and collected rents from apartments when rented; and that the defendant failed to render "a just and true account of the moneys so received" and complainant therefore prayed:

(a). For an accounting;

(b). A reconveyance of the lands held by the defendant;

(c). A receiver to collect the rents pending the litigation (p. 1, et seq.).

The defendant filed an answer under date of June 1, 1915, admitting the allegations of the bill with reference to the ownership of the land and the contract to build an apartment house thereon but denied that it had failed to render a just and true account either of the moneys received or of the cost of the building. A copy of an account made by the defendant prior to the filing of the bill was attached to the answer, with a supplementary sheet bringing the account down to date. The answer also exhibited a cross-bill which set forth transactions between the complainant and the defendant prior to the execution of the agreement of February 26, 1913, which defendant alleged led up, related to and were so intimately connected with said agreement that they must be dealt with in the accounting between the parties. The cross-bill also alleged that certain additions and alterations in the apartment house were requested by complainant and made under her authorization. Also the cross-bill alleged that the defendant was employed by complainant to rent the apartments and collect the rents and to provide such furnishings for said house as might be necessary to secure tenants. The defendant then prayed that these matters might also be dealt with in the accounting (p. 16 *et. seq.*).

The cause was first referred to Charles J. Roe, Esq., as a Special Master, to take and state an account. After some testimony had been taken the cause was referred to Mr. Roe as Advisory Master and thereafter he filed a memorandum opinion in which he requested counsel to agree upon a statement of the account in accordance with the views expressed therein.

Counsel were unable to agree upon a statement of the account and the ~~Special~~ Advisory Master made the accounting. A final decree was then entered and it is from this decree that the present appeal is taken (p. 577).

The learned Advisory Master eliminated entirely all transactions between the parties prior to the execution of the agreement of February 26, 1913, and confined the scope of the account to that agreement and an accounting of the rents; also he made certain rulings as to the capacity in which the defendant was acting which eliminated numerous items from the accounting. Also he struck out numerous items from the account which defendant had entered therein which reduced the amount due defendant by several thousand dollars. It is in these respects that the defendant contends the learned Advisory Master erred.

There are different accountings contained in the state of case. The first one, attached to the cross-bill of defendant, was made by defendant prior to the filing of the bill of complaint. It was a general accounting (p. 27 et seq.). The second accounting was made by the defendant at the hearing before the Advisory Master. It classifies the general accounting, *supra*, by dividing it into different parts, each part showing the cost of some concrete part of the work or of a matter connected therewith or related thereto. Each of these parts or portions

of the accounting is called a statement and there are in all twelve statements which were offered in evidence as Exhibits D 30 to D 42, inclusive (p. 173 et seq.; p. 595 et seq.). The third accounting was stated by the Advisory Master and followed his memorandum opinion in which he outlined the scope of the accounting (p. 561 et seq.).

2.

Specification of Grounds of Appeal.

1. The scope of the accounting should not have been confined to the agreement of February 26, 1913, but should have included therein the transactions between the complainant and defendant prior thereto which led up, related to, and were closely connected with the said agreement.

2. The defendant should not have been regarded as a mortgagee in possession to the extent of disallowing it any compensation for services rendered to complainant under authorization of June 24, 1913, after November 1, 1913.

3. The accounting should not have included the transactions under the authorization of June 24, 1913, if it properly eliminated the transactions prior to the contract of February 26, 1913.

4 The defendant was entitled to have included in the accounting as part of the cost of the apartment house, under the agreement of February 26, 1913, the salaries paid its employes while actually engaged in the performance of work connected with the construction thereof.

5. The defendant is entitled to compensation for financing the erection of the apartment house, in accordance with the terms of the agreement of February 26, 1913.

6. The incidental expense incurred by the defendant "on the job" and for telephone calls, car fare and postage should have been included in the accounting as part of the cost of the apartment house.

7. No counsel fee should have been allowed to the complainant, or to say the least, the complainant is not entitled to a counsel fee of $1,500.

3.

BRIEF OF THE ARGUMENT.

I.

The scope of the accounting should not have been confined to the agreement of Febuary 26, 1913, but should have included therein the transactions between the complainant and defendant prior thereto which led up, related to, and were closely connected with said agreement.

The facts are that the complainant in the Spring of 1912, was the owner of certain lands located on Duncan avenue in Jersey City. The President of the defendant company, G. B. Beaumont, visited her at her house and they had conversations from time to time about building an apartment house. At first it was suggested that an apartment house be erected on Duncan avenue property. Plans were prepared by Mr. Beaumont for a five story building to contain twenty-one apartments (p. 71, l. 25 to p. 72, l. 20). This building was not erected because the complainant did not have sufficient funds to finance the erection of a building of that size. She suggested that Mr. Beaumont see the owner of the adjoining property, a Mr. Green, and ascertain whether he would care to buy her property. Mr. Green did not care to pay the amount that the com-

plainant desired and no sale was made at that time.

Thereafter it was proposed by complainant that a smaller building be erected on the Duncan avenue property and in accordance with a request from the complainant, Mr. Beaumont prepared plans for a three story building (p. 73, ll. 10–40). However, before anything further occurred the complainant succeeded in selling the Duncan avenue property to Mr. Green and on June 20, 1912, she wrote Mr. Beaumont a letter informing him that she had sold said land and was ready to compensate him for services up to that time. She also stated that she would consider the erection of an eight family apartment house in the vicinity of the new Hudson Terminal section (p. 75, ll. 10–30). After this letter was received by Mr. Beaumont, he called to see the complainant and discussed with her the erection of an apartment house, as suggested by her, and she then requested him to look around and see if he could not find a suitable plot on which to erect such a building. Mr. Beaumont did as requested, and his attention was attracted to some land known as the "Craig Property," which was for sale. He called the complainant's attention to it, and she subsequently purchased that property on August 27, 1912 (p. 76, ll. 10–40). Complainant then requested defendant to prepare plans for the erection of a building on that property, the building to be a four story apartment house (p. 76, ll. 30–40), and on August 27, 1912, a contract was entered into between the complainant and the defendant (p. 585, Exhibit C 8). This contract was abandoned by the parties, although plans were prepared (pp. 588, 589, Exhibits D 4, D 8), the building permit secured (p. 591, Exhibit D 14) and a survey ordered (p. 80, ll. 5–15); also a payment on account of $500 was made by the complainant to the defendant on September 19, 1912.

Defendant then prepared plans for a three story and basement apartment house, to be located on Craig property, and a second contract was prepared and entered into bearing date November 22, 1912 (Exhibit D 25, p. 592). This property was located on the southeast corner of the Hudson Boulevard and Highland avenue, and the Craig residence remained thereon after the purchase by the complainant. On November 27, 1912, after the execution of the contract of November 22, 1912, the complainant authorized the defendant to demolish the Craig residence for which she agreed to pay the cost, plus 10%. Also, defendant company was authorized to use such material as it might deem fit and advisable in the construction of the new apartment house (p. 87, ll. 10–40). In accordance with this authorization, the defendant wrecked the Craig residence, used some of the materials thus secured in the erection of the new building, sold the remainder, and the accounting attached to the cross-bill covers this transaction as well as the others. It does not appear in the testimony when the contract of November 22, 1912, was abandoned; but on February 26, 1913, another agreement was entered into between the complainant and the defendant providing for the erection of a four story apartment house, consisting of nine apartments, and this is the contract upon which the complainant's bill prayed an accounting, and it is to this contract and the accounting thereunder that the Advisory Master limited the scope of his accounting, eliminating all of the prior dealings between the parties, which have been set forth above. The learned Advisory Master, in his memorandum opinion, in dealing with this phase of the case, says (p. 543, l. 30, *et seq.*):

"The transactions of the parties up to this

date (February 26, 1913), cannot be in any way taken into consideration in this suit."

The Advisory Master then goes on to give his reasons for his ruling and concludes:

> "It is clear by its terms that this agreement is confined to the building of said building and that the property is conveyed under the terms of that agreement solely and exclusively to pay and secure the costs of erecting said building plus, the sum of 10% of said cost as the the entire compensation of the defendants.
>
> "For that purpose I must decide that the scope of this accounting must be confined to the actual building or construction of the said building, plus the compensation therein provided for the defendants; and to an accounting to be made by the defendant for the rents and profits received by it for the period during which it had possession of said building" (p. 547, ll. 10-20).

With reference to the demolition of the Craig residence the Advisory Master says:

> "The services rendered from April 6, 1912, including demolishing the residence that was known as the Craig house, must be eliminated. Notwithstanding the stipulation made by counsel, I do not feel this Court should concern itself with the dealings between the complainant and the defendant prior to the 26th day of February, 1913. All that I can say with reference to that is that the evidence shows that the Craig residence on the property was demolished prior to the entering into of the contract sued upon; that certain material coming from

> said building was used in the construction of the new buiiding; that the amount used in said building went to diminish the cost of said construction, and the only concern of the Court at this time is to know how much money was expended by the defendant in the construction of the said building, etc" (p. 555, ll. 1-25).

Notwithstanding this statement the Advisory Master in the accounting made by him charges against the defendant $465.11 for lumber received from the Craig residence (p. 563, l. 30). The Advisory Master in his memorandum opinion reaches the conclusion that the scope of the accounting should be confined to the contract of February 16, 1913, because he is of opinion that the equitable jurisdiction of this cause arises under the performance of that contract. He says:

> "It (the equitable jurisdiction) arises by reason of the conveyance of the complainant to the defendant of the property conveyed by her to the defendant in the manner and for the specific purposes expressed in the contract; and that was, first, that the defendant was to hold that property as security, and secondly, to use that property for the purpose of pledging or selling the same to raise money to pay for the cost of construction of the building under the terms of said contract" (p. 543, l. 35 et seq.).

We think the Advisory Master is right in his conclusion that the Court of Chancery did have jurisdiction of this cause by virtue of the peculiar provisions of the contract of February 26, 1913, but it is a *non sequitur* to say that because the equitable jurisdiction arises by virtue of that contract that

therefore the relief given should be limited to the carrying out of the provisions of the contract. It has been the inveterate rule of the Court of Chancery of this State to give complete relief. The rule is well settled that if a case be once properly before the Court the Court will do all in its power to settle the rights of all the parties in the matter in controversy, even as between defendants, justly and equitably by one decree.

Couse vs. Boyles, 4 N. J. Eq., 212.

Ames vs. New Jersey Franklinite Co., 12 N. J. Eq , 66.

Bulloch vs. Adams, 20 N. J. Eq., 367;

Youmans vs. Youmans, 25 N. J. Eq., 149;

Trotter v. Hecksher, 42 N. J. Eq., 254;

Melick vs. Cross, 62 N. J. Eq., 545, 546.

In fact this rule has become so well settled that the Legislature in adopting the Chancery Act of 1915 (Chap. 116, Laws of 1915) has seen fit to enact it into statutory law for in Section 8 that Act provides:

"Jury Trial.—If any question, ordinarily determinable at law and requiring jury trial, arise in a suit of which the Court of Chancery has jurisdiction, a jury trial, if required, may be ordered, but shall be deemed to be waived unless demanded in the pleadings. In case of such demand, if the issue be one requiring a jury trial, the Court shall send such issue of fact to a Court of law for trial according to the existing practice.

"But in all cases referred to in this section the Court of Chancery shall retain the cause

> until the legal question shall be determined; or until an adequate opportunity to determine the same shall have been given, unless justice or the public interest requires a dismissal of the cause."

A jury trial was not demanded in the present case, and it is therefore by virtue of this provision of the Chancery Act waived. However, there is not only an implied waiver, but there is also an express waiver, as shown by the Advisory Master's opinion. He says:

> "Notwithstanding the stipulation made by counsel, I do not feel that this Court should concern itself with the dealings between the plaintiff and the defendant prior to the agreement of February 26, 1913" (p. 555, l. 10).

The stipulation referred to by the Advisory Master was through inadvertence left out of the main state of the case, and is therefore printed in the supplemental state of case, together with a preliminary memoranda of the Advisory Master, which was also left out of the main case. In this preliminary memoranda contained in the supplemental state of case the Advisory Master says (italics ours):

> "As the matter now stands, I will determine the accounting strictly under the terms of the contract of February 26, 1913, without regard to any prior dealings between the parties, or any other dealings that are not connected with this contract, *unless the parties expressly enter into a stipulation consenting and agreeing that all transactions mentioned or indicated* in the defendant's cross-bill shall be taken and considered in the case as coming under the terms of the contract of February 26, 1913, and that

> the accounting may include those amounts, and be charged upon the property mentioned in the bill, without regard to whether or not they come under the terms of that contract.
>
> "Under such waiver I think I would be justified in going over the whole account and charging it on the property."

As a result of this suggestion contained in the preliminary memoranda of the Advisory Master counsel for complainant and for defendant entered into a stipulation which is contained in the supplemental case as follows:

> "It is stipulated that the Court in this cause shall consider and determine complainant's liability upon the said items so claimed in the answer and cross-bill and account thereto exnexed, and if any such liability shall be found, then that the amount of the items found to be due from complainant to defendant, together with the amount of all credits to which complainant is entitled during said period of time be included in the account to be stated in this suit.

Counsel for complainant also in a supplement to his brief in the Court below said (italics ours):

> "The defendant has not demanded a jury trial, consequently it is waived. We are willing that the entire subject prior to the contract of February 26, 1913, *be determined in this suit and waive our right to dismiss the cross bill.*"

This supplement to counsel for the complainant's brief was filed as a result of the preliminary memoranda handed down by the Advisory Master and

after the stipulation above referred to. It will therefore be seen that the Advisory Master in a preliminary memoranda expressly says that he will consider all of the transactions prior to the agreement of February 26, 1913, providing the parties will enter into a stipulation to that effect. The stipulation was entered into as a result of that suggestion and in addition counsel for the complainant in his brief expressly waived any right that he may have had to dismiss the cross-bill of the defendant, and yet, notwithstanding this stipulation and express waiver as the result of the Advisory Master's suggestion, the Advisory Master in his final memorandum of opinion says:

> "Notwithstanding the stipulation made by counsel, I do not feel that this Court should concern itself with the dealings between the plaintiff and the defendant prior to the agreement of February 26, 1913" (p. 555, l. 10).

In addition, the Advisory Master held that all the testimony taken in regard to the prior transactions was not properly admitted (p. 545, ll. 35-40).

We submit that both the Advisory Master's rulings are clearly erroneous.

The general rule is stated in 1 Corpus Juris 616, Section 60, as follows (italics ours):

> "Where a Court of Equity assumes jurisdiction of a controversy on some ground other than the accounting involved, it will, as a general rule, where an accounting is necessary to a full settlement of the controversy, proceed to decree it, *and will settle the whole controversy, even to the extent of adjudicating matters of purely legal cognizance.*"

It is therefore clear that the Advisory Master erred in confining the scope of the accounting to the agreement of February 26, 1913. We contend that those transactions led up, related to and were so intimately and closely connected with the agreement as to be inseparable therefrom. The agreement of February 26, 1913, was merely the reducing to writing of matters that had already been brought into being by the acts of the parties prior thereto. The land upon which the apartment house was erected was purchased prior to that agreement as the result of the activities of the defendant's employe. The plans had all been drawn prior to the execution of that agreement. The agreement expressly says:

> "Whereas said party of the first part is desirous of erecting upon Lots 1 and 2, one four story building consisting of nine apartments, including a janitor's apartment, in accordance *with plans and specifications prepared* by the party of the second part" (p. 10, l. 35).

The Advisory Master says that no allowance should be made for plans. He says "the charges for plans must be stricken out" (p. 553, ll. 1-10). Part of the money that went to pay for the construction and erection of the building was realized through the activities of the defendant's employes in demolishing the Craig residence and also the cost of the apartment house was reduced by using portions of the material obtained from the Craig residence. The Advisory Master says:

> "The services rendered from April 6, 1912, including demolishing the residence that was known as the Craig house, must be eliminated" (p. 555, ll. 5-10).

Long before the contract of Febrnary 26, 1613, was actually executed attempts had been made by the defendant to secure loans on the Craig property from the New Jersey Title Guarantee & Trust Company and from the Hudson City Savings Bank. As early as September and November, 1912, application was made by the defendant to the New Jersey Title Guarantee & Trust Company for a loan and the plans for the apartment house were submitted to it (p. 81, l. 30 to p. 82, l. 90; p. 811, l. 15). In December, 1912, application for a loan was made to the Hudson City Savings Bank (p. 82, l. 35, p. 83, l. 5). Certain fees had to be paid both institutions for examination of the plans when these specifications were made (p. 611, ll. 10–25). This is excluded by the Advisory Master. The survey was made and obtained as early as September 19, 1912 (p. 71, l. 10). This had to be paid for and was excluded by the Advisory Master. The building permit was obtained on September 20, 1912, and a fee had to be paid for it; this was excluded (p. 602, l. 18; p. 108, ll. 20–35). The architect had prepared the plans and had been paid on account thereafter $200, as early as November 11, 1912 (p. 602, l. 30); this was excluded. The Advisory Master starts this accounting on March 20, 1913, and everything prior to that date is eliminated by him. The accounting made by the defendant prior to the institution of the suit shows that up to February 22nd there had been an actual out of pocket expense of $2,978,26 (p. 27, l. 1 to p. 29, l. 15). This was all excluded, notwithstanding the fact it formed part of the actual cost of the apartment house. It would have been impossible to build the apartment house without a survey for the tract of land purchased was divided up into arbitrary parcels, some of which were sold and it was therefore necessary in order

to make sales, under the agreement of February 26, 1913,.to have the survey. The building could not have been erected without a building permit. It could not have been erected without plans and the defendant did not for a moment hold itself out as an architect and we therefore submit that it was imperative in making an accounting to include the transactions which transpired prior to the execution of the agreement of February 26, 1913, first, because they were so intimately connected with that contract as to form part thereof, and secondly, because the entire controversy ought to have been settled in the one suit. As shown in Point III., if the Advisory Master is right in his conclusion that the accounting should not include the transactions prior to February 26, 1913, then, as a matter of logic, the accounting should not have included the transactions under the authorization of June 24, which was a separate and distinct contract authorizing the collection of rents and the furnishing of the apartments in the apartment house so as to secure tenants.

Lastly the agreement of February 26, 1913, shows that the complainant and defendant had in contemplation and intended to include therein the transactions prior thereto for it expressly refers to those transactions. The agreement says that the apartment house should be built according to plans already *prepared* by the defendant (p. 10, l. 35). The eighth clause of the contract provides (p. 14, l. 35 to p. 15, l. 20):

> "The said party of the second part will, on completing said building as aforesaid, render a full accounting of the entire cost thereof, including all expenses connected therewith, and with the matters relating thereto, and upon full payment by the said party of the first part

of all of such costs, charges and expenses, together with the payment to said party of the second part of a sum equal to ten per cent. of such entire cost, or as soon as the proceeds of sale or of mortgages made by the second party under this agreement shall equal in amount, a sufficient sum to reimburse the second party for such entire cost and its ten per cent. compensation, then the said party of the second part will immediately thereafter re-convey said premises or as much thereof as may remain unsold, subject to all liens thereon to the said party of the first part, to the end that said party of the first part may have and enjoy said premises and the improvements thereon absosolutely and forever subject as aforesaid."

This clause specially says that the defendant is to receive as part of the entire cost of the apartment house, including *all expenses connected therewith and with the matters relating thereto.* Upon payment of *such costs, charges and expenses* defendant shall then re-convey, etc.

This is nothing more nor less than a catch-all clause intended to cover all disbursements and out of pocket expenses that in any way were connected with or related to the construction of the apartment house. The Advisory Master seems to have overlooked this clause of the contract in dealing with this question, for he does not refer to it on this point (p. 546, l. 10, to p. 547, l. 10). The Advisory Master admits that if the transactions prior to February 26, 1913, are so intimately connected with that contract as to be inseparable therefrom they must be dealt with (p. 545, l. 40, to p. 546, l. 10), but he concludes that they are not so connected. To our mind the facts demonstrate that they are inseparable, and it is only by adopting an

arbitrary rule eliminating these transactions that it is possible to exclude them. If it were possible to wipe out these prior transactions and the results flowing therefrom and start on February 26, 1913, to erect an apartment house under the contract of that date, and have only such work and services performed as were allowed for by the Advisory Master, it would be found as a practical matter that the apartment house could not be built or, to to say the least, it would be incomplete and unfinished. This test shows that in the nature of things these prior transactions must of necessity be included. The payment of $500 on account in September, 1912, a half year before the contract of February 26th was signed, showed that this was the intention of the parties (p. 582, ll. 30–40). At that time requisition was made "for the sum of $500 as part payment for drawings, to be deducted from final payment on contract."

Counsel for the complainant in the Court below contended that the agreement of February 26, 1913, worked a merger of the prior transactions into that contract. He said:

> "Everything that took place prior to February 26, 1913 (with the exception of wrecking the Craig house), was merged into the contract made that day."

This contention recognizes those transactions as within the terms of the contract. He excepts the wrecking of the Craig house. There are two reasons for this exception, first, because it was *necessary* to remove the Craig house before another house could be built on the land it occupied; second, because there is a credit of several hundred dollars due the complainant on that item. The Advisory Master allowed the credit, but held that the trans-

action could not be considered. On the same ground of necessity, the other services rendered and disbursements made in the transactions prior to February 26, 1913, should be included. The preparations for the construction of the apartment house was as necessary as the actual work of construction. It would not be contended for a moment that if part of the excavation had been made prior to the agreement of February 26, 1913, that then the services so rendered would have to be excluded.

We therefore submit that the scope of the accounting should not have been confined to the agreement of February 26, 1913, but should have included therein the transactions between the complainant and the defendant prior thereto, which led up, related to, and were so closely connected therewith as to be inseparable therefrom.

II.

The defendant should not have been regarded as a mortgagee in possession to the extent of disallowing it any compensation for services rendered to complainant under authorization of June 24, 1913, after November 1, 1913.

As the apartment house was in process of construction, and as it was nearing completion, an agreement was entered into between the complainant and defendant whereby the complainant authorized the defendant "to rent all apartments, making such arrangement as in your judgment may seem advisable. Also such other arrangements as may be necessary in connection with the furnishing and running of apartments, such cost as may be incurred thereby to be added to the contract allowance" (p. 91, ll. 1–20).

Under date of October 28, 1913, the complainant authorized the defendant to furnish and install eight kitchen dressers, and the cost so incurred was to be added to the contract allowance, and paid in accordance with same (p. 91, l. 30 to p. 92, l. 10).

Under these authorizations the defendant took general charge of the building, and rendered services, such as providing a janitor and paying his salary, buying and supplying coal, gas, carpets, fire insurance, electricity, lamps, leases, floor mats, clothes lines and posts, shades, paying interest on mortgages, water bills for house, keys and everything that went to make the apartments, which were of the best on the Hudson Boulevard, suitable for the class of tenant who would pay the amount of rent necessary to lease such apartments (p. 167, et seq). The Advisory Master in his accounting gives the defendant credit for the amounts expended for these different things, but no compensation for the services so rendered. The reason why compenation was refused is stated by the Advisory Master as follows (p. 553, l. 30, et seq.):

> "The object of his holding possession of the property was to procure money with which to pay the amount that might be found due him upon the completion of the building. When the building was completed, the defendant was under obligation to render an account, but prior to the completion of this building on June 24, 1913, the defendant received at his own request from the complainant an authorization to rent and also such arrangements as might be necessary for furnishing and running the apartments; such cost as may be expended in connection therewith to be added to the con-

tract allowance. Under this authorization the defendant claims that he was entitled to charge 10 per cent. of such cost. If there was labor and material which was purchased by the defendant used in the furnishing of those apartments prior to the completion of the building, this authorization would include such furnishing up to the completion of the building as a part of the cost of said building. The defendant can be allowed for the extra material furnished in the construction of said building, and is entitled to its 10 per cent. compensation for the amount paid for such material, together with the labor for putting the same in place. But all expenditures made after the building was completed, and it became ready for occupancy, are not part of the construction account. The defendant's position then became that of a mortgagee, and he must be charged under the same rule with all money received by him, and be allowed for all expenditures made by it. *In this account he cannot be allowed any compensation because the rule is imperative that a mortgagee in possession is not allowed to make profit out of the possession of the estate.*"

The accounting made by the defendant for the Advisory Master covering the furnishing, renting and running of the apartment house, shows in concrete form the work performed by the defendant under the authorization of June 24, 1913. The accounting by the Advisory Master shows in detail the many and various phases of work that the de-

fendant had to perform (p. 556, et seq.). It required the services of an expert to manage this apartment house, and to keep it furnished and rented, and no complaint is made that the work involved was not properly done, but it is said that the defendant is in the position of a mortgagee in possession, and therefore not entitled to any compensation, although by the express terms of the agreement between the parties, the defendant is to have 10 per cent. of all the cost incurred in the performance of the agreement.

We do not dispute the well known rule that an ordinary mortgagee in possession is not entitled to compenation for his own trouble in taking care of the estate and renting it, although there is an agreement between him and the mortgagor that he shall have such compensation. The reason upon which this rule rests is well stated in Jones on Mortgages, Vol. 2, Sec. 1132, as follows:

> "The reason given for this rule is, that to allow such compensation would tend directly to facilitate usury and oppression. And moreover the care he (the mortgagee) bestows is for the furtherance and protection of his own interests, being not an agent, but for the time, as it were, the owner."

However, even under such circumstances, he may charge for the services of an agent employed by him to collect rents, when a prudent owner acting for himself would have probably done so.

Jones on Mortgages, Vol. 2, Sec., 1182.

Davis v. Dendy, 3 Madd. (English Vice Chancellor's Report), 170.

Harper v. Ely, 70 Ill., *581.*

The principal reason, therefore, for refusing to allow compensation to a mortgagee in possession for services so rendered is that it would tend directly to facilitate usury and oppression. However, under the well known maxim *Cessante ratione legis cessat ipsa lex*, when the reason for any particular law, or rule of law ceases, so does the law itself. In the case at bar the defendant is only a mortgagee in possession by virtue of a fiction; it is not receiving any interest or profit on any amount that it has advanced to the complainant for a mortgage. The defendant is a building construction company, holding the property to secure it for moneys due for constructing the building upon which no interest of any kind is paid. There is no reason why it should not have the compensation for its services, which the complainant agreed it should have.

It should also be noticed in this connection, as stated by Jones in his work on mortgages, "that in the early cases a mortgagee in possession was regarded as a trustee, who was not then entitled to commissions. This rule has been changed as regards trustees, and there is no reason why it should be retained as regards mortgagees in possession. The tendency in recent cases is evidently in the direction of a change in this rule."

Jones on Mortgages, Vol a., Sec., 1132.

Green v. Lamb, 24 Hun., 87.

Gibson v. Crehore, 5 Pick., 146.

Tucker v. Buffum, 16 Pick., 46.

Gerrish v. Black, 104 Mass., 400.

Montague v. Boston & Albany R. R. Co., 124 Mass., 342.

It will be noted that the Advisory Master in his accounting (p. 563, l. 10) says:

> "Under the authorization dated June 24, 1913, authorizing the contractor to make such arrangements as will be necessary in furnishing and running the apartment house, such cost to be added to the contract allowance, I will add to the contract allowance such expenditures as were made prior to the completion of the building on November 1, 1913, as follows:"

Then follows the items which the Advisory Master allows under that authorization, totaling in amount about $1,000. It will also be noted that the Advisory Master allows the defendant a 10% compensation on this additional $1,000 of cost incurred under the authorization of June 24, 1913 (p. 564, l. 40). We cannot understand why the Advisory Master allowed a 10% compensation on the items up to November 1st and then stopped such compensation merely because on November 1st the building was supposed to have been completed. If the defendant was entitled to any compensation under the authorization of June 24, 1913, it was entitled to compensation during the entire time that the agreement was in force and on all items of cost that were incurred, and the Advisory Master erred in arbitrarily stopping such compensation after the date upon which the building was about completed, viz., November 1, 1913. The accounting made by the defendant prior to filing of the bill of complaint, herein shows the many and varied items of cost incurred after November 1, 1913 (p. 34, l. 25 *et seq.*).

It is, therefore, clear that the Advisory Master fell into an error in applying this fiction of mortgagee in possession to the defendant to the extent of disallowing any compensation after November 1, 1913, in spite of the express agreement between the parties that there should be compensation.

III.

The accounting should not have included the transactions under the authorization of June 24, 1913, if it properly eliminated the transactions prior to the contract of February 26, 1913.

This point arises out of the patent inconsistency apparent from a cursory reading of the memorandum opinion of the Advisory Master resulting from the position taken by him in excluding the transactions prior to the agreement of February 26, 1913, because he was "unable to discover any relation" between those transactions and that agreement, and yet he finds that "connected" with the agreement, is the authorization of June 24, 1913, whereby the complainant agrees that the defendant shall furnish the apartments and collect the rents. If, as the Advisory Master states, the remedy of defendant in the one case is in a Court of law, then by virtue of the same reasoning the complainant should likewise, so far as this subsequent agreement is concerned, sue in Court of law for recovery thereunder. If the accounting in the case at bar is to be limited strictly to the agreement of February 26, 1913, then it should exclude the subsequent agreement and the transactions thereunder. We are not, however, urging this as proper solution of the case. It is our contention that a Court of equity, having a cause once properly before it, should settle the entire controversy justly and equitably by one decree. It is the duty of the Court of Chancery never to do justice by halves, to beget business for another Court, or when a cause is fairly within its jurisdiction, to leave open the door for further litigation in that Court or elsewhere.

We submit that if the transactions prior to February 26, 1913, were properly excluded from the accounting that then the Advisory Master erred in permitting the accounting, which he said was to be limited strictly to the contract of February 26, 1913, to cover the subsequent agreement of June 24, 1913.

IV.

The defendant was entitled to have included in the accounting as part of the cost of the apartment house, under the agreement of February 26, 1913, the salaries paid its employes while actually engaged in the performance of work connected with the construction thereof.

On this phase of the case the Advisory Master held as follows (p. 551, l. 10 to p. 552, l. 15):

> "However, arising out of this is the charge made by the defendant in its accounting for a charge of $19.20 a day for money paid to its President, Mr. Beaumont, for superintending the construction of this building. As stated, the contract provides for no independent supervision. The defendant cannot charge the complainant with the salaries that it pays its officers for supervising or superintending a building. The defendant is the contracting party; it had a right to employ whoever it chose to superintend on its part, the work of the laborers employed by it. It agreed to do work and receive a compensation, but the contractor himself, cannot charge in such contract for services paid to its President or its Secretary for looking after its own work.

"I find nothing in this agreement that authorizes the defendant to charge this complainant with the salary of its President, Mr. Beaumont, and this salary included in the payrolls must be eliminated from the costs of construction. The only case that I have been able to find in this State upon the question of costs and 10 per cent. is that decided by Vice Chancellor Pitney in 1899, *Isaacs vs. Reeve, 44 Atlantic, p. 1*, in which the Vice Chancellor, in his opinion states that under a contract for costs and 10 per cent. he shortly disposed of a sum charged by the contractor for an attendance of the place and horse hire charge in addition to 10 per cent.; the charge was simply for attendance. He disallowed such charges on the part of the contractor by saying that the 10 per cent. was intended to cover those services. I think that the 10 per cent. compensation is intended to cover all expenses that the defendant may have incurred in the payment of salaries of its President, of its Secretary, and of every person except those that were employed by the defendant engaged in the labor of putting in place the material that went into the construction of the building, and not for the attendance on the building of its President, of its Secretary, or any salaried officer, and the inclusion in the payroll of the President's salary, of the salary of its Secretary, Mr. Rowan, or its messenger boy, Stanley, are improper charges in such account, and should not be allowed to the defendant."

The material portions of the contract of February 26, 1913, dealing with the question of defendant's compensation are contained in the fourth and fifth paragraphs of the preamble and clauses 6 and 8 of

the contract, and are as follows: (p. 10, l. 35 to p. 11, l. 20; p. 14, ll. 10–30; p. 14, l. 35 to p. 15, l. 20).

"Whereas, said party of the first part is desirous of erecting upon lots 1 and 2 one four-story building consisting of nine apartments, including a janitor's apartment, in accordance with plans and specifications prepared by the party of the second part, *at a cost approximating* $42,000, but is without means for such purpose, the only additional funds in the possession of said party of the first part available therefor being five thousand dollars in cash and two mortgages, one for $2,000 falling due in March, 1913, and the other for $2,000 falling due in April, 1913, and

"WHEREAS, the party of the second part is willing to erect said building according to such plans and specifications, *at a cost approximating* $42,000 *aforesaid, and to receive for its entire compensation for its service for so doing a sum equal to ten per cent. of the entire cost of such building* and to complete the same by October 1st, 1913; and" etc.

"SIXTH.—The said party of the second part will, upon receiving said conveyance, assignments, authority and cash as aforesaid, immediately thereafter begin the building operations upon said lots 1 and 2, and complete the same according to said plans and specifications, and have said building ready for occupancy on October 1st, 1913, provided the title to said lots is good and marketable, and the said party of the first part in all respects lives up to this agreement and does not interfere with or prevent the party of the second part in the performance

thereof, or that it is not otherwise prevented in the performance of this agreement through no fault of its own. *And does hereby guarantee that the entire cost of said building (including the ten per cent. compensation to the second party above mentioned) and shall not exceed forty-two thousand dollars;* and does agree that the excess, if any, above that sum shall be paid by it, the second party, at its own cost and expense."

* * * * * * *

"EIGHTH—The said party of the second part will, on completing said building as aforesaid, render a *full accounting of the entire cost thereof, including all expenses connected therewith, and with the matters relating thereto, and upon full payment by the said party of the first part of all of such costs, charges and expenses, together with the payment to said party of the second part of a sum equal to ten per cent. of such entire cost,* or as soon as the proceeds of sale or of mortgages made by the second party under this agreement shall equal in amount a sufficient sum to reimburse the second party for such entire cost and its ten per cent. compensation, then the said party of the second part will immediately thereafter re-convey said premises or so much thereof as may remain unsold, subject to all liens thereon, to the said party of the first part, to the end that said party of the first part may have and enjoy said premises and the improvements thereon absolutely and forever subject as aforesaid."

The total cost as found by the Advisory Master in his account was $38,174.99. This, of course, is almost $4,000 below the limit of cost guaranteed by

the defendant company. Also it must be remembered that there were alterations and additions, the cost of which was to be added to the contract price, and, of course, the defendant would be entitled to have that even though it should increase the total cost beyond $42,000. The question now presented is whether under the contract of February 26, 1913, the defendant is entitled to include as part of the cost of the apartment house the salaries paid its employees while actually engaged in the performance of work under that contract.

There was some discussion in the Court below as to whether or not the complainant knew that she was dealing with any other person than Mr. Beaumont personally prior to June 6, 1912, but it is admitted by the Advisory Master that it was conceded that complainant knew that Mr. Beaumont was the president of the defendant, then a corporation, for the complainant in a letter announcing the sale of the Duncan avenue property stated that she was ready to compensate Mr. Beaumont or the company up to date (p. 541, ll. 20-35). However, there can be no doubt that after June 20, 1912, the complainant knew that she was dealing with G. B. Beaumont Company, for on August 27, 1912, she entered into the first contract with that company, and on September 17, 1912, made a check payable to the order of the company for $500 on account. Mr. Beaumont supervised the construction of the building. He also made the layout (p. 123, ll. 1-20). He kept the books of the company. He did work in connection with the construction of the apartment house, namely, interviewed other contractors in regard to the letting of sub-contracts, ascertained their reliability to do the work, secured bids for work, checked time slips, ordered material, checked material, helped to draw up sub-contracts so as to comply

with the specifications, and drew all checks in payment of bills (p. 139, l. 30 to p. 140, l. 10). The defendant also had an employee by the name of Stanley, who did general office work, but in connection with the construction of the apartment house he first helped in the demolishing of the Craig residence, and sold various parts of the material resulting therefrom (p. 121, ll. 30-40). He also assisted in the construction of the apartment house by doing work on the job as he was instructed by the foreman. He cleaned brick, carried moulding and trim and ran errands (p. 121, l. 35 to p. 122, l. 10).

The defendant in its accounting charged for the services of these three employees while they were actually engaged in work connected with the erection of the apartment house, at the rate of salary that they were receiving from the defendant. The Advisory Master excluded these charges from the accounting stated by him. He thought that the defendant could not charge for the services of any employe "except those that were employed by the defendant engaged in the labor of putting in place the material that went into the construction of the building," other words, in order for the defendant to charge for the time of any of its employes, as a part of the cost, it was necessary for such employes to be actually engaged in the physical manual labor of putting some concrete part of the building in place. We submit that this is not the true rule to be applied. It was merely a coincidence that Mr. Beamont, who was President, should happen to be the man who superintended and supervised the work of erecting the building. It is needless to say that the officers are not the corporation; the agents and the other employes are not the corporation; they are the servants of the corporation, and in this case they were the ser-

vants of the defendant. These servants, or employes, are individuals each in his proper sphere for time being, serving the company for hire. We contend that the defendant is just as much entitled to charge for the services of the superintendent, or any other employe, when he is actually engaged in some part of the work that is necessary in order to erect the apartment house, as it is to charge for the amount paid to a sub-contractor for the work done by him. These services constituted part of the cost of construction of the apartment house, and the value of those services is well fixed on the basis of the salary paid by the defendant to the employes.

We submit that the Advisory Master adopted a rule that is too narrow in its application, when he says that defendant in order to charge for the services of any employe must show that that employe was actually engaged in some part of the physical labor employed to construct the building. The case cited by the Advisory Master, namely, *Isaacs v. Reeve*, *44 Atl.*, *1*, is no authority for the position taken by him, for in that case the contractor charged for his own time, when he was to receive 10 per cent. of the costs for such services, in other words he was receiving, according to his agreement 10 per cent. on the cost for his personal attendance, and yet, he charged a further sum for such attendance. It was clear that it could not be allowed. However, that is not the case here, for here the contractor is the company, and it is charging for the services of a superintendent, which it had to pay while actually engaged in superintending the erection of the building. We do not contend for a moment that the defendant is entitled to charge for the services of its employes while they are engaged in general office work, and that was not

the contention below. The contention is that the defendant is entitled to include as a part of the cost of the building the salary of its employes while they were actually engaged in some part of the work that was necessary to the proper erection of the building. If the salaries of these employes while actually engaged in some part of the work which goes to make the building are to be disallowed, it is clear that the defendant company could not exist on a 10 per cent. compensation. The disbursements for salaries would exceed the income.

V.

The defendant is entitled to compensation for financing the erection of the apartment house, in accordance with the terms of the agreement of February 26, 1913.

The Advisory Master held that the defendant was not entitled to any compensation for this work (p. 547, l. 35 to p. 548, l. 35). In his opinion he says:

> "In addition to the construction of the said building, the contract provides that the defendant shall finance the property conveyed to him, shall see to the procuring of the mortgages and the sales of the various plots, the proceeds of which were to be applied in payment of the construction account. The standing of the defendant in this transaction is twofold. First, that of builder. Second, that of a trustee in the management of the property transferred to it as security. This trust capacity is annexed to this contract by the conveyance made by the claimant of her property to the defendant, subject to the defeasance contained in the agreement.

"There was in the agreement a trusteeship conferred upon the defendant to finance—that is, to sell this property or to mortgage this property for the purpose of raising money with which to pay it under the building contract. This power was under check of the complainant.

"*In the exercise of this trusteeship I find nothing in the contract between the parties that entitles the defendant to compensation.* It is true that this contract is not entirely clear with regard to the compensation provided for, for the defendant. In the recital, the entire compensation for the services in the building is a sum equal to 10% of the entire cost of said building. In the agreement it is provided that on the payment to the defendant of the entire cost including expenses connected therewith and with matters related thereto, together with the payment to the defendant of a sum equal to 10% of such entire cost, referring evidently to the guarantee made by the defendant that the entire cost of the building including 10% compensation to the second party above mentioned, or mentioned in the recital, is the compensation provided for the defendant."

The eighth clause of the contract deals with this phase of the case and allows the defendant compensation on the basis of 10 per cent. of the entire cost "including all expenses connected therewith and with the matters relating thereto." Clause 8 of the contract is as follows (p. 14, l. 35 to p. 15, l. 20):

"The said party of the second part will, on completing said building as aforesaid, *render a full accounting of the entire cost thereof, including all expenses connected therewith, and*

> *with the matters relating thereto, and upon full payment by the said party of the first part of all of such costs, charges and expenses, together with the payment to said party of the second part of a sum equal to 10 per cent. of such entire cost*, or as soon as the proceeds of sale or of mortgages made by the second party under this agreement shall equal in amount a sufficient sum to reimburse the second party for such entire cost and its ten per cent. compensation, then the said party of the second part will immediately thereafter re-convey said premises or so much thereof as may remain unsold, subject to all liens thereon to the said party of the first part, to the end that said party of the first part may have and enjoy said premises and the improvements thereon absolutely and forever subject as aforesaid."

It will be noted that the Advisory Master says that the "contract is not entirely clear with regard to the compensation provided for, for the defendant." Any doubt should be resolved in favor of the defendant for the contract was executed after plaintiff's counsel had approved of same. The acknowledgment was taken by him (p. 15, l. 35 to p. 16, l. 10). The complainant's agreement is that on the payment to the defendant of the entire cost

> "including all expense connected therewith and with the matters related thereto and upon full payment by the said party of the first part (complainant) of all such costs, charges and expenses, together with the payment to the said party of the second part of a sum equal to ten per cent. of *such* entire cost."

then the defendant shall re-convey, etc. (p. 14, l. 35 to p. 15, l. 10).

This language should be construed most strongly against the complainant. If there is any doubt as to the meaning of this clause of the contract it must be with reference to that part of it which says "together with the payment to the said party of the second part of a sum equal to ten per cent. of *such entire cost.*" The words "such entire cost" refer to but one thing and that is "the entire cost thereof, including all expenses connected therewith and with the matters relating thereto." This is both a grammatical and logical construction of this clause of the contract and any other construction would do violence to the terms of the agreement and would be a forced and unnatural one.

The seventh clause of the agreement provided (p. 14, l. 30–35):

> "Seventh. The party of the second part will use its best endeavors to finance said building operation as outlined in the preambles of this agreement for the purposes aforesaid."

The sixth paragraph of the preamble and the second, third, fourth, fifth and sixth clauses of the agreement show that the defendant was bound to take full charge of financiering the construction and erection of the apartment house.

The complainant had only $5,000 in cash when she entered into the agreement of February 26, 1913, with the defendant to construct a $42,000 house (p. 11, ll. 1–10). In addition she had two mortgages for a sum total of $4,000, and the Craig property which she purchased for $33,000 but gave back a mortgage for $15,000, leaving an equity of $18,000 in this property. In other words, the complainant's total assets were $27,000 and she proposed to build a $42,000 apartment house. It is self-evident from these facts that a great

amount of financiering was required to secure the funds necessary to erect the apartment house. This burden was thrown on the defendant by the agreement and there is no question but that the defendant performed this part of the contract with great efficiency. It secured at different times three mortgages as the work progressed; the first for $15,000, and the second for $20,000 and the third for $30,000. Of course, each subsequent mortgage cancelled the prior mortgage by paying it off. Also the original purchase money mortgage of $15,000 was paid off. In order to secure these loans bank officials had to be interviewed, plans submitted, contracts examined, fees paid, the job inspected and financial standing shown. Anyone who has had experience in financiering an apartment house or other large building knows the difficulties that present themselves, especially if complainant's scheme is adopted. The numerous mechanics lien suits and bankruptcy proceedings resulting from attempts to erect large buildings on insufficient capital show most conclusively the nature of the work which defendant agreed to do in addition to actually constructing and erecting the apartment house.

The defendant's testimony and the accounting attached to the cross-bill show that the defendant made many unsuccessful attempts to secure loans; the defendant also under the agreement of February 26, 1913, succeeded in selling several parcels of the Craig property at very good prices. This involved the drafting and execution of agreements to sell and deeds, lawyers' fees therefor, etc. The question presented is whether defendant is or is not to be compensated for these invaluable services to the complainant. This depends on whether the money expended in securing these loans, such as fees for plans, search fees, lawyers' fees, interest

charges, taxes, etc., are to be considered as "expenses connected with the matters relating to" the entire cost of the apartment house. If they are then under the eighth clause of the agreement, *supra*, the defendant is entitled to ten per cent. thereof. There can be no doubt but what these costs, charges and expenses are the costs, charges and expenses referred to in the eighth clause of the agreement, for otherwise that phraseology contained in the agreement would have to be discarded as surplusage.

The eighth clause provides that the defendant will, on completing the building, render a full accounting of the entire cost, including all expenses connected therewith and with the matters relating thereto, and upon full payment by the complainant of all of *such costs, charges and expenses*, together with the payment to defendant of a sum equal to ten per cent. of such entire cost, that then the defendant shall re-convey, etc. There can be but one meaning, and that is that the defendant is entitled not only to ten per cent of the cost of erecting the building, but ten per cent. of the entire cost, including all expenses connected therewith, and with the matters relating thereto. There is no ambiguity latent or patent in this section, and it does not in any way conflict with any other section of the contract. It necessarily refers to the cost of financiering the building because that was an expense connected with and relating to the erection and completion of the building.

Here again we believe the learned Advisory Master had in mind the rule that the defendant was a mortgagee in possession and a trustee to finance the property and therefore not entitled to compensation for such services. The question of defendant's being a mortgagee in possession is fully covered in

Point II. hereof. The idea that the defendant was a trustee is also erroneous. Defendant could not convey title, sign a contract of sale or execute a mortgage under the agreement of February 26, 1913, *and did not in fact do so*. The bill of complaint shows that whenever any act of dominion was to be exercised over the *res* it was the complainant who exercised it and the defendant merely held the title *ad interim* to protect it for the cost of the building and that was defendant's only interest. It was an interest which in no way of itself gave the defendant any profit on its investment. It is well settled to-day that a trustee is entitled to compensation for his services and as shown in Point II. the rule is being changed in regard to an *actual* mortgagee in possession.

We therefore submit that the cost of financiering the building is included within the terms of clause eight, *supra*, so as to give the defendant a ten per cent. compensation on such cost for the services performed in financiering the construction and erection of the apartment house.

The cost of financing the building is shown by Exhibits D 34, 35 and 36 (p. 597 *et seq.*). The defendant's 10% compensation on the first loan of $15,000 secured by it was $83.13. The defendant's 10% compensation on the second loan secured by it of $20,000 was $64.99. Defendant's compensation on the third loan of $30,000 secured by it was $65.09. These three exhibits are itemized in Exhibit D 42, beginning at p. 611, l. 10. Looking at the statements as they are itemized in D 42 it will be seen that the time spent by the defendant's employes in negotiating the loans, the car fares disbursed and the out-of-pocket expense for telephone calls, practically make up the total in the first statement, No. 5, of $478.43, in the second statement of $100.80 and in the third statement of $126.46. Of

course, there is also included in these amounts the charges for survey fees paid banking institutions for examination of plans, etc. However, if we total all of these items for employes' care fares, telephone calls and salaries of employes and add thereto the 10% charged by defendant we have a total of approximately $900.

It will be remembered that all together there were secured in mortgage loans aggregating in amount $60,000. The ordinary compensation charged by a real estate broker is 2 1/2%. However, if we take only 1% of $60,000 we have a total of $600, while if we take 2 1/2% we have a total of $1,500. It must also be remembered that the defendant not only secured a person or banking institution willing and ready to make a loan, but actually negotiated the loan, that is, performed all of the services necessary in order to secure the money.

Also, the defendant succeeded in selling two parcels of the Craig property, one for $3,500 and the other for $9,600. In other words, by the sale of lots the defendant realized for the complainant a sum total of $13,100. This is contained in Exhibit D 37 (p. 598). This exhibit is itemized in Exhibit 42 (p. 613). Defendant charged a 10% compensation on the actual cost incurred in making the sales, the said 10% compensation amounting to $153.55. The charges for the payroll of defendant's employes, telephone calls and car fares were respectfully, $112.80, $4.20 and $1.75, making a total of $118.75 and if this is added to the 10% we have a total of $272.30. If a real estate broker had succeeeded in making these sales he would have charged 2 1/2% on the amount of the purchase price and 2 1/2% of $13,100 is $327.50. All that a real estate broker would do to earn his commission would be to secure a person ready and willing to

purchase. The defendant not only secured the purchaser but negotiated the entire transaction, arranged for the closing of title, etc. It is clear from a comparison of the charges made by the defendant with the charges ordinarily made by real estate brokers that the charges made by defendant are exceedingly low

VI.

The incidental expense incurred by the defendant "on the job" and for telephone calls, car fare and postage should have been included in the accounting as part of the cost of the apartment house.

The Advisory Master had the following to say in regard to these charges (p. 552, ll. 15-35):

> "In the accounting for the construction of this building there are various charges made for money paid for telephone calls carfare, stationery, and expenses for postage. These items are not proper charges against the complainant for the construction of this building. The car fares were largely for the traveling expenses of the officers to and from the place of business, and as stated in the case of *Westendorg, et al. vs. Dinniny*, 92 N. Y. Suppl'nt, p. 858, such charges were disallowed. It was claimed that they were allowed by custom, but no such custom is here pretended, nor was there any provision made in the contract that this should be a part of the cost or the expenses of the said building. The telephone calls which were a large item, are conveniences for the defendant themselves, and not for the complainant. The stationery and the incidental

> items were office charges of the defendant and were not costs and expenses of this building, those must be disallowed."

There were numerous incidental expenses incurred "on the job" which were charged for by the defendant and included in the accounting which was made by the defendant prior to the filing of the bill (p. 125, ll. 5-10; p. 47, l. 20 et seq.). For instance a telephone was installed on the job and paid for by the defendant (p. 125, l. 10-35); the oil heater was purchased and used on the job (p. 127, ll. 20-30); stationery was purchased and used on the job and at the office (p. 127, ll. 30-40). The carfare was spent in going to and from the job and in visiting the complainant to consult with her, and also in going to see the proper people in order to finance the work. Also certain tools for this particular job were supplied by the defendant and charged as part of the cost and when the job was finished the complainant was given a credit for such of the tools as were still usable and taken away by the defendant. The testimony was that—

> "In a ten per cent. job we buy on the job any tools we may require, and if we have tools on another job that we have finished up we send them to the new job and charge them on that job; everything that goes on the job is charged to the job" (p. 124, 20–40).

All of these items and similar items were excluded by the Advisory Master. The question presented is whether they are a part of the cost so as to permit the defendant to include them in the accounting, and also realize ten per cent. thereon. This again depends on what construction the Court

is to place on clause eight of the contract, wherein it says that the defendant is to be paid on the completion of the building such an amount as is shown by a full accounting of the entire cost of the apartment house "including all expenses connected therewith, and with matters relating thereto, and upon full payment by the said party of the first part of all of such costs, charges and expenses, together with the payment to the said party of the second part of a sum equal to ten per cent. of *such entire cost*," then the complainant shall be entitled to re-conveyance, etc.

It will be noted that the Advisory Master limits the accounting strictly, first to the cost of such labor as was used in the physical and manual task of putting some portion of the building in place, and second to the actual cost of the material that formed some part of the building.

In Point IV., *supra*, we dealt with the ruling of the Advisory Master in limiting the scope of the accounting to such labor as was actually used in putting some part of the building in place. We here deal with the ruling of the Advisory Master, wherein he limits the scope of the accounting to the cost of materials actually used in the building. For instance, the Advisory Master held that the cost of the oil heater that was used on the job could not be included in the accounting, because it did not go to form some part of the building. He likewise held that the record books used on the job, the time books, etc., could not be charged for, although they were used exclusively for this particular job. Also, he held that the telephone charges for the telephone installed on the job and telephone charges incurred generally could not be charged for because it did not go to make some part of the building. Likewise, when the complainant needed money and made demand therefor,

the defendant sent the complainant money by registered mail. The cost of the postage charges, the Advisory Master held, could not be included in the accounting. In other words, the Advisory Master, in making the accounting, eliminated everything except the labor actually used in putting the building in place and the materials that went to make the building.

We submit that the rule adopted by the Advisory Master is too narrow when measured by the eighth clause of the contract of February 26, 1913. It was just as necessary in the construction of the apartment house to have a telephone, a heater, record books, time books, etc., on the job as it was to excavate the ground. However, assuming for the moment that these charges do not form part of the cost of the building the least that can be said is that they are expenses connected with and relating to the cost, and if they are then they clearly come with in the eighth clause of the contract and should have been allowed These expenses were necessary and incidental to the construction and erection of the apartment house and were out-of-pocket expenses, that is, money actually disbursed by the defendant in connection with the erection of the apartment house. There are numerous items in the accounting which are merely given as "job expense" (p. 29, l. 10, et seq.). They are all small items such as $1.09, 70c., $3.19, 98c. and $1.43. However, they occurred quite frequently and there can be no doubt but what these incidental expenses which had to be paid should be allowed in the accounting. The car fares that the defendant company expended for its president in visiting the complainant, the job, and the different financial institutions, also the carfare paid for its other employes are to our mind proper and legitimate charges. It

will be noted that the Advisory Master not only said that the salaries of the defendant's employes, while actually engaged in some part of the work that went to make the apartment house, could not be charged against the complainanant in the accounting, but also held that the incidental expenses incurred by the employes while so engaged could not be charged. In other words, when the defendant's superintendent went to Mrs. Shaw's home to discuss with her the erection of the apartment house or when he went to the New Jersey Title Guarantee & Trust Company to make application for a loan, or when he went to the job to inspect the work not only his time should not be allowed for but also his expenses for carfare, etc., should not be allowed.

The Advisory Master's reasoning is that the services should not be allowed for because the superintendent did not lay any of the brick or did not do any of the carpenter work, or did not put the roof on. In other words, he did not assist in putting some of the material in place. The expenses thus incurred could not be allowed because they were not disbursed for some part of the material that was used in the building. There might be something said in favor of this contention if the contract was strictly limited to the actual cost of constructing the building, but even then we would contend that these items would come within that category. But here there can be no doubt, for the agreement is sufficiently broad to cover them. These items are all *expenses connected with and relating to the cost.*

If we keep in mind that the only compensation to be paid the defendant was 10% of the cost, including all expenses connected therewith and matters relating thereto, it is obvious that the defendant could not long exist on a 10% basis if in addition it should be compelled to pay all of the incidental ex-

penses. The Advisory Master, after eliminating many of the items which we claim should have been included, arrived at the total cost of the apartment house and found it to be $34,704.49 (p. 564, ll. 35-40). This, of course, does not include the 10%, which amounts to $3,470.50. The actual cost of the building as paid by the defendant is $37,472.11 (p. 596, l. 1-10). This does not include defendant's 10%, which on this basis amounts to $3,749.56. If we subtract the cost as found by the Advisory Master from the real cost as shown by the defendant's accounting we find that there is a difference of approximately $3.000. This in itself is sufficient to wipe out the defendant's 10% as allowed on the cost as found by the Advisory Master, and leave absolutely no profit. However, that is not all. There were certain changes, alterations and additions authorized by Mrs. Shaw in the building which increased the cost, according to the defendant's figures, approximately $1,000 (p. 596, ll. 10-20). This is included within the cost as found by the Advisory Master, *supra*, but is in addition to the actual cost of the building as shown in the defendant's accounting, and therefore makes a total cost of $38,472.11. This $1,000 is a total loss to the defendant. There is still further loss of salaries paid to defendant's employees and of expenses incurred by such employees while engaged in financing the building and in the transactions prior to February 26, 1913, which can be roughly estimated at $2,000 more. According to the defendant's accounting the actual cost, plus its 10%, left a balance due and owing from the complainant of $4,794.82 (p. 601, l. 20), but when the Advisory Master finished eliminating items the defendant owed the complainant $5,540.35 (p 579, l. 40) which shows conclusively that the Advisory Master eliminated items approximating a sum total of $10,000.

Under the Advisory Master's ruling all the compensation that the defendant was to receive was $3,470.50. In other words, the actual total loss to the defendant is approximately $6,600. This shows that the accounting as stated by the Advisory Master is not only illegal but also unjust and unreasonable. The defendant company erected a very beautiful building for the complainant (Exhibit D 79, p. 499), and although complainant made some complaint as to certain alleged defects in the building, the Advisory Master found that such complaint and objections had not been proven to his satisfaction. He said:

> "The evidence is contradicting and I am not satisfied that such claim for defect of labor is sustained" (p. 551, ll. 1-10.

This being so this Court is not going to construe the eighth clause of the agreement of February 26, 1913, so as to throw on the defendant an approximate loss, that is, out-of-pocket loss of $6,600, unless that agreement absolutely requires the Court to so construe it.

We submit that the eighth clause is broad and comprehensive; that when it says the defendant is to be paid the entire cost, including all matters relating thereto and connected therewith, it means just what it says and the defendant is entitled to recover the entire cost, together with all expenses connected therewith or related thereto, and 10% compensation thereon as is also provided in the eighth clause, and that the items which were eliminated by the Advisory Master, such as the employee's wages while engaged in work connected with the construction of the apartment house, disbursement for tools used exclusively on the job, telephone charges, carfare, postage and job expense, are all covered and included.

VII.

No counsel fee should have been allowed to the complainant or, to say the least, the complainant is not entitled to a counsel fee of $1,500.

The amount of counsel fee allowed by the Advisory Master is $1,500 (p. 576, l. 20). The amount of the recovery of the complainant, as allowed by the Advisory Master, is $5,540.35 (p. 577, ll. 30–40). In other words, the Advisory Master allowed as a counsel fee a sum equal to about one-fourth of the amount recovered.

We challenged the imposing on the defendant of complainant's costs and counsel fees. The bill of complaint was simple, and called for no great acumen in conception or skill in drafting. After the defendant's answer was filed admitting practically all the allegations of fact contained in the bill, all that remained was to ascertain and state the account. Prior to the filing of the bill, defendant had already made an accounting to the solicitors for the complainant, and on the hearing this accounting was practically the sole subject of inquiry. Defendant's present counsel did not attend the hearing, but was substituted after the appeal was taken, but from an examination of the printed book the taking of testimony should not have extended over three or four full days. The work of preparing for argument and arguing the questions involved was not great. Counsel for the complainant made three unsuccessful attempts to have a receiver appointed. This, of course, could not be considered in the allowance of counsel fees.

We submit that $1,500, which was nearly one-fourth of the recovery, was so excessive as to

amount to an abuse of discretion, and that an appeal will therefore lie.

If the decree should be reversed on defendant's appeal, the provision for allowance of costs and counsel fee to complainant should fall with it *in toto*. The case is not one where costs and counsel fee can be allowed irrespective of success. The subject is covered by P. L., 1910, p. 427. Should the decree be reversed the complainant will not be within the purview of the statute, and the dismissal to be directed should not only be without the allowance of costs and counsel fee to complainant, but the Court of Chancery should be directed to award costs and counsel fee against the complainant.

CONCLUSION.

If the grounds of appeal, or any of them, urged by the defendant are sustained, we presume that this court will either send the case back to have the the account re-stated or will re-state the account itself. For the convenience of the Court in the event that it desires to re-state the account here we shall refer to such parts of the state of case as will assist the Court. Exhibits D 30 to 42, inclusive (p. 595 et seq.), are statements itemizing the defendant's accounting made prior to the filing of the bill of complaint. Each of these exhibits state at the beginning what part of the accounting it contains and itemizes. For instance, statement No. 1, which is Exhibit D 30 is entitled "Charges up to and including August 27, 1912, on which date Eleanor P. Shaw signed an agreement with Isabelle M. Craig and Burdette P. Craig for the purchase of property." Statement No. 2, which is Exhibit D 31, is entitled "Cost of Beaumont Apartment." These exhibits were all offered in evidence, one after another, and the offer of the exhibits will be found in the State of Case begining at page 173. In

offering these statements as exhibits they were explained and perhaps such explanation will also assist the Court. Statement No. 12, which is Exhibit D 41 (p. 600, l. 30 et seq.) is a summary sheet showing the total charges of the defendant and also the total credits to which the complainant is entitled. Exhibit D 42 (p. 601) is a detailed statement which itemizes the other statements, 1 to 12, inclusive. This Exhibit D 42 shows the amount expended each day by defendant from April 6, 1912; carfares amounting to 30 cents were disbursed. On April 13th, defendant paid its employes for salaries $30.00. On May 1st, telephone calls were paid for amounting to 50 cents, and so from day to day this exhibit shows what expense was incurred.

If the Court sustains the grounds of appeal urged by defendant the amount due the defendant ought to coincide with the amount shown on Exhibit D 41, which is a summary sheet (p. 600, l. 30 to p. 601, l. 201). If, for example the Court should decide that the demolition of the Craig residence should not be considered then that would simply mean the elimination of Exhibit D 33 which deals with the demolishing of the Craig residence and, of course, the credit of $573.37, due the complainant as a result of that transaction, could not be given to the complainant.

It will be remembered that the Advisory Master, although he eliminated this transaction, nevertheless allowed the complainant $465.11 for lumber received from the Craig residence (p. 563, l. 30).

We do not think it will assist the Court any for counsel to make an elaborate accounting, but on the contrary it might confuse the matter. It will be remembered that in the statement of the case contained in the beginning of this brief the relations of the three different accountings to each other are explained. If the Court will keep in mind that the orig-

inal accounting is that attached to the cross-bill of the defendant and that that accounting was classified and itemized, such classification and itemization being contained in Exhibit D 30 to 42 inclusive, and that from these itemized statements the Advisory Master made up his accounting, we do not think there will be any difficulty for the Court in re-stating the account if it sees fit so to do instead of sending the case back to the Court below to have the account re-stated.

Dated March Term, 1917.

COLLINS & CORBIN,
Solicitors of Defendant.

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EDWARD A. MARKLEY,
Of Counsel.