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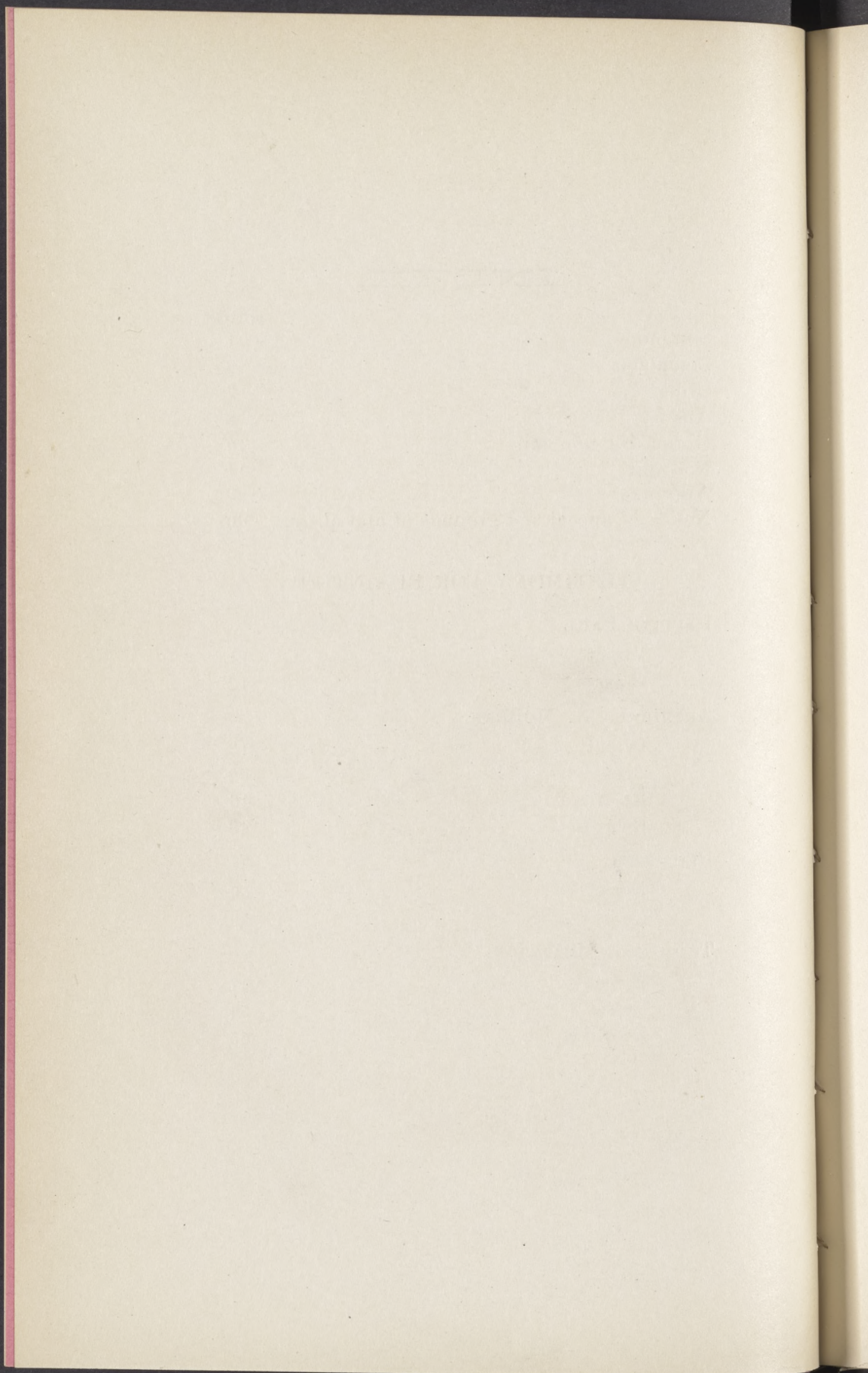
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SUMMONS.

The State of New Jersey to GUSTAVE DE KIMPE,
(L. S.):

You are summoned to answer the annexed complaint of Joseph P. Briody, in an action at law in the Supreme Court.

10

And take notice, that unless you file your answer to said complaint, with the Clerk of the Supreme Court, at Trenton, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see notice endorsed hereon.)

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-ninth day of March, nineteen hundred and thirteen.

20

WILLIAM C. GEBHARDT,
Clerk.

WILLIAM F. BURKE,
Attorney.

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COMPLAINT.

NEW JERSEY SUPREME COURT.
ESSEX COUNTY.

10

JOSEPH P. BRIODY,

v.

GUSTAVE DE KIMPE.

Action at Law.
Complaint.

The plaintiff, residing at No. 91 Palisade avenue, Jersey City, N. J., says:

(1.) That on September 6, 1912, the defendant and one Archibald N. McBean entered into a contract, bearing date the said sixth day of September, 1912, wherein and whereby the said defendant agreed to engage the said McBean to solicit work for him for general construction of public and private buildings, and agreed to pay said McBean for such services, a commission of one per cent. (1 %) on any and all contracts which the said defendant accepts, and defendant agreed to pay the said commissions, one-half thereof on the signing of the contract and the balance thereof on completion of the contract, the completion of the contract not to exceed a fair and reasonable time.

(2.) A copy of said agreement is attached hereto and is marked "Schedule A."

(3.) The said contract was delivered by the defendant to the said McBean and is now in the possession of the plaintiff.

(4.) After the making of the said contract and while the said contract was in full force and effect, the said McBean solicited for the defendant the

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COMPLAINT

work for the construction of a Public School Building then about to be erected by the Board of Education of the City of Newark, in the State of New Jersey, which school building was to be erected at the corner of Johnson avenue and Alpine street, in the City of Newark aforesaid, and which school building was to be known as the "South Side Public School" and subsequent thereto, to wit, on December 31, 1912, the defendant accepted a contract for said work from the Board of Education of the City of Newark, for the contract price of two hundred and forty-six thousand five hundred dollars (\$246,500), of which sum of two hundred and forty-six thousand five hundred dollars, the said McBean, on acceptance of said contract by the defendant, became entitled to receive from the defendant one per cent. (1%) of the said contract price namely, two thousand four hundred and sixty five dollars (\$2,465) and became entitled to receive from the defendant one-half thereof on the signing of said contract and the balance on the completion of said work, or within a reasonable time, thereafter.

(5.) Through the solicitation of said McBean the defendant accepted said work and the defendant obtained said work of constructing the said Public School Building, and the defendant entered into a written contract on the thirty-first day of December, 1912, with the Board of Education of the City of Newark, aforesaid, for the construction by the defendant, for the said Board of Education of the City of Newark, of the said school building, at the contract price of two hundred and forty six thousand five hundred dollars (\$246,500).

(6.) The defendant after making said contract with the Board of Education of the City of Newark,

COMPLAINT

proceeded with the construction of the said school building.

10 (7.) The work under the contract above referred to between the defendant and the Board of Education of the City of Newark, has not yet been completed by the defendant.

(8.) Plaintiff says that the commissions on the contract price aforesaid of two hundred and forty-six thousand five hundred dollars (\$246,500) at one per cent. (1%) is the sum of twenty-four hundred and sixty-five dollars (\$2,465).

20 (9.) On the execution of the contract referred to above, between the defendant and the Board of Education of the City of Newark, the said McBean became entitled to receive from the defendant, one-half of the said sum of twenty-four hundred and sixty-five dollars, to wit, the sum of twelve hundred and thirty-two dollars and fifty cents (\$1,232.50) which sum is still unpaid.

30 (10.) Before bringing this suit, to wit, on the first day of March, 1913, the said McBean conveyed, assigned, transferred and set over to the plaintiff therein, the said sum of twenty-four hundred and sixty-five dollars (\$2,465) and all moneys and sums, of money which the said McBean was entitled to receive from the defendant, together with all claims and demands which the said McBean then held against the said defendant, by an instrument in writing, a copy of which is annexed hereto and marked "Schedule B," which said instrument in writing was delivered on the day of its date to the plaintiff herein and is now in the possession of the plaintiff herein.

40 (11.) The plaintiff claims as damages the sum of twelve hundred and thirty-two dollars and fifty

COMPLAINT

cents (\$1,232.50) with interest thereon from the thirty-first day of December, one thousand nine hundred and twelve.

WILLIAM F. BURKE,
Attorney for Plaintiff.

SCHEDULE "A."

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Agreement made this 6th day of September, 1912, by and between Gustave De Kimpe of North Bergen, Hudson Co., N. J., and Archibald N. McBean of 119 P. O. Box, Hoboken, N. J. The said DeKimpe contracts and agrees to engage the said McBean to solicit work for him for general construction work of Public & Private buildings and to pay said McBean for such services the sum of 1% commission on any and all contract or contracts that the said DeKimpe accepts, and said commission payable one-half on signing of the contract & the balance on completion of the contract, not to exceed a fare & reasonable time to complete said work; and said DeKimpe agrees to protect said McBean with any Job or Jobs he may solicit for said DeKimpe & to pay said commission on Jobs he may solicit for said DeKimpe and to pay said commission on jobs coming direct from customers once supplied, or any Job or Jobs said McBean solicits if they, he or it order direct the same commission to be paid McBean as herein stated; and to pay McBean a fare & reasonable compensation for securing estimates on material required for the construction of any Job, to estimate on or work taken if desired if such services shall be required by said De Kimpe; this agreement to be in force & effect for a period of two years from date of this agreement and this agreement can be renewed if desired by the two contracting parties by expressing said desire in writing. If De Kimpe

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COMPLAINT

incorporates this agreement will terminate as to length of time.

G. DE KIMPE,
ARCHIBALD N. McBEAN.

SCHEDULE "B."

10 In consideration of the sum of One Dollar and other valuable consideration to me in hand paid by Joseph P. Briody, of the City of Jersey City, in the County of Hudson and State of New Jersey, I, Archibald N. McBean, do hereby assign, transfer, convey and set over to the said Joseph P. Briody, the sum of Twenty four hundred and sixty five dol-
20 lars (\$2,465) due to me from Gustave De Kimpe for commissions for soliciting and obtaining for the said Gustave De Kimpe the work for the construction of a Public School Building known as the South Side Public School, now being erected by the Board of Education of the City of Newark, New Jersey, at the corner of Johnson Avenue and Alpine Street, in the City of Newark aforesaid, all other moneys and sums of money due to me from the said Gustave De Kimpe, and all claims and demands of every kind, nature and description which I hold against the said Gustave De Kimpe. To have and to hold
30 to the said Joseph P. Briody, his executors, administrators and assigns forever.

Dated March 1, 1913.

ARCHIBALD N. McBEAN (L. S.)

In Presence of:

PAULINE PAUL.

ORDER.

NEW JERSEY SUPREME COURT.

JOSEPH P. BRIODY,

Plaintiff,

vs.

GUSTAVE DE KIMPE,

Defendant.

Order.

10

This matter coming on to be heard upon application of the plaintiff to amend his complaint, and sufficient reason appearing herefore,

It is, on this sixteenth day of February, nineteen hundred and fifteen, on motion of Wilbur A. Heisley, ordered, that the plaintiff have leave to amend his complaint in the following particulars, viz.:

20

1st. By making the total sum to be demanded the sum of two thousand four hundred and sixty-five dollars (\$2,465) besides interest.

2nd. By alleging in said complaint that since the commencement of this action, an additional sum of one thousand two hundred and thirty-two dollars (\$1,232) has accrued and become due to the plaintiff from the defendant upon the contract referred to in said complaint.

30

It is further ordered, that the defendant shall have twenty days from the service of a copy of this order, which copy need not be certified, in which to file any answer to said amended complaint.

Allowed in open Court on motion of Wilbur A. Heisley, Attorney of Plaintiff.

A true copy.

WM. C. GEBHARDT,

Clerk.

40

ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

JOSEPH P. BRIODY,

*Plaintiff,**vs.*

GUSTAVE DE KIMPE,

*Defendant.**Action at Law.*

20

The defendant residing at No. 143 Milford avenue, Newark, New Jersey, says that:

1. He admits paragraph one, three, six and seven of the complaint herein.

2. He denies paragraphs two, eight and nine of said complaint.

30

3. He denies paragraph four of said complaint with exception of that part which states that "on December thirty first, nineteen hundred and twelve, the defendant accepted a contract for said work from the Board of Education of the City of Newark, for the contract price of two hundred and forty-six thousand five hundred (\$246,500) dollars.

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4. He denies paragraph five of said complaint except for the statement that "the defendant entered into a written contract on the thirty first day of December, 1912, with the Board of Education of the City of Newark, aforesaid, for the construction by the defendant for the said Board of Education of the City of Newark, of the said school building, at

ANSWER

the contract price of two hundred and forty-six thousand five hundred (\$246,500) dollars.

5. He denies any knowledge or information sufficient to form a belief as to paragraph ten of said complaint.

DANIEL G. BERGEN,
Attorney for Defendant.

10

Case came on trial before the Honorable Frederic Adams, Judge, without a jury, and the following proceedings took place:

For plaintiff appears Wilbur A. Heisley, Esq.

For defendant appears J. Emil Walscheid, Esq.

The parties waive trial by jury.

20

Mr. HEISLEY—I offer in evidence, by consent, the testimony taken on behalf of the plaintiff at the former trial as contained in the printed book, in the Supreme Court, on rule to show cause, up to and including page 46.

Ex. P 1—not marked.

Mr. HEISLEY—I also offer the contract, of which a copy is found upon pages 4, 5 and 6 of the printed book, together with the assignment thereof.

30

Ex. P 2—not marked.

PLAINTIFF RESTS.

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MOTION FOR NON-SUIT

Mr. WALSCHEID—Now, I move to non-suit on the following grounds:

10 First, because the paper writing sued upon and offered in evidence as the contract upon which the action is based lacks mutuality, and is therefore not enforceable as an agreement.

Second, because the paper writing sued upon and offered in evidence as the contract upon which the action is based is not a contract of present employment, but is only an agreement to employ at some future date.

20 Third, because the paper writing sued upon and offered in evidence as the contract upon which the action is based is not a contract engaging the plaintiff to solicit work for the defendant, but is merely a contract agreeing to engage the said plaintiff to solicit such work at some future date.

Fourth, because the contract obtained by the defendant to erect the South Side Public School in the City of Newark, in the County of Essex, could not be obtained by the defendant or any other person by solicitation from the Board of Education of the City of Newark, or from any other person or persons.

30 Fifth, because the work of erecting the South Side Public School in the City of Newark, in the County of Essex, could not be obtained by solicitation from the Board of Education of the City of Newark or from any other person or persons.

Sixth, because there is no evidence in the cause showing the authority of the witness McMahon to represent and act for the Board of Education of the City of Newark, in the County of Essex.

40 Seventh, because the defendant, as a matter of law, was entitled as of right to a set of the plans

PAULINE PAUL—Direct

and specifications of the South Side Public School in the City of Newark, in the County of Essex, for the purpose of preparing his estimate and submitting his proposal for the said work on deposit of the sum of \$50 by him.

Eighth, because the plans and specifications for the erection of the South Side Public School in the City of Newark, in the County of Essex, were public property, and no solicitation was necessary by or on behalf of the defendant to obtain a copy of the same for the purpose of estimating thereon and for the purpose of submitting a proposal for said work.

10

Ninth, because the solicitation of such plans and specifications is not a solicitation of work under the language of the contract offered in evidence.

THE COURT—The motion to non-suit is granted. Plaintiff's counsel prays an exception to this ruling of the Court.

20

Exception noted as ground of appeal.

PAULINE PAUL, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q. Miss Paul, I believe you are employed by Mr. Burke, a counsellor-at-law in West Hoboken, are you not? A. Yes, sir.

30

Q. And do you know Mr. McBean, this gentleman sitting here (indicating)? A. Yes.

Q. And do you know Mr. Joseph P. Briody, of Jersey City? A. Mr. Briody, yes.

Q. What is his occupation? A. He is employed as a clerk in Mr. Burke's office.

Q. He is still employed there, is he? A. Yes.

Q. I show you a paper and ask you if you know whose signature this "Pauline Paul" is (paper shown to witness)? A. That is my signature.

40

PAULINE PAUL—Cross

Q. And do you know the signature purporting to be Archibald N. McBean's? A. Yes, I do.

Q. Did you see Mr. McBean sign that paper? A. I did.

Q. And did you thereupon subscribe your name as a witness to it? A. I thereupon signed my name as a witness, yes.

Cross-examination by Mr. Brogan.

Q. Was this sealed before Mr. McBean signed it? A. Yes; it was.

Q. And what was the date of that, Miss Paul, do you know? A. I don't remember the date, no.

Q. Was Mr. Briody in the office at the time? A. I don't think so.

Q. Had Mr. Briody and Mr. McBean conferred over this matter, to your knowledge? A. Why, I don't know; not to my knowledge, no.

Q. All you did was to see Mr. McBean sign and witness it? A. That is all.

Q. Is that all? A. Yes.

Q. You do not know whether the recitals to the assignment are true? A. Well, Mr. Burke—I took it from Mr. Burke's dictation; I transcribed it, and then—

Q. When did Mr. Burke dictate this, do you remember, before it was signed? A. The same afternoon it was signed.

Q. And Mr. Briody was not in the office? A. I don't think so.

Q. And was Mr. McBean in while Mr. Burke dictated it? A. Yes, he was present.

Mr. HEISLEY—I offer the paper in evidence, your Honor.

Marked Exhibit P 2.

ARCHIBALD N. McBEAN—Direct

ARCHIBALD N. McBEAN, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q. Mr. McBean, where do you live? A. 1267 Robert street, West Elizabeth.

Q. How long have you lived there? A. I have lived there about a year and a half. 10

Q. What is your present occupation? A. Well, I am in the commission business.

Q. What kind of commission business are you in? A. Well, I secure contracts for different people and they pay me a commission on securing the work.

Q. Not a commission merchant? A. No, not a commission merchant.

Q. Are you acquainted with Mr. DeKimpe? A. I am. 20

Q. And are you the McBean who is named in this Exhibit P 1 for the plaintiff, this contract (paper shown to witness)? A. Yes.

Q. And also named in the Exhibit P 2, being the assignment (paper shown to witness)? A. Yes, sir.

Q. After this Exhibit P 2, being the assignment, was signed, who had possession of it? A. Mr. Burke. 30

Q. This contract between you and Dekimpe bears date the 6th of September, 1912? A. Yes.

Q. Did you do any work for Mr. DeKimpe after the making of this contract, and if so, state generally what that work was? A. I called to the Board of Education in Newark—

Q. Now, was that the first job that you went for or not.

ARCHIBALD N. McBEAN—Direct

Mr. BROGAN—I object to anything, if the Court please, that tends to widen the scope of this man's inquiry. He is suing on a specific contract for certain work that he alleges was done. I think that anything outside of that is immaterial.

10

Mr. HEISLEY—I do not want to go into it in detail, your Honor; I simply want to show that immediately after his employment he started to work under the contract; that is to say, he started soliciting numerous jobs, among others, the particular job in question.

THE COURT—It seems to me that work outside of the scope of this case is irrelevant to the issue.

20

Mr. HEISLEY—Very well, sir. I do not press it.

Q. Mr. McBean, tell us what you did, if anything, pursuant to this contract towards soliciting or getting Mr. DeKimpe a chance to figure upon the building of the South Side Public School in the City of Newark? A. I went to see Mr. McMahan.

Q. When? A. Shortly after the contract was signed; it must have been along sometime about the middle, I should say, of September last—September.

30

Q. Who is Mr. McMahan? A. He was the one in the Board of Education, in Newark, who had charge of giving out the plans.

Q. Where did you find him? A. I found him at the Board of Education in Newark, in the City Hall.

Q. At their office you mean? A. Yes, at the City Hall.

40

ARCHIBALD N. McBEAN—Direct

Q. What did you say to Mr. McMahan? A. I gave Mr. McMahan Mr. DeKimpe's card, and told him that we would like to figure on this south side school job. I can't exactly recall the exact words, but the sum and substance, I said that Mr. DeKimpe was an experienced builder and would do good work, and I gave him references of certain jobs that he had done in Hudson County; I said I would like very much to have him allow Mr. DeKimpe to give an estimate on the work. He said, "All right;" he says, "When the plans are ready," he says, "I will let you have them and Mr. DeKimpe give an estimate. It is customary," he says, "to get a deposit of \$50"—

10

MR. BROGAN—I object to anything that was said, if the Court please.

20

MR. HEISLEY—I submit that we must have all that was said in order to enable the Court and jury to determine whether or not what we said was a solicitation.

MR. BROGAN—I object on the ground that it is hearsay.

THE COURT—Still, the question is whether this is an exception to the hearsay rule. I will hear counsel on that question.

30

MR. HEISLEY—(After argument). Perhaps I might save the time of the Court if your Honor would indicate whether you would consider that there would be any doubt about its admissibility if I called Mr. McMahan. He is present in Court. Mr. Brogan's objection is that it is hearsay. I have Mr. McMahan here, who can testify directly, if that will save any time.

40

ARCHIBALD N. McBEAN—Direct

10 THE COURT.—Mr. McMahan is a good witness as to anything he said, of course. Whether he is a good witness as to anything Mr. McBean said is another question, Mr. McBean not being a party to this suit. That raises another question; whether an assignor is to be regarded as sufficiently a party to have his oral statements prior to the assignment admitted for the purpose of binding the defendant. You have here two parts of a pair of scissors. Mr. McBean can testify as to what he said, and Mr. McMahan can testify as to what he said. If you put the two together you have the whole conversation.

20 MR. HEISLEY—We will save the time, then.

Q. Mr. McBean, just answer this yes or no. Did Mr. McMahan make any reply to you, to what you said to him? A. He did.

Q. Did he give you anything of any description, any document or anything else?

Objected to as leading.

30 THE COURT—Any thing that he did is evidential.

A. Not at that time.

Q. Is that all that you said to him at that time?

A. Substantially, yes.

40 MR. HEISLEY—If your Honor please, in order to make the record clear, will you, rule upon Mr. Brogan's objection. I want to offer, and I would like to have it go

ARCHIBALD N. McBEAN—Direct

upon the record, that I ask Mr. McBean to relate what Mr. McMahan said in reply, and that your Honor rules upon it, that is all.

THE COURT—You may ask your question.
Do not answer this question.

10

Q. What did Mr. McMahan say in reply to your conversation with him, which you have just related? Do not answer the question yet.

Mr. BROGAN—Objected to on the ground that it is hearsay.

THE COURT—I will reserve my ruling on the objection until counsel have satisfied me as to what the legal rule is.

20

Mr. HEISLEY—I confess my inability to tell when I have satisfied your Honor or to be able to satisfy your Honor.

THE COURT—Well, I think I could satisfy myself in a very short time, if I had access to a law library. In the meantime, cannot we get along with the other half of the pair of scissors?

Mr. HEISLEY—Very well. Perhaps that is right.

30

Q. Have you related all that you said to Mr. McMahan at this interview of which you have spoken?

A. This first interview, yes, substantially all.

Q. Did you ever report to Mr. DeKimpe, and if so, when, what you had done, if anything, with Mr. McMahan?

Mr. BROGAN—I object, if the Court please, to almost all of the questions of counsel.

40

ARCHIBALD N. McBEAN—Direct

They are directly leading. It seems to me that this story may be gotten out by asking this man what happened.

Question withdrawn.

10 THE COURT—You have to ask leading questions to some extent; they are not necessarily objectionable.

Q. What did you do next? A. I went to see Mr. DeKimpe—

Q. When? A. After this interview with Mr. McMahon, within a few days—and told him that I had solicited for that school, the South Side School, from Mr. McMahon, and that as soon as the plans were ready Mr. McMahon was to let him figure on them, and I understood—I told Mr. DeKimpe that
20 they wanted a deposit of \$50 before they would let the plans go, and I understood that Mr DeKimpe and Mr. Kenny went over—

Objected to.

THE COURT—Not as to what you understood.

Q. Where was Mr. DeKimpe when you told him this, if you recall? A. Well, this first time I told
30 him I think it was in his house. I think nearly all the meetings were in his house or his office. He had an office for a short time, and then he moved up to his house. I reported at both places. My impression is that all my conversations were at his house, but it might have been at his office at that time.

Q. What reply, if any, did Mr. DeKimpe make to you? A. He told me that we would go to the Board of Education to see about getting the plans
40 at this first time.

ARCHIBALD N. McBEAN—Direct

Q. That is what I mean. A. The plans were not ready then, you know.

Q. What? A. The plans were not ready then.

Q. I understand that. What else, if anything, did you do in connection with soliciting for this work? A. Well, I went to the Board of Education—

10

Q. When? A. After I reported to Mr. Dekimpe.

Q. How soon after? A. Oh, probably—well, maybe a week or so; I can't tell exactly.

Q. Whom did you see upon the occasion of this visit? A. I saw Mr. McMahan and—

Q. What did you say, if anything, to Mr. McMahan? A. Well, Mr. Dekimpe had gone there for to see about the Newton street school at the time—

20

Mr. BROGAN—Objected to. I ask that that be stricken out.

THE COURT—What did you say?

Mr. HEISLEY—Yes, I consent to have it stricken out.

Q. Answer my question specifically. I asked you what did you say to Mr. McMahan? A. I asked Mr. McMahan if Mr. Dekimpe had been there to see about the plans, and he said, "yes"—

30

Objected to.

THE COURT—Never mind what he said.

Q. What else did you say to him? A. Well, I can only answer as he replied to me; I can't answer if his reply is not given.

THE COURT—Well, just at present omit his

40

ARCHIBALD N. McBEAN—Direct

reply and testify only as to what you said or as to what either of you did.

Q. Well, do you recall anything else that you said to McMahon on the occasion of the second visit, or anything that he did with you?

10

Mr. BROGAN—If the Court please, I object to this testimony on the ground that it is immaterial, for the reason that it is now plain from the testimony that, if there was any solicitation such as would enable this man to recover under his contract, that solicitation is past.

THE COURT—How does that appear?

20

Mr. BROGAN—This witness is now testifying to a conversation, something which he said to Mr. McMahon, and thus far this second conversation has not any bearing whatever upon this case.

THE COURT—It follows up the first.

Mr. BROGAN—It does, but if there was an act or a series of acts such as would entitle this man to recover under a contract, that solicitation is past.

30

THE COURT—The first step of it is past; that is, the first interview is past. How does that show that the solicitation is over.

Mr. BROGAN—Well, I was following it very closely. He has not said a single word about solicitation on the second visit. Maybe he will. I will withdraw the objection for the present.

40

Q. What else, if anything, did you say to Mr. McMahon on the occasion of the second visit? A.

ARCHIBALD N. McBEAN—Direct

I said I would leave him Mr. Dekimpe's card—

Q. On the second visit? A. Yes—with my personal address on, and, "Now," I said, "when the plans are ready I wish you would let me know, so that I can communicate with Mr. Dekimpe, so that we will not lose our opportunity to estimate on this contract." And he said he would let me know. 10

THE COURT—Never mind what he said.

Mr. HEISLEY—Never mind what he said; the Court does not want you to testify to that yet.

THE COURT—You asked him to let you know when the plans were ready?

WITNESS—I gave him my card, with my personal address. 20

Q. I show you a card and ask you if you have ever seen that card before (shown to witness)? A. Yes.

Q. Well, is that or is that not the card which you handed to Mr. McMahan? A. Not at that time, no; that is not the card.

Card marked P 3 for identification. 30

Q. Is that all that occurred on the occasion of your second visit? A. Substantially so, yes.

Q. What did you do then after that? A. I went and reported to Mr. Dekimpe.

Q. What did you tell Mr. Dekimpe? A. I told Mr. Dekimpe that I saw Mr. McMahan, and that he agreed to let me know when the plans were ready for to figure on, and I would communicate with Mr. Dekimpe and he would go there and get them, or words to that effect. 40

ARCHIBALD N. McBEAN—Direct

Q. That who would go there and get them? A. Well, Mr. Dekimpe.

Q. That Dekimpe would go and get the plans, you mean? A. Yes. And just about that time I complained to Mr. Dekimpe about another man that was interfering with my soliciting.

10

Objected to.

Mr. HEISLEY—I think it is competent, if your Honor please, because he not only solicited, but he reported to Mr. Dekimpe that he was soliciting, and told him of some difficulty that he was having on account of somebody else. I think we are entitled to have that—all that he said to Mr. Dekimpe concerning his effort.

20

THE COURT—I am inclined to think that you are entitled to the whole conversation with Mr. Dekimpe so far as it related to the subject matter of the contract.

Q. What did you say to Mr. Dekimpe about that? A. I said that Mr. Kenny was interfering with my soliciting. I said, "My contract with you, Mr. Dekimpe, was before Kenny's contract, if he has any contract; and," I said, "Kenny has no business to be trying to go in between me and people that I am working with." I said, "I have got a contract with you, and you agreed to protect me in this contract, and Kenny says he don't care anything about the contract," or words to that effect.

30

Mr. BROGAN—I ask that Kenny's remark be stricken out, sir.

THE COURT—No, this is the conversation with Mr. Dekimpe.

40

ARCHIBALD N. McBEAN—Direct

Mr. BROGAN—This is a conversation as to something Kenny said to this witness.

THE COURT—Yes, but it is what he told Dekimpe.

Mr. BROGAN—Yes, sir.

THE COURT—It is part of the conversation with Dekimpe. 10

By the Court.

Q. Now, what did he say to that? A. He said, "Mr. Kenny is a smart man, but he can't interfere with my business. Now," he says, "I will tell you what I wish you would do. There is a Lyons Farms school, and the architect"—I told him I was also working on that job; that was the job that he was interfering with me on, too—"Now," he said, "the architect, I believe, was called up on that, so Mr. Kenny reported to me, and he wants him to figure on that job, and I wish you would leave Kenny at work on the Lyons Farm school, and then you go back; you go to the South Side school in Newark." I said, "All right. Then I will leave Kenny work on the Lyons Farms school, but," I said, "I will have the South Side school, and he must not interfere with me there;" and he said, "No, that he won't." 20 30

By Mr. Heisley.

Q. What did you do then? A. Then I went back again

Q. Where? A. To see McMahan. Mr. McMahan told me—

By the Court.

Q. That is the third time? A. Yes, sir; and 40

ARCHIBALD N. McBEAN—Direct

Mr. McMahon told me that the plans were now ready—

Objected to.

THE COURT—Leave that out. Tell us what you said and Mr. McMahon did, if anything.

10

By Mr. Heisley.

Q. What did you say to Mr. McMahon upon the occasion of your third visit to him? A. I said that I called there to find out about the South Side plans, or job, or something like that, whether they were ready, and he said they was—

Q. No, what he said. Did you say anything to him—give him any card or any paper, or did he
20 give you any card or any paper at that time? A. No, I don't think—no, not at that particular time, I didn't give him that card.

Q. What did you do then after that? A. Well, I went right off that same afternoon, or evening, and saw Dekimpe, and told Mr. Dekimpe that I had been to the Board of Education and found out the plans were ready for the South Side school and—

Q. How did you tell him that you knew they were ready? A. Because Mr. McMahon told me
30 they were ready.

Q. Did you tell him that? A. Yes, sir. And I said that Mr. McMahon would not give me the plans unless I gave \$50 deposit for the safe return of the plans; and Mr. Dekimpe said, "I don't think I will figure on that job." "Well," I said, "if you don't want to figure on it you don't have to, but if you figure on it and you get it, you have got to pay me my commission." He says, "I don't think I will figure on it."

40 Q. And when was this conversation? A. Well,

ARCHIBALD N. McBEAN—Direct

that was about the—I think it was the 5th of November, as near as I can remember. I am not certain of it.

Q. What did you do after that, if anything? A. Then Dekimpe. you know, commenced, as he did, after the first information I gave him of the South Side school—he commenced to want to ring in Kenny and uphold Kenny. I said that we had an understanding on that, that I was to keep off the Lyons Farms school and Kenny was to keep off the South Side school. “Well,” he said, “Kenny is working on that.” I said, “Kenny has got no business to work on that school.” And I went to see Mr. McMahan, and I said, “Dekimpe is trying to make believe that I have not done anything pertaining to this contract at all.” “Why,” he says, we don’t know anybody but you”—

Objected to.

Q. One minute. You must not tell what Mr. McMahan said in answer to you until his Honor rules further. You did go there the fourth time, did you? A. Yes, sir.

Q. What else, if anything, did you say to Mr. McMahan on the occasion of your fourth visit, other than you have already testified to? A. I asked him if he would give us some information to show that I had solicited and that I had worked to try and get these plans. He said he would.

Q. Well, what did he give you, if anything? A. I gave him a card—

Q. One minute. I show you this P 3 for identification, and ask you if that is the card that you gave him (shown to witness)? A. Yes, that is the card I gave him at that time.

ARCHIBALD N. McBEAN—Direct

Q. Did it have all this printed matter on it, including the red letters? A. Yes, sir.

Q. At that time? A. Yes.

Q. What did he do then?

THE COURT—You offer that, I suppose?

10

Card shown to defendant's counsel.

Mr. BROGAN—If your Honor please, I object to its going in until McMahan has verified his signature and the writing on the back of it. There is a certain notation on the back of that which, of course, is in evidence if the card goes in, and I think it ought to be verified. Nothing has been said about when this man wrote it or who wrote the message that is on the back.

20

Mr. HEISLEY—Suppose I ask him a question or two first.

Q. Mr. McBean, what did Mr. McMahan do, if anything, pursuant to his statement that he would give you something to show that you had been there soliciting the job? A. Well, I gave him that card, and he wrote on the back that I called—

30

Q. One minute. What he did then, I understand, was to write on the back of this card; is that true? A. Yes, sir.

Q. Is that all that he did? A. Yes, sir.

Q. Did you see him write this on the back of the card? A. Yes, I did.

Q. And did you see him sign his name to it? A. Yes, I did.

Mr. HEISLEY—Do you still object?

40

Mr. BROGAN—No.

ARCHIBALD N. McBEAN—Direct

Card marked Ex. P 3.

THE COURT—Now you may read the card.

Mr. Heisley reads Ex. P 3 to the jury.

Q. What month was that, Mr. McBean? A. In November.

Q. What, if anything, did you next do after you received that card? A. Oh, I saw Mr. Dekimpe several times.

Q. Not several times. When did you see him next after you received this card? How soon afterwards? A. Well, I should think probably ten days after.

By the Court.

Q. Did you show him that card? A. I don't think I did; I am not positive.

By Mr. Heisley.

Q. What was your object in getting something from Mr. McMahan, if you did not show it to Mr. Dekimpe?

Mr. BROGAN—That is objected to. It is argumentative.

THE COURT—I will allow it.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

A. What is that?

Q. What was your object in asking Mr. McMahan to give you something that would show that you called there, if you did not show that something to Mr. Dekimpe? A. Well, it probably

ARCHIBALD N. McBEAN—Direct

slipped my mind about showing it to Mr. Dekimpe, but I told Dekimpe I had been there all the time; he knew all about that.

Q. Yes, I understand that. Well, now, as a matter of fact, do you know that he got the contract? A. Yes.

10 Q. And did he erect the building? A. Yes; that is, I see the building is erected; I didn't—

Mr. HEISLEY—Now, so that the jury will be advised, I believe the pleadings admit that Mr. Dekimpe did secure the contract; that he completed the building, and that he collected from the Board of Education the contract price of \$246,000.

Mr. BROGAN—Yes, sir.

20

THE COURT—Mr. Brogan admits that.

JUROR No. 8—Can I ask a question, your Honor?

THE COURT—Certainly.

JUROR No. 8—I would like to ask the witness if he had any contract about bringing the plans and specifications direct, or was it just recommending each other?

30

THE COURT—Do not answer that question yet. I understand the question which is asked by the gentleman on the jury relates to what the contract was.

JUROR No. 8—Yes, sir.

THE COURT—The contract is in writing, and this is what it says: "Agreement made this sixth day of September, 1912, between Gustave Dekimpe and Archibald N. McBean. The said Dekimpe con-

40

ARGUMENT

tracts and agrees to engage the said McBean to solicit work for him for general construction work of public and private buildings, and to pay said McBean for such services the following named consideration." The agreement is that Mr. Dekimpe agrees with McBean to solicit work for Dekimpe to do for general construction of public and private buildings, for which services Dekimpe agrees to pay the compensation named in the contract. It is to solicit work. 10

JUROR No. 8—It does not say anything about any plans and specifications?

THE COURT—Plans and specifications are not specifically mentioned in the contract. The agreement is to solicit work, and there is no reference in the contract to any particular job—no reference to this particular South Side schoolhouse. It is a general engagement to solicit work on any public and private building. 20

JUROR No. 8—The reason I asked this question, your Honor, is that they generally get plans and specifications, and that is the question. I ask that question, whether there was any plans and specifications in the contract. As I understand, there is no plans and specifications mentioned in that contract. 30

THE COURT—There is no mention in the contract specifically of plans and specifications.

Mr. HEISLEY—Counsel admits, if your Honor 40

ARGUMENT

please, that Dekimpe secured the contract; did the work and was paid \$246,000.

10 THE COURT—Going back to the pleadings themselves, the answer admits the making of the contract and the delivery of the contract, and that the defendant, Dekimpe, after making the contract, proceeded with the construction of the school building, and that the work under the contract had not been completed; that is, when the answer was drawn, which was some time ago.

20 Mr. HEISLEY—I ought to call your Honor's attention to something that I overlooked. Since the suit started the work has been completed, and the Supreme Court permitted an amendment. You will find it in the transcript. It allows us to amend our claim from half of one per cent, which was due at the time of the signing of the contract, so as to include the full sum of twenty-four hundred and some odd dollars, and alleging that the work has been done, and Mr. Brogan has kindly admitted that the work has been done.

30

THE COURT—The amendment allowed by the Supreme Court is this: First, by making the total sum to be demanded the sum of \$2,465, with interest. That would be one per cent. on the full cost of the building.

40 Mr. HEISLEY—Yes, sir. It saves two suits; that is the idea.

ARCHIBALD N. McBEAN—Direct

THE COURT—And also by alleging that since the commencement of the action an additional sum of \$1,232.50 has accrued and become due from the defendant. In other words, the amendment amounts to this: that the complaint now avers that the building was completed and the full amount of the one per cent. on the whole consideration became due. 10

Mr. HEISLEY—Yes, sir.

Q. Have you ever been paid anything by De-kimpe or anyone for him for your services in this matter? A. Not a cent.

Q. Did you ever demand payment of him? A. I did.

Q. When? A. When I found out that he had got the contract. 20

Q. About when was that? That is very indefinite. A. Well, a few days after I found out that he got—that the contract was awarded to him.

Q. But will you be good enough to say whether it was three months ago or three days ago? A. Well, let me see. I should think that was along about the 1st of December or maybe the last of November. 30

THE COURT—What year?

Q. Of 1912? A. Yes, 1912.

Q. What did he say to you? A. Why, he pooh-hoohed it. Why, he wouldn't talk to me about it. "Well, then," I said "If you won't pay me I will have to sue you." He said, "Why, you are not entitled to anything; you didn't do anything. You ain't going to stand here and talk to me about any 40

ARCHIBALD N. McBEAN—Cross

money." It was absurd. He didn't think I was entitled to a cigarette; he pooh-poohed it.

Q. Did he say why he did not think that you were entitled to it? A. I am not sure that he did give any reason at that time

10 THE COURT—Tell us anything that you remember.

WITNESS—No, sir; he just looked at it as an absurdity.

Q. Did he deny that you had solicited the work? A. No; certainly not.

Q. Did he claim that you had failed to live up to your contract? A. No.

20 *Cross-examination by Mr. Brogan.*

Q. So, then, he did not give any reason at all for saying that your claim was absurd? A. No; I don't think he did; I just think he kind of pooh-poohed it; just as much as to say it was the most ridiculous thing that ever happened.

Q. Never mind that. What did he say, if anything? A. Well, as near as I can get at it, he told me to—well, it was more actions than talk; he didn't really say anything—acted more as if he was
30 disgusted to think I would ask him for money.

Q. And he did not tell you that you did not deserve it, did he? A. What?

Q. He did not make a flat declaration and say you did not deserve any money? Did he not say that to you at that time? A. No; I don't think he did.

Q. Are you sure of that? A. I am quite positive that he did not.

40 Q. Where were you when you demanded this

ARCHIBALD N. McBEAN—Cross

money from him? A. I think it was at that theatre he was building in West Hoboken.

Q. Are you not sure? A. Yes; I am sure that is where it was.

Q. Why do you say you think it was? A. Why, because I am as positive as I can be; but I am liable to be mistaken, like anybody else; I am not infallible. 10

Q. How much of the rest of your testimony is mistaken or liable to be? A. None of it.

Q. How long have you been in the commission business? A. I have been in the commission business ever since I failed in my own business; more or less for twenty six years.

Q. That is, you have been in this particular business for twenty-six years? A. No; not that particular business, but in the commission business. 20

Q. How long have you been in this business, soliciting work for contractors? A. The same as this contract? A. Well, I think that was—if I am not mistaken, that was almost the first experience that I had.

Q. So that your contract with DeKimpe was the first contract on this commission basis that you had? A. Yes. He knew that I had no experience in it

Q. That is all. Now, this assignment that you made to Mr. Briody, when was that assignment, Mr. McBean? A. It bears the date of the assignment. 30

Q. Don't you know when it was? A. Well, it was prior to the commencement of this suit.

Q. Is that as near as you can say? A. Yes, I don't think I can state positively the date. I know it was prior to the commencement of the suit. 40

Q. What consideration did Mr. Briody pay you

ARCHIBALD N. McBEAN—Cross

for that assignment? A. Well, I will state the circumstances—

Q. I did not ask you that. A. Well, I can only answer that by stating the circumstances.

Q. I did not ask you any circumstances; I asked you what consideration was paid you for the assign-
10 ment? Here you have a claim of \$2,500— A. It was prospective consideration, outlays to be made by Mr. Burke at the commencement of this suit.

Q. Did you make the assignment to Mr. Burke? A. I asked Mr. Burke if I could make the assignment to him, because I didn't have the—

Q. Just a minute. You did not make the assignment to Burke, did you? A. He asked to have it made—

Mr. BROGAN—No.

21

THE COURT—Just answer the question.

Q. You did not make the assignment to Burke, did you? A. At the solicitation of Mr. Burke, I did not.

Mr. HEISLEY—Answer the questions yes or no when you can.

Q. What did Mr. Briody pay you for this assign-
30 ment? A. Mr. Briody did not pay me anything for that assignment.

Q. So that your assignment is without consideration, is it not? A. What?

Q. Your assignment is without consideration? A. No, sir; it is not.

Q. Mr. Briody paid you nothing? A. Mr. Briody was acting for Mr. Burke and myself, and the consideration came from Mr. Burke.

Mr. BROGAN—I ask that that be stricken
40 out. He does not know these things.

ARCHIBALD N. McBEAN—Cross

Mr. HEISLEY—I submit that it is responsive. He was asked if the assignment was without consideration, and he said the consideration came from Mr. Burke.

THE COURT—I will let the answer stand.

Q. But, Mr. McBean, as I understand your testimony thus far; Mr. Briody did not pay you anything for this assignment; that is so, is it not? A. I received— 10

Q. Yes or no? A. I received consideration from another source.

Mr. BROGAN—One moment.

THE COURT—The witness has already answered that question once. It need not be asked again. 20

Mr. BROGAN—All right, sir.

Q. What was the date of your first visit to the City Hall to see Mr. McMahan? A. Well, it was only ten days or two weeks after the making of the contract, a very short time after that.

Q. About when was that? A. Well, I understand the contract was made in September some time.

Mr. HEISLEY—The 6th. 30

WITNESS—Well, I should think probably my first visit was along probably the middle of September, I won't say positively; thereabouts.

Q. Now, you have said in your direct testimony that you gave certain references to the office of the board in behalf of Mr. Dekimpe? A. Yes, sir.

Q. What were those references? A. Well, it was 40

ARCHIBALD N. McBEAN—Cross

with regard to work that Mr. Dekimpe had done with Mr. Vrooman.

Q. What were they? A. Well, there was the construction of certain buildings. One building was in Hoboken, that large grocery house building. I can't recall the names; there was four or five that
10 had typewritten on a piece of paper that Mr. Dekimpe gave me.

THE COURT—What name did you say?

Mr. BROGAN—Vrooman.

WITNESS—Vrooman & Dekimpe. He used to have a partner named Vrooman, and he did the work with Mr. Vrooman, and it was given to me as evidence of his ability to carry jobs and his work.
20

THE COURT—Well, you have mentioned a building in Hoboken.

WITNESS—Hoboken; yes, sir. And I think there was a building for a grocery concern in Jersey City. There was four or five references.

Q. That firm that erected those buildings was the firm of Vrooman & Dekimpe, was it not? A. Yes, sir; so I understand.
30

Q. A construction company? A. Yes, sir.

Q. A corporation? A. Yes, sir.

Q. Then how could you recommend Dekimpe personally on the strength of work of this kind? A. Well, Mr. Dekimpe told me to give those references, and I gave them.

Q. You do not know the other references that you gave? A. There was four of them, and I gave the amount of dollars and cents and all about them;
40 there were four or five references.

ARCHIBALD N. McBEAN—Cross

Q. What was the nature of those references—just your own word? A. No; Mr. Dekimpe wrote out the price, the name of the contractors and the amount of the contract and the location where the work was done.

By the Court.

10

Q. What became of that paper? A. Well, I had several typewritten from that paper, and I used to give them to different people that I was soliciting and tell them that Mr—

Q. To whom did you give this? A. Well, I—

Q. What became of that paper? A. Well, I had several typewritten from that paper and I used to give them to different people that I was soliciting and tell them that Mr—

Q. To whom did you give this? A. Well, I— gave one—I am not positive if I gave one to Mr. McMahan or not. I referred to them, anyhow, I think I did give it to him.

20

By Mr. Brogan.

Q. So that you do not know whether you did give it to him? A. I say I gave him the names and the price.

Q. What did he do, copy them down? A. I don't remember I don't say positively that I did give it to him. I know I gave him the names.

30

Q. You are positive that you had these references? A. And I communicated them to Mr. McMahan, but whether I gave him this typewritten sheet or not I don't know.

Q. And did Mr. McMahan take them down? A. I don't know whether he took them down or not.

Q. Now, then, you have testified that you went back to see Mr. Dekimpe? A. Yes.

Q. Is that so? A. Yes.

40

ARCHIBALD N. McBEAN—Cross

Q. Where did you see him? A. Well, as I said, I am not positive if I saw him that first time—you are alluding to the first visit?

Q. Yes. A. I am not positive if I saw him at his office or at his residence. My impression is now that I saw him at his residence.

10 Q. Who was there, Mr. McBean? A. There was never any time that there was anybody present in the office but Mr. Dekimpe and I, excepting one time when Mr. Kenny was there.

Q. And this first visit was at his house, was it? A. My impression is that it was at his home.

Q. Who let you in the house, Dekimpe? A. Well, I couldn't exactly tell that, but my impression is that it was a lady that let me in.

20 Q. You are not sure about this? A. No, I couldn't remember such circumstances as that.

Q. You are not sure whether you saw him in in the office or in the house? A. No, not this first time.

Q. Now, subsequent to your first visit you went to the Board of Education in Newark again, is that true? A. Yes.

30 Q. Is that the time you left your card, or Dekimpe's card with your name and address on it—the second time? A. Yes, I think that was the time I left it; but I left a card before that, you know; I had left a card the first time I went, but I left a card the second time for Mr. McMahon—

THE COURT—Do not get off the question. The question is whether it was at the second interview that you left the card that has been put in evidence?

WITNESS—Oh, no.

ARCHIBALD N. McBEAN—Cross

THE COURT—With something written on it?

WITNESS—Oh, no; that was, I think, the third time.

Q. Did you not testify that the second time you went to Mr. McMahan's office you left a card of this defendant with your name and address written on it? A. I did. 10

Q. And the purpose of that card was so that you might be informed when you could go and get the plans; isn't that so? A. He would let me know when the plans were ready; yes.

Q. So that you could go and get them? A. No; I don't know as I said to go and get them, because I had no business to go and get them; I was only doing that gratis. 20

Q. What business did you have to know, then, that they were ready? A. I had to do that; I was the locater; I would go and locate the jobs; find out who was giving out the job, whether it was the owner or the architect; and when I would get that information I would give it to Dekimpe. It wasn't my business to do anything but locate the job; I didn't have to get the plans.

Q. How often under this contract did you get plans? 30

Objected to.

Mr. BROGAN—If your Honor please, I am ready to show what was done, what was the practice between the parties, and what prior to this time had been done under the contract. I am ready to submit authorities.

THE COURT—The plaintiff is not suing for everything that he did under the con- 40

ARCHIBALD N. McBEAN Cross

tract, but only to recover a specific item. The pleadings are all adapted to that. The complaint is no broader than that and the answer no broader than that. I think it is a mistake to go outside of the pleadings and inquire into other transactions, if there are any, which are not in issue. I sustain the objection.

10

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Mr. McBean, when was the third time you went to see Mr. McMahan? A. Well, I think it was about the 6th of November.

20 Q. Are you sure of that? A. Well, Mr. McMahan has so stated on the paper, and I presume that he knows the date.

Q. So that the third time you went there you got this card from Mr. McMahan? A. Yes.

Q. Are you sure of that? A. Well, I wouldn't say positively to the third. It was long after Mr. McMahan said that the plans were ready the last time.

30 Q. So that you do not know whether it was or not? A. I am quite positive it was about the third time.

Q. Do you not remember that ten minutes ago you testified that it was the fourth time? A. Well, the fourth time.

Q. Yes. A. Well, I called so many times there that it would be almost impossible for me to enumerate them exact.

40 Q. Now, you testified on direct examination that you called four times, and now you say it is impossible to tell how many times? A. Four specific

ARCHIBALD N. McBEAN—Cross

times, but I called numerous other times in between.

Q. Were there any other times you called that were not specific? A. What?

Q. You say four specific times? A. Well, that was when I got sort of specific information, the last time. The fourth time he said, "The plans are all ready;" the first time they were not ready; the third time, "I will let you know when they are ready." Those are three specific allegations. 10

Q. After your third visit, you then went to see Dekimpe at his home, did you, or was it at his office? A. No, after the third visit, when Mr. McMahon told me the plans were ready, right off that afternoon I went and saw Mr. Dekimpe at his home, and told him the plans were ready.

Q. Who was present at that interview? A. There wasn't anyone present, only Mr. Dekimpe and I, but I think there was someone in the other room. He went out in the other room and came back, and told me, "I don't think we will figure on the job." 20

Q. On what street was this house where he lived? A. Well, it was on the Boulevard, North Bergen.

Q. On the occasion of your fourth visit what transpired? A. The fourth visit to the— 30

Q. To the City Hall, in Newark? A. Well, you mean when I got that card?

Q. I mean your fourth visit. You just testified that it was on your third visit that you got that card. A. Yes. Well, the fourth visit was in between these three visits. I was there numbers of times; I don't know as there was any—

Q. You have intelligence enough to answer the question? A. Certainly.

Q. Will you try to answer it? A. Yes. I told 40

ARCHIBALD N. McBEAN—Cross

you that I called not only four times, but probably a dozen times in between those specific times.

THE COURT—On whom are you now speaking of calling?

10 WITNESS—On Mr. McMahon. I didn't only call three times; I was there a dozen times.

Q. Did you go back to Dekimpe, then, after the fourth visit? A. I went and saw Dekimpe, as I said, when I found out—I saw Dekimpe after I found out that he was figuring on the job, and told him, "I understand that you are figuring on that job, and if you get the job you have got to pay me my commission."

20 Q. Where was this? A. I think that all of these interviews was at that theatre in West Hoboken.

Q. You think it was? A. Yes; I am quite positive.

Q. Are you not sure of anything? A. Well, I am quite positive; yes.

Q. Now, you testified that you demanded payment on December 1, 1912. A. I don't say the date, but some time in December.

30 Q. Well, around the 1st of December? A. I can't say it was the 1st of December.

Q. Well, you said it before, did you not? A. I didn't say it was on the 1st of December.

Mr. HEISLEY—If your Honor please, I submit that he did not say that at all; he said he could not fix the time; he thought it was in December and might have been the latter part of November.

40 Mr. BROGAN—I am going to go by the record.

ARCHIBALD N. McBEAN—Cross

Q. You testified that it was around the end of November or the 1st of December that you demanded your payment under your contract; is that so? A. Yes; after he got the job; I locate the date from that; it was some time after he got the contract, and I understand it was in December that he got the contract, and, to the best of my knowledge, it was along in December that I went to see him. 10

Q. Don't you know very well that it was not until near the beginning of the year, 1913, that he got this contract, and you could not have demanded payment around the end of November? A. Well, I say that it was after I found out that the job was awarded to him. Now, I don't know when the contract was signed; I didn't know. They first estimate on the job, and then they give out who is the lowest bidder, and then they go to work and say who has got the job, but when they signed the contract I don't know. 20

Q. Where were you when you demanded this payment? A. I saw him in West Hoboken.

Q. At what place? A. At that theatre.

Q. Again at the theatre? A. I had nearly all of these interviews that we had after the job was awarded to him—I say they was at that theatre; that is the best I can remember.

Q. So that you made your demand on the street? A. No; right in the building. 30

Q. In the building? A. In the building; yes.

Q. Who was there? A. Several workmen.

Q. Who were they? A. I don't know; a lot of workmen; Dekimpe and I were the only ones interested and the rest were at work.

Mr. BROGAN—Answer the question.

THE COURT—He says he does not know who they were. 40

ARCHIBALD N. McBEAN—Cross

By the Court.

Q. What was going on at the theatre, was it under construction? A. Yes; that was another job that Dekimpe was doing.

By Mr. Brogan.

10 Q. Are you ready to swear now, Mr. McBean, that you communicated to Mr. Dekimpe, the defendant here, that you made this inquiry and that you made arrangements for him to get the plans? Are you ready to swear to that? A. Why, certainly, I swear.

Q. For the South Side High School? A. Yes.

20 Q. When did you first get this information regarding the proposed building of the South Side High School? A. I think I communicated the information to Mr. Dekimpe.

By the Court.

Q. When did you first get the information? A. Well, I think it must have been early in September, right after this contract was made.

By Mr. Brogan.

30 Q. From what source did your information come? A. Well, one of the sources—I am not saying all of the sources, but one of the sources was these reports that the firm that I am with subscribe to and mail.

Q. So that you got your information from something that Mr. Dekimpe paid for, is that so? A. Oh, no; not Dekimpe's firm at all.

Q. What firm is that? A. A lumber concern.

Q. What concern is that? A. Bossert & Son.

Q. Where is it located? A. Brooklyn.

40 Q. How long have you been with them? A. Oh,

ARCHIBALD N. McBEAN—Cross

I have been with them, I guess, ten years, eight or ten.

Q. You do not know how long you have been there exactly? A. Well, I can't tell exactly; eight or ten years. I don't keep no diary account of it.

Q. What was your other source of information?

10

Mr. HEISLEY—Is that material, your Honor?
I do not object to it. It takes time, that's all.

THE COURT—I think the witness may answer.

Q. I think—well, from inquiring from the general trade.

Q. Whom did you make inquiry from? A. Oh, I inquired from different people who were in the supplying business what jobs was going on? I was just informed this morning when I inquired from Mr. Kelly about plans—

20

THE COURT—Never mind that.

Q. Did you not get your information from Dodd's reports? A. I say partly, yes, but I got it from other sources, too.

Q. When did you first get this information? A. I say it was shortly after making the contract; it must be somewhere around the early part of September.

30

Q. Did you not work for a man named Cabot?
A. Yes.

Q. Did you have a contract with him? A. Yes.

Q. Similar to this one?

Objected to.

THE COURT—That is irrelevant.

40

ARCHIBALD N. McBEAN—Re-direct and Re-cross

Mr. BROGAN—If your Honor please, I want to test the witness's credibility, that is all. He testified that this was the first contract of this kind that he ever had with anybody.

10 WITNESS—With this building concern, I said.

THE COURT—You may test the witness's credibility as to matters connected with the case.

Q. Did you ever have a contract like the one you had with Mr. Dekimpe with a man named Cabot?

A. No, they were in the trim business.

20 THE COURT—That question is not relevant to the case.

Question withdrawn.

Re direct examination by Mr. Heisley.

Q. Mr. McBean, will you tell me again when you say it was that you informed Mr. Dekimpe that \$50 would have to be left as a deposit with the Board of Education in order to get the plans and specifications? A. The last time I told him was November—

30 Q. No, when was the first time you told him?
A. The first time, that was early in September.

Q. Was that after the occasion of your first visit?
A. Yes, after the occasion of my first visit.

Re-cross examination by Mr. Brogan.

Q. Early in September? A. I should think so—right after making that contract.

40 Q. Now, you know, as a matter of fact, Mr. McBean, that no information as to this contract was

THOMAS J. McMAHON—Direct

given out to the public before the 6th day of November, 1912, do you not? A. Oh, I had information about the plans being in progress long before that.

Q. When did you get your first information, the 1st of September? A. I say I think it was early in September. 10

Q. Who gave you your information? A. I got it from a number of sources.

Objected to as repetition.

Q. Did you get it from Mr. McMahon at that time?

THE COURT—We have been all over this.

Mr. BROGAN—There is only one point there that I want to bring out, if your Honor please. 20

Q. Did you get it from Mr. McMahon at the time?

A. Early in September Mr. McMahon told me the plans were in progress, yes.

Q. Did he tell you anything about the deposit of \$50 being required? A. Yes, sir; that was on my first conversation. He told me it was customary to make a deposit of \$50. 30

THOMAS J. McMAHON, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q. Mr. McMahon, you are connected with the office of the Board of Education of the City of Newark, are you not? A. Yes, sir.

Q. That is in the City Hall, here on Broad street? A. Yes, sir.

Q. And you recall the fact of the preparation of 40

THOMAS J. McMAHON—Direct

plans and specifications for the building of the new South Side Public School? A. Yes, sir.

Q. When did you ever see Mr. McBean first?

A. When did I see him first?

Q. Yes, and where was it, if you recall? A. In the City Hall, in the Board of Education rooms; that was the first place I ever met him.

Q. What did he say to you? A. Well, he asked for a set of plans on the South Side High School, and I refused to give them to him, because he did not—

Q. What? A. I refused to give them to him, because he did not have a certified check of \$50.

Q. Was that the rule of the board, to have a certified check of \$50 deposited with you? A. Yes, sir.

Q. And what did he say to you as to whom he wanted them for and why he wanted them.

Mr. BROGAN—That is objected to for the same reason that Mr. McBean's testimony was objected to; it is hearsay.

THE COURT—Are not the cases different? Mr. McBean was then the owner of the claim, was he not?

Mr. BROGAN—No, sir; there was no claim in existence.

Mr. HEISLEY—He was the owner of the contract.

Mr. BROGAN—Nothing had accrued under the contract.

THE COURT—When was the contract dated?

Mr. BROGAN—September 6, 1912.

THE COURT—And Mr. McBean did not assign

THOMAS J. McMAHON—Direct

his interest under that contract until when?

Mr. HEISLEY—Until March 1, 1913.

By the Court.

Q. Mr. McMahon, can you fix about the date of this first interview with Mr. McBean? A. Well, your Honor, the only date I could fix for that—I can't fix any special date—the only time I can fix is when the plans were advertised, on the 6th of November, 1912. That is the only time that anybody could solicit the plans, from that date on. Any solicitation previous to that, there was nothing doing.

THE COURT—Any negotiations prior to that time, the assignment being dated March 1, 1913, must have been dealing with a contract under which he was the owner of the claim which is now asserted by the assignee. I think that makes his statements in this conversation competent.

Mr. BROGAN—The purpose of my objection was this, if your Honor please; that even though McBean had a contract with Mr. Dekimpe, he had no claim under that contract, because at this time he had done nothing; up to this time he had done nothing to earn any money under it. He could not have sued the defendant, as he did later. So that that would not come under the rule that your Honor mentioned.

THE COURT—In passing on the admissibility of this particular piece of evidence, I am

THOMAS J. McMAHON—Direct

not considering what right had then accrued to Mr. McBean under the contract, but merely the fact that he was then a contracting party; he was talking about a matter in which as a contracting party he had an interest. That admits his part of the conversation, in my opinion.

10

Defendant's counsel objects to the ruling of the Court.

Objection noted as ground of appeal.

By Mr. Heisley.

Q. Mr. McMahan, how many times would you say in all probability Mr. McBean called at your office? Just a fair approximate figure. A. That I couldn't really say. He had been there a few times, but how many I don't know.

20

Q. You saw him there on a number of occasions, did you? A. Oh, yes, he has been there.

Q. Several occasions? A. Yes, sir.

Q. And on the occasion of his first visit did he say the object of it? If he did say, what did he say the object of his visit to you was? Did he say whom he represented? Just tell us the conversation without my suggesting anything to you. A. The only thing I recall is his asking for the South Side High School plans; I don't recall anything else, because there are so many come in all the time, constantly, day after day, calling for plans and specifications. I know he came and asked me for the plans, and I couldn't give them to him. He might have come before that and said something else, but I can't remember it.

30

Q. Do you remember whom he said he was inter-

40

THOMAS J. McMAHON—Direct

ceding for or representing? A. Yes, sir; he told me he was for Mr. Dekimpe.

Q. Do you recall whether or not he told you who Dekimpe was and gave you any references? A. I don't think he did, because we don't require references for giving out plans.

Q. You do not recall his giving you any references? A. No, I am sure he did not. 10

Q. Was it on the occasion of the first visit that you told him that there would have to be a deposit of \$50 before the plans would be allowed to be figured on? A. Well, the plans were out on the 6th of November. It must have been at that time; I won't say whether it was the first or second call, but it was when the plans was out; it was after they were advertised, that he made a request for them and I refused him. 20

THE COURT—You have hardly answered the question, Mr. McMahon.

Q. (Question read). A. I don't know whether that was the first visit or not.

Q. But you did tell him that on the occasion of some of the visits? A. I did, yes.

Q. Did he tell you that Mr. Dekimpe was a builder or a contractor, or anything of that kind? A. Yes, sir. 30

Q. What do you recall his saying about that? A. Well, of course, when we give out a set of plans I ask whether it is a mason contractor or what he is, and then I take a receipt and mark them down for what it is, what he is figuring on; if he is figuring on masonry I mark him down under "Masonry."

Q. Do you recall on the occasion of any of his 40

THOMAS J. McMAHON—Direct

visits of handing you this Exhibit P 3 (shown to witness)?

THE COURT—Look at both sides of it please.

A. That is my writing.

Q. Now, do you recall his handing it to you? A.

10 Yes, sir.

Q. And did you write this on the back? A. I did, yes.

Q. Now, you have here on the back, "Mr. McBean notified to get plans on South Side. Called for them on the 6th instant, but had no certified check." That is your handwriting, is it? A. That is mine; yes, sir.

Q. Did anybody solicit you for these plans, for the opportunity of bidding, for Dekimpe, other than
20 Mr. McBean? A. Mr. Kenny received a set of plans.

Q. When did Kenny receive this set of plans as regards Mr. McBean's solicitation, before or after McBean's; solicitation? A. He was there after McBean that is, Mr. McBean asked for the plans previous to the time that Mr. Kenny did, but had no check. Mr. Kenny had his check on the 8th of November and received the plans.

Q. Kenny brought a check for \$50, did he, on
30 the 8th of November? A. A certified check.

Q. How many times would you say prior to that time McBean had called upon you, several or not? A. Regarding what?

Q. About these plans, or having Dekimpe afforded an opportunity of bidding? A. Oh, I should judge he was there—I don't know just exactly; I know he was there several times regarding plans, but whether it was regarding the South Side High School plans or not I don't know.

40 Q. Well, I mean prior to Kenny's coming there

THOMAS J. McMAHON—Direct

with a check for \$50. A. After the plans were advertised.

Q. I do not know anything about that. I want to know how many times would you say your best judgment is that McBean called on you in connection with the South Side School before Kenny came there with the \$50 check? A. I can't answer that; I don't know how many times. 10

Q. A number of times? A. Well, I should say several times, but whether it was two or three or four or five or six I don't know.

Q. Did Kenny ever call on you about the South Side School before he came there on the 8th of November with that \$50 check? A. Yes, sir; he did.

Q. When was that? A. Him and Mr. Dekimpe was in the office at the time that we advertised the Newton Street School; that was in September. 20

Q. When was that? A. Well, I don't know just the exact date. They came to get a set of plans on Newton street, and I told them it was such a late date then, that it was too late; they couldn't get their bid in. It was two or three days before the bids were in.

By the Court.

Q. You are talking now about another matter? A. Yes, sir. 30

By Mr. Heisley.

Q. Was it before or after McBean had been there to solicit the plans? A. I don't get your question.

Q. Was the occasion of Dekimpe's and Kenny's visit to you before the 8th of November after McBean had been to see you about the South Side School? A. I won't say whether I met McBean previous to that or not. 40

THOMAS J. McMAHON—Cross

Q. What? A. I don't think I met Mr. McBean previous to that visit.

Q. On the occasion when these two men called together, that was not about the South Side School; it was about the Newton Street School; is that right? A. About Newton street.

10 Q. The South Side School was not discussed at that time? A. Oh, yes, it was discussed.

Q. It was? A. Yes, sir.

Q. Do you recall whether or not Mr. Dekimpe said to you on the occasion of this visit that he was there with Mr. Kenny that he had been informed by Mr. McBean of the fact that there was to be a new building put up on the South Side? A. No.

Q. You do not recall whether he did or not? A. No.

20 Q. And you say you do not know whether that was before or after McBean's first visit to you? A. No, I don't know that I knew Mr. McBean until after that visit; I wouldn't say for sure; I wouldn't be positive.

Q. Do you recall upon the occasion of Mr. McBean's first visit to you of your telling Mr. McBean about the Newton Street School building? A. No, Mr. McBean, I think, only solicited—he didn't solicit no plans on Newton street from me.

30 Q. You do not recall whether you discussed the Newton Street School? A. No, I don't.

Q. What? A. Not that I know of.

Cross-examination by Mr. Brogan

Q. Mr. McMahan, you do remember that Mr. Kenny and Mr. Dekimpe called with reference to the Newton Street School? A. Yes, sir; I do.

Q. You also will testify that Mr. McBean did not solicit the plans for the Newton Street School? A.

40 Yes, as far as I know.

THOMAS J. McMAHON—Re-direct

Q. Do you remember at the time of Mr. Dekimpe's and Mr. Kenny's solicitation for plans for the Newton Street School that you told them that there would be plans out soon for the South Side High School? A. I did, yes.

Q. Do you remember that? A. Yes.

Q. What did Dekimpe say to you at that time about his bidding on them, if anything? A. Well, he refused to take the plans on Newton street, because it was too late. 10

Q. He did not have enough time to figure? A. Did not have enough time to figure, and said that he would figure on the South Side High School when it came out.

Q. And up to this time, Mr. McMahan, you had never met Mr. McBean? A. I never met either one of the gentlemen, that I know of; that was the first time. 20

Q. Then the next time you saw Mr. Dekimpe was when Mr. Kenny, his superintendent, called on November 8th with a certified check and got these plans? A. Well, Mr. Kenny called at that time.

Q. He paid you your money and got the plans? A. Yes, sir.

Q. And subsequently they figured on the job and got the job? A. Got the job. 30

Re-direct examination by Mr. Heisley.

Q. Mr. McMahan, how long before the plans were ready was it generally known or determined that there would be a building erected on the South Side? A. Well, that probably would be a month or two, maybe two or three sometimes. We gave out reports two or three months before the work would be on, and the Dodd reporter would come in, and we would say, "Well, we expect to be ready 40

ARCHIBALD N. McBEAN, recalled—Direct

on such and such a date;" and at the next meeting probably the plans would be presented to the board, and they would make some alteration, which would send them back to the architectural division for the alteration in the plans, and then they would be advertised for another month or two.

10 Q. When would you say that it was that Dekimpe and Kenny called about the Newton Street School building, what month? A. Well, I don't know.

Q. Do you recall when the Newton street contract was awarded? A. The estimate, I believe, was received the 26th of September, or 22nd; I wouldn't say sure. It was somewhere in the 20s.

Q. The latter part of September? A. Yes, sir.

20 *By the Court.*

Q. Then this call with reference to the Newton street job was, of course, earlier than September 20th? A. Yes.

Q. About how much earlier? A. Oh, I should say it was around ten days or may be two weeks. It takes over two weeks to get an estimate out on a plan.

Q. It was before the 20th? A. Yes.

30 ARCHIBALD N. McBEAN, recalled in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q. Mr. McBean have you any way of fixing the time when Dekimpe and Kenny called upon Mr. McMahan as regards your first visit?

MR. BROGAN—That is objected to on the ground that it is incompetent?

40 THE COURT—Why is it incompetent to ask the witness if he can fix a date?

ARCHIBALD N. McBEAN, recalled—Direct

Objection withdrawn.

Question read.

A. Yes, because it was only about ten days after the making of the contract that I told them there was a Newton Street School going on first and the South Side School—

10

THE COURT—Do not run on.

Q. Only ten days after the making of the contract—what contract? A. This contract with Dekimpe.

Q. Your contract, you mean? A. Yes.

By the Court.

Q. What was ten days after that? A. That I called to the Board of Education about the South Side School. That was my first visit, early in September.

20

THE COURT—Now we have got that fixed. You have not quite covered the question that Mr. Heisley asked you.

By Mr. Heisley.

Q. How do you know, if you do know, that the occasion of the visit of Kenny and Dekimpe was after your first visit to Mr. McMahan? A. Because Mr. McMahan told me—I called at the Board of Education, and Mr. McMahan told me, he says, “Kenny and Dekimpe were here, but,” he says, “they were too late for the Newton Street School, and,” he says, “the South Side School wasn’t ready yet.” “Now,” I says, “Here is my card. Be sure and let me know when the South Side School is ready, so that I won’t be too late.” That is when I gave him the card, on my second visit.

30

40

ARCHIBALD N. McBEAN, recalled—Cross

Q. Now, what I am getting at is at what conversation was this that Mr. McMahan said what you have just related, the first or a subsequent visit? A. The first visit was—

Q. Won't you just answer my questions? A. what visit was it that Mr. McMahan told you that
10 Dekimpe had been there to figure on the Newton Street School building, but was too late? A. That was the second visit.

Q. Are you sure of that? A. Certainly the second visit.

Q. How many days elapsed, would you say, between your first visit and your second visit? A. Oh, well, I used to call there about every—

Q. No, just answer the question. A. Well, I
20 should say it was probably about a week, something like that.

Q. Let me ask you then, when you first reported to Mr. Dekimpe that you had called upon McMahan; did Mr. Dekimpe say anything to you about his already having heard or known or solicited the privilege of bidding on the South Side School? A. Not until after the first time; he made no objection.

THE COURT—Just answer the question.

Q. I am asking you a plain question. I want to
30 know if on the occasion of your reporting to him the first time whether he said anything to you indicative of his knowledge that the South Side School building was contemplated? A. No, sir; none whatever.

Cross examination by Mr. Brogan.

Q. Mr. McBean, when did he say that he knew
40 about the South Side High School? A. Well, he had called there at my request for him to call.

ARCHIBALD N. McBEAN, recalled—Cross

Q. At your request? A. Yes, sir.

Q. How do you know it was at your request?

A. Because he went there a few days afterwards, and he didn't say that he knew anything about it at all, but said he would go, and he and Kenny did go, so Mr. McMahan told me.

Q. How do you know that Mr. Dekimpe and Mr. Kenny did not go to the Board of Education, in Newark, and learn about the proposed South Side High School before you knew anything about it? 10

A. You asked me if they went at my solicitation—

Q. I asked you how do you know that they did not go before you went? A. Well, because he said he would go when I asked him to go. That was quite evident that he hadn't been there before and didn't know anything about it.

Q. Will you please answer the question? You have not answered it yet. 20

Mr. HEISLEY—I think he has answered it.

THE COURT—I think he has answered it.

He answers it by stating his inference from what passed between him and Mr. Dekimpe.

Q. Well, let me see. Dekimpe and Kenny knew about this proposed South Side High School from Mr. McMahan. That has been the testimony. How do you know that they didn't know it before you did? A. They made no—they gave me no information; when I told him about it they said they would go down 30

Q. In other words, they did not tell you about it? A. When I told them they said they would go, and I supposed from that that they acted upon my information.

PLAINTIFF RESTS.

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NOTICE AND GROUNDS OF APPEAL

Exhibit P 2. Copy of contract and assignment, Schedule A and B annexed to the declaration.

Notice and grounds of appeal.

To J. Emil Walscheid, Esq., Attorney for Appellee:

10 SIR:

Please take notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

At the conclusion of the plaintiff's case the Court directed a non suit in favor of the defendant.

MERRITT LANE,
Attorney for Appellant.

20 Dated April 29, '16.

Due notice of argument for November Term,
1916.

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40

New Jersey Court of Errors and Appeals.

On Appeal from Supreme Court.

JOSEPH P. BRIODY,
Plaintiff Appellant,

VS.

GUSTAVE DEKIMPE,
Defendant Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

Statement of Facts.

Plaintiff's assignor, Archibald N. McBean, and defendant on the sixth day of September, 1912, executed a paper writing which reads as follows:

“Agreement made this 6th day of September, 1912, by and between Gustave DeKimpe of North Bergen, Hudson Co., N. J., and Archibald N. McBean of 119 P. O. Box Hoboken, N. J.

“The said DeKimpe contracts and agrees to *engage* the said McBean to *solicit work* for him for *general construction work* of Public & Private buildings and to pay said McBean for *such* services the sum of 1% commission *on any and all contract or contracts* that the said DeKimpe *accepts*, and said commission, payable one half on signing of the contract and the balance on completion of the contract, not to exceed a fair

and reasonable time to complete said work, and said DeKimpe agrees to protect said McBean with any job or jobs he may solicit for said DeKimpe and to pay said commission *on jobs* he may solicit for said DeKimpe, and to pay said commission *on jobs* coming direct from customers once supplied, or any *job* or *jobs* said McBean solicits if they, he or it order direct, the same commission to be paid McBean as herein stated, and to pay McBean a fair and reasonable compensation for securing estimates on material required for the construction of any job, to estimate on or work taken if desired if such services shall be required by said DeKimpe, this agreement to be in force and effect for a period of two years from date of this agreement, and this agreement can be renewed if desired by the two contracting parties by expressing said desire in writing. If DeKimpe incorporates this agreement will terminate as to length of time.

G. DEKIMPE,
ARCHIBALD N. McBEAN.'"

On December 31, 1912, the defendant entered into a contract with the Board of Education of the City of Newark for the erection of a school building at the corner of Johnson Avenue and Alpine Street in the City of Newark, to be known as the "South Side Public School" for the contract price of two hundred and forty-six thousand five hundred dollars (\$246,500) and thereafter erected said building for said board under said contract.

The plaintiff thereafter instituted this suit, claiming to be entitled to a commission of one

per cent. of said contract price and recovered a verdict for the full amount; i. e., \$2465.00 plus interest.

The trial judge allowed a rule to show cause reserving to defendant his objections for appeal.

This rule after argument was made absolute at the June term 1915, the court delivering the following *per curiam*:

“This action is based upon a contract by the terms of which the defendant agreed to engage Archibald N. McBean to solicit for him general construction work, and to pay McBean a commission on all contracts which the defendant accepted. The contract, which McBean assigned to the plaintiff, contains other provisions not required to be considered in disposing of this rule. The plaintiff had a verdict and the trial court allowed a rule to show cause reserving ‘all questions of law involved in any ruling of the court upon the trial of said cause to which an objection was noted by the counsel of the defendant.’

“It is only necessary to consider one of the reasons urged in support of this rule, and that is, that it was error to instruct the jury that the plaintiff must show, in order to make out his case, that McBean solicited for defendant ‘the opportunity to bid for the general construction work on the South Side Public School building,’ and also that McBean had given defendant notice that a deposit of \$50 was required in order to get copy of plans, and then proceeded ‘if you are satisfied that the plaintiff has established his case thus far then, there being no doubt that a contract was subsequently signed, whether or not it was procured and signed by the application made by Mr. McBean, the conditions of the contract are all fulfilled.’ We are of opinion that this instruction

was erroneous, the contract does not by its terms include soliciting an opportunity to bid, but 'work for him for general construction work of public or private buildings.' This plainly means more than an opportunity to bid on work open to all, the solicitation of which could have no effect. Under the instructions above set out the jury were told in effect that if McBean solicited an opportunity to bid the defendant was bound to pay even if the contract was not procured because of the application for an opportunity to bid, if for any other reason it was procured and accepted. We think that under this contract the plaintiff was bound to show more than such an opportunity to bid, and that in order to recover he must show a successful solicitation of construction work as, in substance, left to the defendant the option to accept or refuse the work offered. The plaintiff's assignor was to solicit work, not an opportunity to compete for public work which the law requires shall be competitive, open to all responsible bidders, the awarding of which cannot be controlled by personal influence or solicitation. The instruction complained of is not subject to any exception noted, and therefore not reserved by the terms of the rule to show cause, and may properly be considered in disposing thereof. We are of the opinion that the rule should be made absolute."

The case was thereupon again brought to trial before Judge Adams at the Essex Circuit without a jury and at that trial the plaintiff by consent offered in evidence the testimony taken on behalf of the plaintiff at the former trial together with the contract hereinbefore set out and rested. The defendant then moved for a non-suit for the reasons stated on pages 10-11 of the printed book.

The motion was allowed and plaintiff prayed

an *exception* to the ruling of the court and this exception was noted as ground of appeal (p. 10, f. 20).

The granting of this motion is the subject of this appeal.

The evidence then introduced by the plaintiff follows:

Archibald N. McBean, plaintiff's assignor, swore that he went to see Mr. McMahan *to get Mr. DeKimpe a chance to figure upon the building* (p. 14-15). This was about the middle of September (1912). Mr. McMahan was the one in the Board of Education *who had charge of the giving out of plans* (p. 14, fol. 30). He told Mr. McMahan that DeKimpe would like to figure on the job; that DeKimpe was an experienced builder and would do good work and gave McMahan references of certain jobs which DeKimpe had done, and said *he would very much like to have him (McMahan) allow DeKimpe to give an estimate on the work* (p. 15, fols. 10-20).

After this interview with McMahan, plaintiff went to DeKimpe and told him that he had *solicited* for that school *from Mr. McMahan and that as soon as the plans were ready McMahan was to let him (DeKimpe) figure on them*. He also told DeKimpe that *they* wanted a deposit of \$50.00 *before they would let the plans go* (p. 18, fols. 1-20).

DeKimpe told plaintiff that *he* would go to the Board of Education to see about getting the plans. The plans were then not ready (p. 18, fol. 30). Thereafter plaintiff again saw McMahan who told him DeKimpe *had been there to see about the plans* (p. 19, fol. 30). On this visit plaintiff said to McMahan "When the plans are ready, I wish you would let me know, so that I

can communicate with Mr. DeKimpe, so that he will not lose his opportunity to estimate on this contract," and McMahon promised to do so (p. 21, fols. 10-20). Then plaintiff went and reported to DeKimpe and told him that he had seen McMahon and that he had agreed to let him know when the plans were ready to *figure on*, and he, plaintiff, would communicate with DeKimpe and he, DeKimpe, could go there and get them (p. 21, fols. 30-40).

Plaintiff thereafter again went to McMahon when the plans were ready, and returned to DeKimpe and told him he had found out the plans were ready for the South Side School (p. 24, fol. 20) and that McMahon would not give him the plans unless he gave \$50.00 deposit for the safe return of the same (p. 24, fols. 30-40) and DeKimpe said, "I don't think I will figure on that job." Plaintiff then told defendant that he need not figure on the job, but if he did, he would have to pay the commission (p. 24, fols. 30-40). Plaintiff then again went to McMahon to get from McMahon some information (evidence) that he had solicited and that he had worked to try and get these plans (p. 25, fol. 30). Upon cross-examination plaintiff said McMahon was to let him know when the plans were ready—but not so that he could go and get them—because he had no business to go and get them,—he had to know when they were ready because he was the locator; he would go and locate the jobs; find out who was giving out the job and give this information to DeKimpe. *It wasn't his business to do anything but locate the job. He did not have to get the plans. He was the locater.* (p. 37, fols. 1-20).

The information that the Board of Education intended to build this school was then obtainable

from reports that the firm with whom plaintiff worked subscribed to (p. 44, fols. 20-40) and could also be ascertained *from inquiry from "the general trade"* (p. 45, fol 20) and from *Dodd's Reports and other sources* (p. 45, fol. 20).

Mr. McMahon called as witness for the plaintiff, said he first met plaintiff in the City Hall of Newark when he asked witness *for a set of plans on the South Side High School* and witness refused to give them to him because he did not have a check for \$50.00 to deposit for them (p. 48, fols. 10-30.) This was on November 6th, 1912. From that day on the plans could be solicited. Any solicitation previous to that, there was nothing doing (p. 49, fols. 10-20). Plaintiff called on McMahon several times. He came *for the plans* and witness could not give them to him and he told witness that he was *for Mr. DeKimpe* (p. 50, fols. 20-40). Witness was of the opinion that plaintiff gave him no references of DeKimpe because the board *does not require references for giving out plans* (p. 50, fols. 1-10). This witness further said that DeKimpe and a Mr. Kenny came there in September (1912) to get a set of plans on the Newton Street School but they could not get their bid in; it was two or three days before that letting (p. 53 fols. 20-30); *at that time the South Side School was discussed* (p. 54, fols. 10-20) and *McMahon told DeKimpe and Kenny that there would be plans out soon for the South Side High School* (p. 41, fols. 30-40) *at that time DeKimpe told McMahon he would figure on the South Side High School when it came out and up to that time McMahon had not met either McBean or DeKimpe* (p. 55, fols. 20-30).

Mr. Kenny was the Superintendent for Mr. DeKimpe (p. 55, fols. 20-30).

And the plaintiff upon being recalled, said he knew that DeKimpe did not go to the Board of Education in Newark and learn about the proposed South Side High School because he, DeKimpe, told McBean that he would go when he asked him to go. *That made it quite evident that he had not been there before* and did not know anything about it (p. 59, fols. 10-30).

ARGUMENT.

Point I.

The paper writing sued upon and offered in evidence as the contract upon which the action is based lacks mutuality, and is not enforceable as an agreement.

An examination of the writing (p. 5) will disclose that plaintiff *is not in any manner bound to the performance of anything*. There is neither a promise *by* the plaintiff *for the promise of defendant*, nor is there *any other consideration* for the promise made by defendant.

The contract imposes no obligation upon the plaintiff and is therefor void for want of mutuality.

9 Cys. 327, note 20.

Such a proposition as the one contained in the alleged contract is not binding on either of the parties. Unless both parties are bound, so that an action can be maintained *by either against the other* for a breach, neither will be bound.

Bishop Contr. Enlarged Ed. 78;
Ashcroft vs. Butterworth, 136 Mass.,
 511;

Thayer vs. Burchard, 99 Mass., 508;
Chicago & G. E. R. Co. vs. Dane, 43 N
 Y., 240;
Newlin vs. Prevo, 90 Ill. App., 515;
Chicago & A. R. Co. vs. Jones, 53 Ill.
 App., 431.

A promise is not a good consideration for a promise unless there is an absolute mutuality of engagement so that each party has the right *at once* to hold the other to a positive agreement.

Bailey vs. Austrian, 19 Minn., 535;
Tucker vs. Woods, 12 Johns, 190;
Keep vs. Goodrich, 12 Johns, 397;
Macedon & B. Pl. Rd. Co. vs. Snedicker,
 18 Barb., 317.

A promise made by one party without a corresponding obligation by the other party is void.

Utica & S. R. Co. vs. Brinkerhoff, 21
 Wend., 139;
Rafolowitz vs. American Tobacco Co., 73
 Hun, 87;
Hoffman vs. Maffioli, 104 Wis., 630;
Davie vs. Lumbermen's Min. Co., 93
 Mich., 491;
Teipel vs. Meyer, 106 Wis., 41.

The foregoing rule, however, has some well-recognized exceptions which may be summarized in the following manner:

Whenever the accepted proposition or contract is for the sale or delivery of a *specific* article or number of articles, or a *specific amount of service* or materials, or where *by the terms of the contract* the number of such articles, or the amount of such services or materials are ascertainable, a

promise of the other party may be implied, and the engagements are then mutual.

Robson vs. Mississippi River Logging Co., 43 Fed. Rep., 364;

Minnesota Lumber Co. vs. Whitebreast Coal Co., 160 Ill., 85;

Cooper vs. Lansing Wheel Co., 94 Mich., 272;

Jones vs. Binford, 74 Me., 439;

Minneapolis Mills Co. vs. Goodnow, 40 Minn., 497;

Justice vs. Lang, 42 N. Y., 493.

In the case at bar the contract deals with services to be rendered by plaintiff's assignor. The *specified* amount of services to be rendered by McBean is *not* set out in the paper, nor is there *anything* before the court from which *by the terms* of the contract *the amount* of such services to be rendered can be ascertained.

There is one exception under which defendant would become liable under the terms of *this* agreement: If he had specifically *ordered* plaintiff's assignor to solicit *work* for him for *general construction work* on *this* proposed school building, and plaintiff's assignor had, pursuant to such *order* actually solicited such *general construction work from parties able to give*, and defendant had thereafter *accepted* such work, he would be liable. But such liability would be based upon the subsequent *order* or *offer* of *specific* work or service, which order or offer in turn then completed the main contract by acceptance through plaintiff's assignor of the *specific* order. This exception, therefore, is but *a restatement* of the general exception hereinbefore set out which provides that where the services to be rendered *are specific in*

amount or may be made so the party becomes liable. The *specific order* and *its acceptance* and the main contract, together then constitute a valid agreement upon which the *defendant* could institute suit for damages upon refusal by plaintiff's assignor to perform the *specific services*.

Plaintiff, however, cannot avail himself of this exception because:

(a) There is no evidence of any such specific order.

(b) The work alleged to have been done by plaintiff's assignor was not accepted by defendant.

(c) Plaintiff's cause of action was *pleaded and tried* on the theory that his assignor did not need a specific order and that he could solicit work upon the strength of the covenants contained in the agreement.

To allow a recovery upon a theory other than that presented to the jury, or other than that raised by the pleadings would be error.

Excelsior Elect. Co. vs. Sweet, 30 Vroom, 441;

Marlinger vs. Lambert, 47 Vroom, 806;

Partridge vs. Woodland Steamboat Co., 37 Vroom, 294;

Martiney vs. Runkle, 28 Vroom, 111;

Murphy vs. North Jersey St. Ry. Co., 42 Vroom, 5;

DeRaismes vs. DeRaismes, 41 Vroom, 15 at p. 19.

We therefore submit that this contract is void for want of mutuality.

Point II.

The paper writing sued upon is not a contract of present employment. It is an agreement at some future date to employ plaintiff's assignor to solicit.

The language of the alleged contract is: "The said DeKimpe contracts and agrees *to engage*" (P. V., fol. 1). He contracts *to engage*; he agrees *to engage*. There is no time mentioned *when* the employment is to commence and this language, we submit, requires that it be construed to mean a contract or agreement whereby DeKimpe agrees from time to time thereafter to call upon plaintiff's assignor to solicit specific jobs of general construction work. In this way only could DeKimpe keep control of his work; in this way only could he indicate to plaintiff's assignor the construction work he was interested in and which he desired to obtain.

Plaintiff contends that under this contract his assignor had the right to solicit work for DeKimpe *without DeKimpe's instruction so to do*, and if thereafter this work was offered to DeKimpe, *independent of any influence produced by the solicitation*, and DeKimpe accepted the same, he plaintiff's assignor would become entitled to his commission.

If this is a fair construction of the language of this contract, it means that McBean was the *master* and DeKimpe the man. It means that plaintiff's assignor had it in his power to force DeKimpe to pay him commissions *on all work which came to the knowledge of both of them by soliciting the work and notifying defendant that he had done so*. Under this construction by slight diligence in the examination of public advertisements and building

reports, plaintiff's assignor could learn of *all* desirable construction work about to be done in New Jersey and New York; could write a letter of solicitation to the proper parties on behalf of DeKimpe and after having notified DeKimpe of the fact, could sit back and watch whether defendant contracted for any of the work thus solicited—and if he did—why plaintiff's assignor had earned his commission. This construction we deem forced and erroneous. It was never intended by this agreement to give to McBean a roving commission under which he could *speculate* as to the work DeKimpe would be likely to desire and then go out and by the mere acts of solicitation and notification place himself in line for commissions on all of DeKimpe's work. Such construction turns this agreement into a contract of *actual daily continuous employment*; whereas we contend, that under correct construction, McBean was *only to solicit such work* as DeKimpe actually ordered him to go after, and if his efforts then produced results, which DeKimpe accepted, he became entitled to his commissions. Such construction satisfies the language that DeKimpe "contracts to engage" and "agrees to engage"; it leaves DeKimpe the master and McBean the man; it produces a fair result; prevents McBean from obtaining money *for nothing* and is agreeable to the real intention of the parties.

Point III.

The contract obtained by defendant to erect the South Side Public School in the City of Newark could not be obtained by solicitation.

Section 52 of the School Law (L. 1903 Second Special Session, p. 21) governing the board, provides:

“No contract shall be entered into for the building of a new school house or for the enlarging or repairing of a school house already erected, except after advertisement made under such regulations as said board may prescribe.”

And Section 53 of the same act (L. 1903, Second Special Session, p. 21) provides:

“No bid for building or repairing school houses or for supplies shall be accepted which does not conform to the specifications furnished therefor, *and all contracts shall be awarded to the lowest responsible bidder.*”

And a general act adopted in 1912 ordains that whenever it shall be lawful and desirable for a public body in any county or city, etc., to let contracts for the doing of *any* work or for the furnishing of *any material* or *labor*, where the sum to be expended exceeds \$500.00 the making of any such contract *shall be invalid “unless such public body shall first publicly advertise for bids therefor, and shall award said contract for the doing of said work, or for furnishing of such material or labor to the lowest responsible bidder.”* (L. 1912 p. 593.)

DeKimpe agrees to engage McBean *to solicit* work for him for general construction work of public and private buildings. The work which DeKimpe obtained *could not be solicited*. To solicit means to ask earnestly, to crave, to entreat, to *beg*, to *importune*. To obtain work by solicitation is to obtain it *by favor*. The policy of our law now is and for a long time has been against such procedure in relation to public work, and we maintain that since the work *could not be obtained* by solicitation, since it would be futile to solicit it, and since plaintiff and his assignor are charged with knowledge of the law, they should not be allowed to recover for solicitation which could not, and which they know could not produce any results.

The contract should, by construction, be limited to construction work of such public buildings as can be obtained by solicitation, or to such work on such buildings as can be obtained in that manner. This would permit the solicitation of sub-contracts on municipal buildings which are not affected by the statutes and would also permit the solicitation of work in the erection of theatres, railroad stations, churches, office buildings and other structures to which the public is generally admitted in distinction from private buildings

Point IV.

There is no evidence showing the authority of the witness McMahon to represent and act for the Board of Education of the City of Newark.

We think that a proper construction of this contract not only requires that the work desired be *capable of being obtained by solicitation*, but

that such solicitation in order to be effective and to furnish the foundation for a suit at law must be made *of* and *from* the party having the *power* to respond to the solicitor *by an award of contract*. And this fact must be established as part of plaintiff's case.

McBean spoke to no one during his acts of solicitation except one McMahan. Who was McMahan? He was he one in he Board of Education, in Newark, who had charge of *giving out the plans* (p. 14 fols. 30-40). He *was connected with* the Baord of Education (p. 47 fols. 30-40); *but whether as a member or a clerk does not appear*. The Board of Education *as a body* undoubtedly had the right to give out the contract for the erection of the school building upon which the commission is claimed and it seems elementary that they *could not delegate* this right and power to a clerk of the board or even to a single member thereof. How then could McMahan be the proper party to receive and respond to a solicitation? The rule governing the payment of commissions where sales are negotiated, is that the agent must bring a buyer who is *able* and ready to buy. By analogy the rule in this case should be that McBean must bring to DeKimpe a party able and ready to give to the latter the construction work he desired so that DeKimpe might either accept or reject such work.

McMahan could not award any work; *he had none to give*; and solicitation of the right to erect this school and perform the construction work thereon, addressed to McMahan was just as futile and useless as if it had been addressed to the Emperor of Japan.

Point V.

The defendant as a matter of law was entitled to a set of the plans and specifications of the South Side Public School upon depositing fifty dollars therefor and these plans and specifications could not be procured by solicitation.

Plaintiff's assignor claims to have solicited a set of plans and specifications for the erection of the South Side Public School from the witness McMahon for and on behalf of the defendant. *He did nothing else to bring himself within the terms of the contract and his right to recovery rests solely upon this act* (p. 39 fols. 20-30).

Since the erection of this school building is governed by the statutes set out under Point III.; since the work must be awarded to the lowest responsible bidder under specifications *furnished therefor* by the Board of Education, it follows that any prospective bidder *must be entitled to the plans and specifications* furnished by the board *so as to enable him to make up his bid*. The only limitation upon the right is a deposit of fifty dollars to secure the safe return of the plans and specifications or perhaps the bona fides of the application.

Refusal by the board to furnish plans and specifications to a prospective bidder would destroy the full, fair and open competition aimed at by the statutes and would invalidate the corporate action awarding a contract following such refusal: The act of McBean in attempting to *solicit, beg or importune* a set of these plans and specifications was therefor a useless act and cannot furnish the basis for this suit.

Point VI.

The solicitation of plans or of specifications is not the solicitation of work under the terms of the contract.

Appellant in his brief says:

“He (Plaintiff-Assignor) went to the Board of Education office in Newark and told the party in charge about DeKimpe *and solicited the contract for him*” (p. 9 fols. 30-40 of brief).

Again at p. 13 fol. 20 of his brief, Appellant says:

“There can be no question but that McBean asked for and tried to obtain on behalf of DeKimpe, *the construction work of the South Side School.*”

We challenge the correctness of these statements. *There is no such evidence in the case.*

The contract of McBean was to solicit *work* and the contract of DeKimpe was to pay for *such* services, i. e., *the solicitation of work on contracts accepted by him*. If defendant below was bound only to pay for work *accepted by him*, it necessarily follows that plaintiff's assignor would have to be *successful in his solicitation of work* and upon *terms satisfactory to defendant* below before he could claim commission. In other words, as a result of *his solicitation* he would have to come to DeKimpe *from an owner* desiring the erection of a public or private building *with an offer by that owner* to have DeKimpe do that work, and *that offer* would have to be accepted by DeKimpe before plaintiff's assignor would be come entitled to commission. We admit, of course, that it is not necessary to show the state of facts just outlined by *direct evidence* to entitle plaintiff to recover, and that it would be sufficient if these facts ap-

peared only inferentially from the testimony.

The Supreme Court upon the argument of the rule to show cause dealt with this question and said:

“The contract does not by its terms include an opportunity to bid, but ‘work for him for general construction work of public or private buildings.’ This plainly means more than an opportunity to bid on work open to all, the solicitation of which could have no effect. * * *” We think that under this contract the plaintiff was bound to show more than such an opportunity to bid, and that in order to recover he must show a successful solicitation of construction work, as in substance, left to the defendant the option to accept or refuse the work offered. The plaintiff’s assignor was to solicit work, not an opportunity to compete for public work, which the law requires shall be competitive, open to all responsible bidders, the awarding of which cannot be controlled by personal influence or solicitation.”

Plaintiff’s assignor admittedly met nobody except the witness McMahan, who was “connected with the Board of Education” (p. 35 fols. 1-10). Plaintiff’s assignor admittedly did nothing more than *solicit a set of plans and specifications from McMahan* for DeKimpe and was refused because he did not have a check for \$50.00 to deposit for the same in conformity with the rules (p. 35 fols. 20-30).

We submit that this act of asking for a set of plans and specifications is a ministerial act which could have been performed by a messenger boy, and that it is not the act of *soliciting work for general construction work* under the contract (p. 5 fols. 1-10) or any other act under said *contract* which entitles plaintiff to a recovery.

McMahon himself, under the evidence, was nothing more than a ministerial agent charged with the distribution of these plans against a deposit of \$50.00 per set. There is no claim that McMahon could give out or award work, but whether he could or could not do so, the evidence is undisputed that he was *merely solicited for a set of plans*.

CONCLUSION.

We submit that for the foregoing reasons the judgment of non-suit should be affirmed.

Respectfully submitted,

J. EMIL WALSCHEID,
Of Counsel with Appellee.

June Term, 1917.

New Jersey Court of Errors and Appeals 10

ON APPEAL FROM SUPREME COURT.

JOSEPH P. BRIODY,
Appellant,

vs.

GUSTAVE DE KIMPE,
Appellee.

Tried by
Adams, Cir.
Judge, with-
out a jury.

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BRIEF OF APPELLANT.

Statement.

This suit was brought by Joseph P. Briody, as assignee of Archibald N. McBean, against Gustave De Kimpe, to recover a commission claimed to be due from De Kimpe, under a contract between him and McBean, wherein De Kimpe engaged McBean to solicit work for him for construction work of public and private buildings, and agreed to pay him one per cent. commission on contracts accepted by him, De Kimpe (see Contract, page 5). De Kimpe received and accepted a contract for the construction of the "South Side Public School" in Newark (a public building), which contract had been solicited by McBean, and received \$246,000, 30 40

for said construction work; the commission due is \$2,460, with interest.

10 The case was first tried before Judge Adams and a jury, and resulted in a verdict in favor of the plaintiff, Briody. A rule to show cause was granted, and the same was argued at the June Term, 1915, before Chief Justice Gummere and Justices Swayze and Bergen; the rule was made absolute.

The case was retried before Judge Adams, without a jury, and the testimony taken on behalf of the plaintiff at the first trial was offered by consent, and a non-suit was granted.

Evidence in Case.

20 *The evidence shows* that McBean, shortly after his contract with De Kimpe was signed, went to the Board of Education in the City Hall, Newark, and saw Mr. McMahon who had charge of giving out the plans for school houses to be constructed, &c. (page 14, line 29, &c). He solicited for De Kimpe a contract to build this school. He told McMahon about De Kimpe, and his ability to do work, and spoke to McMahon on behalf of De Kimpe, about the South Side School. He gave McMahon De Kimpe's card.

30 Within a few days after this interview with McMahon, McBean went to see De Kimpe, and told him he had solicited for the South Side School, and that as soon as plans were ready, McMahon was to let him figure on them. He also told De Kimpe that a deposit of \$50 was required before he could get the plans. De Kimpe replied that he would see about getting the plans (page 18).

40 After McBean reported to De Kimpe as above,

he went to the Board of Education again, in about a week, and saw McMahan (page 19).

McBean left another of De Kimpe's cards with McMahan, with his own address on it. McBean again reported to De Kimpe, and told him McMahan was to let him know when plans ready to figure on, and he (McBean) would let De Kimpe know (page 21).

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McBean spoke to De Kimpe and told him that one Kenny had been interfering with people he was soliciting work from, and people he was working with, &c. (page 22). De Kimpe replied that Kenny could not interfere with his business. De Kimpe said, let Kenny look after the Lyons Farm School (another construction job McBean was soliciting)—“you go to the South Side School in Newark.” McBean said, “All right. Then I will leave Kenny work on the Lyons Farm School but I will have the South Side School, and he must not interfere with me there”—and De Kimpe said, “No, that he won't.” McBean then went to see McMahan again (page 23).

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McBean found out plans for South Side School were ready, and that same afternoon or evening went to see De Kimpe and told him McMahan said plans were ready, but that deposit of \$50 had to be made for return of plans. De Kimpe said, “I don't think I will figure on that job.” McBean said, “If you don't want to figure on it you don't have to, but if you figure on it and get it, you have got to pay me my commission.” De Kimpe said, “I don't think I will figure on it” (page 24).

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De Kimpe did figure on it and got the contract; he completed the building and collected from the Board of Education \$246,000 for his work (page 28).

McBean, after he found out the contract had been awarded to De Kimpe, made demand for pay-

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ment (one-half of commission was due on signing of construction contract), but De Kimpe would not talk about it. He said, "You are not entitled to anything; you didn't do anything" (page 31).

He did not deny that McBean had solicited the work; he did not claim that McBean had failed to live up to his contract (page 32).

10 McBean called at the Board of Education in Newark so many times, it would be impossible to enumerate them exact (page 40, line 35).

McMahon testified that McBean said he was interceding for and representing De Kimpe—he said De Kimpe was a builder or a contractor (page 51). McBean asked for the plans previous to time Kenny (De Kimpe's other man) did. McBean was there several times before that (page 52). McBean only *solicited*—but not on the
20 Newton Street School (page 54). (Newton Street School contract is not the basis of plaintiff's suit.)

McBean was recalled and testified that when he reported to De Kimpe the first time, De Kimpe did not say anything to him indicative of his knowledge that the South Side School building was contemplated (page 58). De Kimpe went there a few days after I reported—he said he would go. McMahon told McBean that De Kimpe and Kenny did come. When I told De Kimpe
30 about South Side School he said he would go down (page 59).

No proofs were submitted by defendant—a non-suit having been granted—and the evidence on behalf of plaintiff, that he had performed his contract, stands uncontradicted.

At the first trial of this case evidence was submitted on behalf of the plaintiff, and also the defendant, and the case, on all the evidence, was submitted to the jury, which found in favor of the
40 plaintiff as above stated.

Argument.

As will be seen from the opinion filed by the Supreme Court, under which the rule to show cause was made absolute, the Court passed only upon one or two questions, as follows:

The Supreme Court found that it was error for the Trial Judge to instruct the jury that the plaintiff must show, in order to make out his case, that McBean solicited for defendant "the opportunity to bid for the general construction work on the South Side School building"; and also that McBean had given De Kimpe notice that a deposit of \$50 was required in order to get a copy of the plans. The Court in its opinion stated:

"We think that under this contract the plaintiff was bound to show more than such an opportunity to bid, and that in order to recover he must show a successful solicitation of construction work as, in substance, left to the defendant the option to accept or refuse the work offered. The plaintiff's assignor was to solicit work, not an opportunity to compete for public work which the law requires shall be competitive, open to all responsible bidders, the awarding of which cannot be controlled by personal influence or solicitation."

In the case now before the Court there is, of course, no question as to any instructions to the jury, as there was no jury; a non-suit was ordered.

The Trial Judge at the first trial apparently misunderstood the contract between the parties, because said contract did not provide that McBean should solicit for De Kimpe "the opportunity to bid" for construction work, but that contract did

provide that McBean should "solicit work for him for general construction work for public and private buildings."

Under the evidence submitted by the plaintiff at the second trial, which evidence is clear, it appears beyond question that McBean did solicit the construction work for this South Side School, and that De Kimpe did accept the contract for the construction of that school, and received his money under that contract.

The only question before this Court to consider, and which was referred to in the Supreme Court opinion is, in effect, whether the contract between McBean and De Kimpe covered the soliciting of contracts for public buildings, which under the law of this State is subject to competitive bidding, and was binding on the defendant as far as public buildings is concerned.

The grounds for the motion to non-suit (page 10) are nine in number.

The first ground is that the contract lacks mutuality, which I respectfully submit, upon an examination of the contract, will be found to have no foundation. McBean was to solicit work for De Kimpe, and upon certain conditions De Kimpe was to pay McBean, so there was unquestionably mutuality.

Where one employs another as agent to sell land for remuneration on performance, the contract is based on a sufficient consideration.

Albany Land Co. vs. Rickel, 162 Ind., 222.
Rowan vs. Hull, 47 S. E., 92.

The second ground is to the effect that the contract is not one of present employment, but only an agreement to employ at some future date.

Upon an examination of the contract it will be seen that there is no foundation for this contention. McBean was to proceed to solicit work for De Kimpe, and by a reading of the whole contract it will be seen that he was to start at once. This contract was not one of future employment, in any sense of the word. The contract must be read as a whole; towards the end of the contract the following appears: "This agreement to be in force & effect for a period of two years from date of this agreement." This shows conclusively that the contract was to commence at once and to run for a period of two years, and was not for employment "at some future date." 10

The third ground is practically the same as the second ground, and we refer to what has been said in connection with the second ground.

The fourth and fifth grounds refer to whether a contract could be "solicited from a Board of Education," and will be referred to hereafter. 20

The sixth ground refers to whether McMahan had any authority to represent and act for the Board of Education in Newark. This is not a material fact, which it was necessary to prove; but even if it were, it has been shown that McMahan was at the Board of Education office in Newark, and had charge, at least to a certain extent, of matters connected with the construction work of public schools in the City of Newark. 30

The seventh ground is to the effect that De Kimpe was entitled, as a matter of right, to a set of the plans and specifications for the construction of this school building, for the purpose of submitting an estimate; this is, perhaps, true, but has no reference to the matter of the contract between the parties in this suit. He could not have submitted a bid for the work if he had not known such a school was to be built. 40

The ninth ground also refers to the question of whether McBean could solicit such a public contract as was given to De Kimpe, and will be referred to hereafter.

10 The main question to be considered by this Court, and which is the only real question raised, under the grounds for motion for non-suit, is whether the contract for the South Side School, obtained, accepted and carried out by De Kimpe, and for which he was paid, is one which would come within the contract between De Kimpe and McBean, and which is the foundation of plaintiff's cause of action. Said contract will be found on page five of the State of the Case.

20 Upon a reading of this contract, the Court will see clearly that the same was not prepared by a hand skilled in the drawing of contracts, but was undoubtedly prepared by the parties themselves, who were men in the contracting business, and who were not particular in the selection of the words which they inserted in their contract. They used words which to them would indicate what they intended should be done, and what benefits the parties were to receive under their agreement. It appears clearly in this contract that De Kimpe was in the building business and that McBean was to locate and solicit work for De Kimpe to perform; and that for his services McBean was to get paid, provided De Kimpe procured contracts in his line of business, which was construction work. The parties are, of course, presumed to know the law, and must have known that contracts for constructing public buildings were open to competitive bidding, and that it would have been improper and illegal for McBean, or either of them, to have used other than "open and above board" methods to procure public work. If the contract had simply provided for the soliciting

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of work "of buildings," one construction *might* be put upon this contract, but it is clear that both parties to the contract had in their minds and contemplated *public* buildings (which were subject to competitive bidding) as well as private work, which might be procured by special influence, or by a solicitor's personal friendship, or in other ways. The contract reads that McBean was to "solicit work" for De Kimpe "for general construction work of *public & private buildings.*" De Kimpe knew, and under the law it is presumed he did know, that building contracts for the construction of public buildings could only be procured by competitive bidding. From the wording of the contract it is clear that he knew just what McBean could do, or to what limits he could go in soliciting construction work of "public buildings." All that could be done in the matter by McBean was done, and all that he could be called upon to do under his contract, to carry out the same on his part, in the procuring of construction work of public buildings, he did in connection with the South Side School. He used what knowledge he had, and followed up such leads as he could, to find out where public buildings were being constructed, or were liable to be constructed, and went to the place where information in connection with the same was to be obtained; and, as appears by the evidence, found out about at least two public buildings—one at Lyon's Farm and one in the City of Newark (The South Side School). He went to the Board of Education office in Newark and told the party in charge about De Kimpe and solicited the contract for him. As soon as he obtained the information in regard to the South Side School he notified De Kimpe and told him the particulars about the same, and that in order to procure a copy of the plans he would

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have to deposit \$50; upon the strength of this information De Kimpe told him that he would see about getting the plans. The getting of these plans was, of course, the first step to be performed on the part of De Kimpe in pursuance of the contract, and toward getting this construction work for this school. I do not think it was necessary
10 for McBean to do anything further under his contract, to be entitled to his commission. But he did not stop at this point; he followed up the matter and went to the Board of Education in Newark a number of times, and he subsequently informed De Kimpe that the plans were ready, and in pursuance of this information (as far as evidence shows) De Kimpe went to Newark and obtained the plans; he submitted his bid, and obtained the contract.

20 No question was ever raised by De Kimpe that McBean was not entitled to his commission, as set forth in his contract with De Kimpe, until after De Kimpe had obtained his contract for the construction of this school. It is clear from the evidence that one Kenny was endeavoring to undermine McBean in connection with his contract with De Kimpe. When McBean first informed De Kimpe about the South Side School, De Kimpe seemed to want the contract, because he said he
30 would go down and get the plans as soon as they were ready; but subsequently, when McBean told him the plans were ready (Kenny had evidently been, in the meantime, working against McBean) De Kimpe stated to McBean that he did not think he would figure on that job; but he did figure on the job, and obtained it. When De Kimpe stated to McBean that he did not think he would figure on the job, McBean stated his position clearly to De Kimpe, which was that De Kimpe did not, of
40 course, have to figure on the job, but that if he

did so and obtained the contract that he would have to pay him (McBean) his commission. To this clear statement of the position of the parties under their contract De Kimpe took no exception and made no objection.

It also appears from the testimony that McBean had heard or knew that Kenny was interfering with his work under his contract with De Kimpe, and so stated to De Kimpe (which was before De Kimpe had secured his South Side School contract), and De Kimpe told McBean to go to the South Side School in Newark, and leave the Lyon's Farm School, which McBean was also working on, to Kenny. McBean carried out De Kimpe's instructions and stuck to the South Side School job, and he is certainly entitled to his commission as set forth in the contract between the parties. 10

The refusal of De Kimpe to pay McBean his commission is the "old story," and is clearly an attempt on the part of De Kimpe, after he has received the benefit of McBean's knowledge, foresight and work, and after he agreed to pay him for such work, to try to evade such payment. De Kimpe received his \$246,000 from the City of Newark, and McBean should have received his little \$2,460. 20

The contract between the parties, is, of course, for construction by the Court, but I do not see how any construction can be placed upon the same other than that placed upon it by the plaintiff. The defendant made this contract, and he should be compelled to live up to it. 30

The Court will consider the meaning of the word "solicit," and what construction should be put upon the same in connection with the facts of this case. In doing so the Court must take into consideration the parties to the contract, 40

whether they were parties who would be very careful in selecting the words for a contract which they were making, and what their intention was. The whole contract must be read; it appears from the whole contract, that this was a contract between two working men, and we must, from this whole contract, endeavor to find out what they meant at the time they entered into the contract.

10 The meaning of the word "solicit" has been passed upon, and we find in 36 Cyc., 510, that this word "solicit" means "to importune, to entreat, to implore, to ask, to attempt, to try to obtain. To importune, entreat, implore, ask, attempt, try to obtain."

In the case of St. Paul F. & M. Ins. Co. vs. Sharer, 76, Iowa, 282, 41 N. W., 19, it was held, that an insurance agent who receives an application and has a policy issued thereon, is a "soliciting 'agent' within the meaning of a statute providing that any person soliciting insurance or procuring applications therefor, shall be held to be the soliciting agent of the insurance company issuing a policy on such application."

20 There can be no question but that McBean *asked for* and *tried to obtain*, on behalf of De Kimpe, the construction work of the South Side School.

30 One of the conditions, as set forth in the contract between the parties, was that McBean was only to be paid his commission on contracts which De Kimpe *accepted*. This condition referred to the right of McBean to a commission, but cannot interfere with his right to the commission on the South Side School contract, because this contract was *accepted* by De Kimpe; he submitted his bid for the work, and took upon himself to decide at what figure he would be willing to accept that

40 work, and unquestionably he had in his mind, at

the time, the commission which he would have to pay McBean, and made out his figures accordingly. If he had not been awarded the work at his bid price, which he made out himself and over which McBean had no control, he would not have been awarded the contract, and McBean would not have been entitled to any commission.

If at the time McBean had first informed De Kimpe about the contemplated South Side School, De Kimpe had told him that he knew all about that school and had then the matter in mind, or that another man was working on that, then there might have been a different situation; but, according to the evidence, McBean was the first one to bring to De Kimpe's attention the fact that there was to be constructed in Newark a public building known as the South Side School, and McBean had solicited or asked for that contract for De Kimpe, and McBean is therefore entitled to his commission. 10
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This contract between the parties is similar, in its general nature, to a contract by an owner of property with a real estate agent to sell such property for him. If such a real estate agent has a written contract for his commission, and introduces the parties and brings the attention of one to the other, and the property is finally sold, such real estate agent is entitled to his commission. In this case McBean solicited this work; he did all he could, as far as he was concerned and able, to procure the work for De Kimpe; he asked for the contract for De Kimpe; he kept De Kimpe informed of the situation, and De Kimpe got the contract, and received his money; and McBean, or his assignee, the plaintiff herein, was entitled to a judgment for the amount of said commission. 30

The defendant should be held to his contract, The contract between the parties cannot be held 40

to be against public policy; it is good public policy to have as many bidders as possible on any public work; the result of the contract in question was to have one more bidder (a successful one) for the school. This is simply a case where a contractor was anxious to get work—either public or private building contracts—but he did not want to take the time or go to any expense to hunt up the jobs, but wanted some one to do that for him, and solicit the work. Instead of paying such party a regular salary, he thought it better business to agree to pay him a commission *only in case* he (the contractor) got the contract and could get his money; in that way he (the contractor) was taking no chances. If no contracts were obtained, he was not “out of pocket.” The contractor should not now be allowed to pocket all the money and break his agreement, and have the solicitor’s time, expenses and efforts in the contractor’s behalf go for naught, as far as he is concerned.

There was certainly before the Court below sufficient proof and evidence to sustain the plaintiff’s cause of action, and the granting of a non-suit was gross error.

We submit that the judgment of non-suit should be reversed.

Respectfully,

LEON ABBETT,
Attorney and of Counsel
with Appellant.

June Term, 1917.

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