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SUMMONS.

THE STATE OF NEW JERSEY TO CHARLES E.
SCHROEDER.

You are summoned to answer the annexed complaint of Clarence H. Conover in
(SEAL) an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit, and judgment may be entered against you. And see notice endorsed hereon.

Witness, Hon. Theodore W. Schimpf, Judge of the Atlantic County Circuit Court at Mays Landing, this third day of August, 1926.

WM. A. BLAIR,
Clerk.

LEE F. WASHINGTON,
Attorney.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10 CLARENCE H. CONOVER, *Plaintiff,*
 vs.
 CHARLES E. SCHROEDER, *Defendant.*

} Action at Law.
 } Complaint.

The plaintiff, Clarence H. Conover, who resides in the City of Pleasantville, in the County of Atlantic and State of New Jersey, says that:

20

1. At all times herein stated, plaintiff has been and is an architect, practicing as such in and around the City of Atlantic City, in the County of Atlantic and State of New Jersey, and duly registered and licensed as such under the laws of said State.

30

2. On or about the seventeenth day of August, 1925, the defendant, Charles E. Schroeder, employed plaintiff to prepare for him, the said defendant, preliminary sketches, plans, drawings and specifications for a two-story private residence, with a garden, which defendant then proposed constructing in Brigantine, near Atlantic City aforesaid, the defendant then agreeing to pay plaintiff for his services in preparing said sketches, plans, drawings and specifications, the reasonable and customary

charge of architects in said Atlantic City for such services.

3. On or about March 1, 1926, the defendant, Charles E. Schroeder, also employed plaintiff to prepare for him, the said defendant, preliminary sketches, plans, drawings and specifications for a combined office and apartment building, which defendant then contemplated constructing in Brigantine aforesaid, the defendant then agreeing to pay plaintiff for his services in preparing said sketches, plans, drawings and specifications and reasonable and customary charge of architects in said City of Atlantic City, for such services. 10

4. Promptly after the dates aforesaid, plaintiff commenced work on said respective preliminary sketches, etc., and actually prepared for defendant the preliminary drawings and sketches for the residence and garden aforesaid, and actually prepared for defendant the preliminary drawings and contract drawings for said office and apartment building, with the exception that work on the contract drawings for said office and apartment building was not quite completed when defendant, without any legal cause or excuse, notified plaintiff that he, plaintiff, should go no further with his work, as aforesaid, in connection with either the residence and garden or the combined office and apartment building and plaintiff thereupon stopped all work as instructed. 20

5. Plaintiff further says, that annexed hereto, marked Exhibit "I" and hereby made a part hereof, is a correct copy of the account between plaintiff and defendant, for the work actually done by plaintiff for defendant as 30

aforesaid, and that said statement is a correct statement of the sums which defendant owes plaintiff for plaintiff's said work; that the charges of plaintiff as computed on said statement are based upon the reasonable and customary charge of architects in the City of Atlantic City aforesaid, for such services, that defendant is indebted to plaintiff in the sum of \$1,225.00, being the balance due plaintiff from said defendant, together with lawful interest on such \$1,225.00 from May 26, 1926, until
 10 payment.

6. Plaintiff further says that on May 26, 1926, he made demand on defendant for the payment of said sum of \$1,225.00, but defendant failed and refused to pay plaintiff anything whatsoever upon account of said balance so due him for his said services, and said balance of \$1,225.00 remains due and owing from defendant to plaintiff, together with lawful interest thereon from May 26, 1926. Plaintiff accordingly demands judgment for
 20 the sum of \$1,225.00 together with lawful interest thereon from May 26, 1926, besides costs of suit.

LEE F. WASHINGTON,
Attorney for Plaintiff.

EXHIBIT "I."

Freeman Building
 Atlantic City, N. J.

May 25th, 1926.

MR. CHAS. E. SCHROEDER,
 TO C. H. CONOVER.

To professional services rendered as follows: 10
 Preparing preliminary drawings and sketches for residence and garden.

Estimated cost of residence	\$40,000.00
" " " Garden	5,000.00
(except planting)	<u> </u>
	\$45,000.00

Commission at 1/5 of 5% of estimated cost of 1/5 of 5% of \$45,000.00	\$450.00
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Preparing preliminary drawings and work on contract drawings for redesigned office and apartment. 20

Estimated cost of office and apartment	\$33,000.00
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Commission at 1/2 of 5% of estimated cost, or	
1/2 of 5% of \$33,000.00	825.00

Total for the above	<u>\$1,275.00</u>
Rec'd on acct 5/4/26	50.00

Balance due	<u>\$1,225.00</u> 30
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TO THE WITHIN NAMED DEFENDANT:

In case the within summons and complaint are served upon you personally then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service

hereof upon you and that unless you file such affidavit judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

Lee F. Washington,
Attorney.

10

Duly served within Summons & Complaint August 5th, 1926, on Charles E. Schroeder, by leaving a copy at his residence 312 Atlantic Avenue, Atlantic City, Atlantic County, New Jersey, with a member of his family above the age of fourteen years, to wit: His daughter-in-law.

Howard R. Cloud, Sheriff, by
James Cimino, Under Sheriff.

20

Sheriff's fees \$5.22
Received Aug. 5, 1926. Sheriff.
Filed Aug. 9, 1926, at 9 A. M. William A. Blair,
Clerk.

30

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

<p>CLARENCE H. CONOVER, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>CHARLES E. SCHROEDER, <i>Defendant.</i></p>	}	<p>Action at Law.</p> <p>Answer.</p>	10
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Defendant of Atlantic City, New Jersey, answering the complaint says:

20

1. Paragraph one is admitted.
2. Paragraph two is denied.
3. Paragraph three is denied.

4. Defendant is without information as to the work claimed to have been done by the plaintiff and therefore can neither admit nor deny. He admits that he instructed plaintiff to proceed no further with his work but denies that this was without legal cause or excuse, as alleged.

30

5. Paragraph five is admitted except as denied. It is denied that there is any indebtedness from defendant to plaintiff. Otherwise defendant is without knowledge touching the averments in paragraph five, and therefore can neither admit nor deny.

6. He admits the demand made by plaintiff and defendant's refusal to pay but denies that there is any amount due plaintiff.

COLE & COLE,
Attorneys for Defendant.

Filed Aug 17, 1926, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

10

REPLY.

ATLANTIC COUNTY CIRCUIT COURT.

CLARENCE H. CONOVER,
Plaintiff,

20

vs.

CHARLES E. SCHROEDER,
Defendant.

Action at Law.
Reply.

Plaintiff, by way of reply to answer of defendant in above matter, says:

30 Plaintiff denies all the allegations of defendant's answer and joins issue on the same.

LEE F. WASHINGTON,
Attorney for Plaintiff.

Filed Aug. 18, 1926, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

CLARENCE H. CONOVER,
Plaintiff,

vs.

CHARLES E. SCHROEDER,
Defendant.

Action at Law.

10

APPEARANCES:

LEE F. WASHINGTON, ESQ., for plaintiff.
MESSRS. COLE & COLE, for defendant.

20

The above entitled case was tried October 27, 1926, before HON. WILLIAM H. SMATHERS, Judge, and a jury.

Mr. Washington opened the plaintiff's case to the jury.
Mr. Cole opened the defendant's case to the jury.

30

SARAH SCHROEDER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Washington:

10 Q. Mrs. Schroeder, you are the daughter, are you not, of Mr. Charles E. Schroeder, deceased?

A. Daughter-in-law.

Q. Did Mr. Schroeder ever discuss with you or with anyone else, in your presence, any work which he was contemplating having done with respect to his two-story private residence with a garden in Brigantine?

A. In regard to the plans.

Q. You did hear a discussion in regard to plans?

A. Yes.

20 Q. Did you actually see the plans?

A. I did.

Mr. Washington—I offer these for identification.

(Plans referred to are marked P1 for identification.)

30 Q. I show you P1 for identification and ask you to examine those, please.

A. Yes. They are the plans.

Q. You recognize the papers?

A. Yes.

Q. And those were discussed by Mr. Schroeder in your presence?

A. Yes.

Q. With whom?

A. With Mr. Conover.

Mr. Washington—I offer in evidence another set of sketches which I would like to have marked P2 for identification.

(Papers marked P2 for identification.)

Q. I show you P2 for identification and ask if you will examine them? 10

Mr. Cole—If it is important for the jury and me to hear what is going on, I wish you would speak a little louder.

Q. (Repeated by the stenographer)—I show you P2 for identification and ask if you will examine them?

A. Yes; I saw these.

Q. You saw those, also? 20

A. Yes.

Q. Can you tell us, Mr. Schroeder, what these plans relate to?

Mr. Cole—I object. They speak for themselves. Besides, it would amount to hearsay so far as this witness was concerned.

Mr. Washington—I will withdraw that question for the moment. 30

Q. Were those—the last batch of sketches also examined by your father in your presence?

A. Yes.

Q. Anyone else present?

- A. Paul.
 Q. Who is Paul?
 A. My son.
 Q. Was Mr. Conover present?
 A. At one time he was, yes.
 Q. Do you know who prepared both of these sets of sketches?

10 Mr. Cole—I object. How can she know?

The Court—I will permit it.

Mr. Cole—It must be hearsay.

The Court—I will permit the question.

Mr. Cole—Allow me an exception?

The Court—Yes, sir.

20 Q. (Repeated by the stenographer)—Do you know who prepared both these sets of sketches?

A. Well, I didn't see them drawn. I know Mr. Conover brought them; that is all.

Mr. Cole—I ask that that question now be stricken because it now appears she does not know, that it is pure hearsay.

30 The Court—I will permit it to stand.

Mr. Cole—Exception.

Q. What discussion did you hear between Mr. Conover and your father when your father was present and had the two sets of plans or either of those sets of plans before him?

A. It was not discussed in my presence. I saw the plans and I don't know anything more about what they had between them.

Q. Did you hear your father discuss any changes in those plans?

A. No.

Q. Did you hear any discussion between your father and Mr. Conover as to what, if anything, was to be paid to Mr. Conover for preparing either of those sets of papers?

A. No, I did not. I know nothing about the financial end of it at all. 10

Q. Didn't hear any discussion? Was it a fact that your father was then contemplating erecting both an office building and a separate residence with a garden in Brigantine?

Mr. Cole—I object on the ground it is a conclusion and hearsay.

Mr. Washington—Will you read the question? 20

Q. (Repeated by the stenographer)—Didn't hear any discussion? Was it a fact that your father was then contemplating erecting both an office building and a separate residence with a garden in Brigantine?

The Court—I will permit it.

Mr. Cole—Exception. 30

A. The apartment was over the office. Is that what you mean? Not a separate building.

Q. Well, it is a fact that your father, when he examined this set of plans was contemplating erecting a private residence with a garden in Brigantine?

Mr. Cole—That is objected to for the same reason. I suppose it is the same ruling.

The Court—Yes.

Mr. Cole—Exception.

Q. Do you mean—

A. Do you mean whether I—

10 Q. When he saw this first set of plans—I would like you to look at those, if you please. (Showing the witness P1.)

A. A garden was attached to the apartment.

Q. Was that attached to the apartment or was it attached to the private dwelling?

A. Well, there was not a private dwelling beside the apartment.

Q. Well, what is this, Exhibit P1? Does this Exhibit P1 refer to an apartment or to a private dwelling?

20 A. This has been so long back that I don't just recall.

Q. You are not positive. You are still positive, however, that these plans were talked over and discussed by your father?

A. I saw the plans, yes, but I don't know what was said about it.

Q. Did your father ever mention, in your presence, how much he planned spending for the buildings represented on those plans?

30 A. He did not. I don't know anything about the financial plan.

Q. About how many times, Mrs. Schroeder, did you discuss the question of this building or those buildings with him?

Mr. Cole—The witness said he never discussed it. She said all she saw was the plans.

Mr. Washington—I will withdraw that question.

Q. On how many occasions, when you were present, did your father discuss either with you or with anyone else the buildings referred to on those plans?

A. How do you suppose I can remember that? I **10** don't remember anything like that.

Q. The answer is, you don't know?

A. No; I don't know.

Q. Do you remember how many times Mr. Conover came to the house to see him?

A. No; I do not.

Q. More than once?

A. Yes. When he brought the plans. Each time.

Q. Do you know whether your father ever received a statement from Mr. Conover covering charges which **20** the plaintiff claimed were due from your father to him in connection with the plans and sketches in question?

Mr. Cole—I object on the ground that that cannot establish his claim.

Mr. Washington—But it has some relevancy.

Mr. Cole—I object on the ground that it is not relevant or material. **30**

The Court—I will permit it.

Mr. Cole—Exception.

Q. (Repeated by the stenographer)—Do you know whether your father ever received a statement from

Mr. Conover covering charges which the plaintiff claimed were due from your father to him in connection with the plans and sketches in question?

A. My father didn't show me his business affairs. I don't know anything about that.

Q. The answer is, you don't know?

A. I don't know.

Q. Whether he ever received any bills for that or whether he didn't?

10 A. I don't know anything about that part of it.

Mr. Washington—Cross-examine.

Mr. Cole—No questions.

(Witness excused.)

20 PAUL SCHROEDER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Washington:

Q. Mr. Schroeder, what relation, if any, are you to the last witness who was on the stand?

30 A. The son.

Q. Grandson of Mr. Charles E. Schroeder?

A. Yes.

Q. Were you ever present with your grandfather and with Mr. Conover, the plaintiff, when any of the plans or sketches?

A. Yes.

Q. I show you Exhibit P1 and P2 and ask you if both of those sketches were discussed when you were present? (Handing papers to the witness.)

A. I remember very little of that one.

Q. You remember very little of Exhibit P1?

A. I may have seen it once.

Q. You did see that, however, in your grandfather's presence?

A. Yes.

Q. Was Mr. Conover there at the time? 10

A. I don't know.

Q. You don't know?

A. I don't remember.

Q. How did it happen that you saw them? Who showed them to you?

A. My grandfather.

Q. Your grandfather? What did he say to you when he showed them to you?

Mr. Cole—That is objected to. That would 20 be hearsay.

Mr. Washington—Conversation with the defendant himself.

Mr. Cole—But not with the plaintiff.

The Court—I will permit it.

Mr. Cole—Exception. 30

Q. (Repeated by the stenographer)—What did he say to you when he showed them to you?

A. We just discussed the living qualities of the plans; that is all.

Q. Whether they were workable or not?

A. Yes.

Q. Did you have any conversation with the grandfather or hear any conversation when your grandfather was present and when Mr. Conover was present, touching how much your grandfather proposed to expend, if any, in the buildings in question?

10

Mr. Cole—Objected to on the ground it is wholly irrelevant as to how much was to be spent. There is a complaint based on an express contract to pay a certain amount based upon an ultimate figure as to expenditure.

The Court—I will permit it. I don't know whether the witness knows.

Mr. Cole—Allow me an exception.

Q. (Repeated by the stenographer)—Did you have any conversation with the grandfather or hear any conversation when your grandfather was present and when Mr. Conover was present, touching how much your grandfather proposed to expend, if any, in the buildings in question?

20

A. No.

Q. Did you ever hear any conversation between your grandfather and Mr. Conover touching the sum, if any, which your grandfather was to pay to Mr. Conover for his work?

30

A. No.

Q. Now, did you, Mr. Schroeder, on any occasion go to Mr. Conover's office in connection with the work which Mr. Conover was doing?

A. Yes.

Q. How did you—how did that come about, sir?

A. I went to see—

Mr. Cole—I object to that on the ground that his going does not help to support it.

Mr. Washington—Well, the answer makes it clear.

The Court—I will permit it.

Mr. Cole—Exception. No agency is shown here.

10

Q. How did you come to go there, sir?

A. To see how the plans were coming along.

Q. Had your grandfather sent you there?

A. Yes.

Q. You went at his request?

A. Yes.

Q. What did he tell you to do?

A. To find out how soon the plans would be finished.

Q. Did he say what plans?

20

A. Plans that were under discussion at that time, of the last set. I don't remember just which set it was.

Q. Did you go to see the plans?

A. I didn't see the plans, no.

Q. Well, you did go to Mr. Conover's office?

A. Yes.

Q. Did Mr. Conover show you anything?

A. I believe he did.

Mr. Washington—I offer the witness papers which I would like marked as Exhibit P3 for identification.

30

(The papers referred to are marked for identification P3.)

Q. Mr. Schroeder, please look over those exhibits and

I ask you if you saw those on the occasion of that visit?

A. I believe they are the plans; but they were not finished when I saw them last.

Q. When you saw them they were not quite as far finished as they are now? Do you remember, sir, when it was that you saw those?

A. Sometime between March 11th, and seven weeks later when he came home from the hospital.

Q. How soon after you saw the plans in their uncompleted state—how soon after that did your grandfather go to the hospital?

A. He was in the hospital, I believe, when I saw the plans in their uncompleted state.

Q. When you called at Mr. Conover's office?

A. Yes.

Q. And it was how long afterwards before he was taken home again?

A. Approximately, I should judge, four weeks.

Q. During that time, was he in position or in condition to have any conferences with Mr. Conover?

A. No.

Q. He afterwards sent you to see Mr. Conover?

A. Yes.

Q. And you went to see him again. About when was that, sir?

A. I don't remember.

Q. You don't remember?

A. No.

Q. What conversation did you have with Mr. Conover at that time?

Mr. Cole—Objected to. It cannot bind this estate, what conversation he had with Mr. Conover.

The Court—I sustain the objection.

Mr. Washington—I withdraw that question.

Q. Who sent you or how did you come to go to see Mr. Conover on this second occasion?

A. On my grandfather's request.

Q. What did he tell you to do, sir?

A. To find out how the plans were progressing.

Q. Did you go there?

A. I did.

Q. Did your grandfather give you any message for Mr. Conover?

A. Not that I remember.

Q. And you gave him no message?

A. No.

Q. Did you ever go on any other occasion to see Mr. Conover?

A. I don't believe so.

Q. Do you know anything more—do you know whether Mr. Conover was ever paid for that work?

A. Not in full.

Q. He was not paid in full?

A. No.

Q. Do you know how much, if anything, was paid to him on account of it?

A. I know—I believe it was \$50 on account, the check that I made out.

Q. And you made out that check?

A. Yes.

Q. Under instructions of your grandfather?

A. Yes.

Q. Can you tell us when that payment was made, sir?

A. No, I cannot.

Q. Was it made during this year, 1926?

A. Yes, sir.

Q. There was only one payment made on account?

A. That I know of.

Q. And that was \$50?

A. Yes.

Q. Do you know whether Mr. Conover afterwards rendered any statement to your grandfather for sums that he claimed due to him in connection with that work?

Mr. Cole—Objected to as irrelevant and immaterial. It does not tend to support this claim.

10

Mr. Washington—In the nature of an admission we think that would be relevant.

The Court—Repeat the question.

Q. (Repeated by the stenographer)—Do you know whether Mr. Conover afterwards rendered any statement to your grandfather for sums that he claimed due to him in connection with that work?

20

The Court—I will permit it.

Mr. Cole—Exception.

A. Not until the plans were finished, when he was told to stop work.

Q. Well, was there a bill rendered at that time when he told to stop work?

A. The bill came along afterward.

30 Q. Did—do you have that bill with you?

A. No; I do not.

Q. Would you recognize it if you saw a copy of it?

A. I don't believe I would.

Q. Do you know what the amount of that bill was?

Mr. Cole—Objected to, may it please your Honor. It seems to me if there was any bill we are entitled to have it. We have not been asked to produce anything.

Mr. Washington—I have a copy of what we claim is the bill.

The Court—I sustain the objection.

10

Q. Do you know what became of that bill?

A. I don't know.

Q. Did you discuss it with your grandfather?

A. No.

Q. How do you know he received it?

A. I saw it through the mail.

Mr. Washington—I call on the defendant for any bill rendered by complainant to them of any bill in their possession purporting to be made out by Conover against Schroeder now in their position. 20

Mr. Cole—I answer that I never saw any bill and I have no such bill. The only bill I saw was that which was attached to the papers served in this case.

Mr. Washington—Cross-examine, sir.

Mr. Cole—No questions.

30

(Witness excused.)

JOSIAH CONOVER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Washington:

- Q. Mr. Conover, where do you reside?
 10 A. 1500 North Arkansas Avenue.
 Q. In Atlantic City?
 A. Atlantic City.
 Q. What is your occupation, sir?
 A. Builder.
 Q. What relation, if any, are you to the plaintiff?
 A. I am the father. He is my son.
 Q. He is your son? Where is your office or place of business?
 A. 301 Freeman Building.
 20 Q. In Atlantic City?
 A. Atlantic City.
 Q. Where is your son's office or place of business?
 A. The same building, same room.
 Q. In the same building, same office?
 A. The same office.
 Q. How long have you and your son had offices together?
 A. About a year, I guess; somewhere like that. Let me see—I guess it is over a year.
 30 Q. Mr. Conover, did you know Mr. Charles E. Schroeder, the former defendant?
 A. Yes.
 Q. Did Mr. Schroeder ever come to your son's office in your presence?
 A. Yes.

Q. And discuss plans?

A. Yes, sir.

Q. I show you P1 for identification and ask you if you ever saw those before?

A. Yes, sir.

Q. Did you ever go over any of those sketches in Mr. Schroeder's presence and with him?

A. Not exactly with Mr. Schroeder. I went over them with—

Q. Did anyone else ever discuss—go over those 10 sketches with Mr. Schroeder, in your presence?

A. I could not say that, no; I ain't sure. I am not sure that anybody did.

Q. I show you the second set of sketches, P2 for identification, and ask you if you ever saw Mr. Schroeder go over those sketches with anyone else, in his presence?

A. I saw Mr. Schroeder go over those with Mr. Conover and I was right there within four feet of them, but I didn't go over them myself.

Q. You saw Mr. Schroeder go over them with Mr. 20 Conover, your son?

A. Yes.

Q. And you were near him?

A. Yes; but I didn't go over it with Mr. Schroeder because it was none of my business.

Q. I show you Exhibit P3 for identification and ask you if you ever saw this before?

A. Yes.

Q. What is the answer, sir?

A. Yes, sir.

Q. Did you hear Mr. Schroeder discuss those plans and sketches with anyone?

A. I did. I heard him discuss them with my son.

Q. Do you know who prepared them?

A. Yes.

Q. Who?

A. My son prepared the sketches.

Q. Do you know who prepared the other sketches?

A. They were prepared in the office of my son.

Q. Do you know for whom your son prepared them?

A. Yes, for Mr. Schroeder.

Q. At whose request?

A. At Mr. Schroeder's request.

10 Q. Did you ever hear any conversation in which your son and Mr. Schroeder discussed the probable cost of the building?

Mr. Cole—Objected to on the ground that probable cost is not the test of the amount upon which commission is to be based.

The Court—I will permit it.

Mr. Cole—Exception.

20

The Witness—Read that again. I didn't get it.

Q. (Repeated by the stenographer)—Did you ever hear any conversation in which your son and Mr. Schroeder discussed the probable cost of the building?

A. I think I heard them talking over the cost of it, but I couldn't say just what it was for or why it was.

30 Q. Do you know whether your son ever made any estimates of cost and submitted them to Mr. Schroeder?

A. I do.

Q. What were those estimates of cost?

Mr. Cole—Were they in writing?

The Witness—In writing. I estimated for my son, with my sons' help, the cost of those buildings.

Mr. Cole—Well, were they left with Mr. Schroeder?

The Witness—Beg pardon?

Mr. Cole—Were they left with Mr. Schroeder, handed to him, the estimates you speak of? 10

The Witness—They were left with my son to take up with Mr. Schroeder, take up the dwelling, residence, take up with him the cost and what to do with it and how far to go with it and all those things, as you would; but I didn't have anything to do with Mr. Schroeder.

Mr. Cole—Did you see the estimates handed to Mr. Schroeder? 20

The Witness—No; I did not.

Q. Mr. Conover, I show you Exhibit P4 for identification and ask you if any or all of that includes an estimate made by you of the probable cost of that work?

(The paper referred to being marked P4 for identification.) 30

A. Now, that estimate was made jointly between us. The greater part of it I made myself. Some part of it he called up and got estimates from other people, and I put it down and we turned it in as an estimate.

Q. That was the estimate made by the two of you as to the probable cost?

A. Yes, under evidence.

Q. Was that as accurate as it was possible to make, of the probable cost?

A. That was as accurate as I could get at it.

Q. Were the buildings ever actually built?

A. No, sir; the buildings were never actually built.

10 Mr. Washington—I offer it in evidence.

(The paper offered is received in evidence, having been heretofore marked Exhibit P4 for identification.)

Q. Did you ever hear any discussion between Mr. Schroeder and your son as to what, if anything, Mr. Schroeder was to pay your son for doing this work?

20 Mr. Cole—I ask that the witness be required to relate the conversation, if there was any, touching the agreement; because there is a specific agreement alleged here which we deny and, of course, if there is a recovery, as I see it, it must be upon the agreement set out; and it seems to me, therefore, in view of the fact that Mr. Schroeder is not here that this witness ought to be required to state any conversation he heard touching the contract and touching the agreement.

30 The Court—I will permit it.

Mr. Cole—Exception.

Q. (Repeated by the stenographer)—Did you ever hear any discussion between Mr. Schroeder and your

son as to what, if anything, Mr. Schroeder was to pay your son for doing this work?

A. No, not these bills—not these two. I didn't really hear him make any stated bargain.

Mr. Washington—Cross-examine.

Mr. Cole—No questions.

(Witness excused.)

10

CLARENCE H. CONOVER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Washington:

20

Q. Mr. Conover, you are the plaintiff in this case, are you not?

A. I am.

Q. What is your occupation?

A. Architect.

Q. How long have you been acting as an architect? How long have you been acting as an architect?

A. I would judge about twelve years.

Q. Have you a license with you?

30

A. Yes, sir.

The Court—I suppose it is admitted.

Mr. Cole—There isn't any doubt about it at all. There is no point to it.

Q. Mr. Conover, on what theory did you compute the amount of your claim—

Mr. Cole—Objected to.

Mr. Washington—May I finish the question?

10 Mr. Cole—I take it that will lead up to what this complain was. My friend said a moment ago that this suit was based upon an implied contract. Now, this is what the agreement—I mean the complaint, says (Reading from the complaint): That is setting forth an express contract and that must be established if there is to be a recovery in this case.

Q. (Repeated by the stenographer)—Mr. Conover, on what theory did you compute the amount of your claim—

20 Mr. Cole—Objected to on the ground it is not a question of theory but of proving his contract.

Mr. Washington—Please repeat that again?

Q. (Repeated by the stenographer)—Mr. Conover, on what theory did you compute the amount of your claim (Mr. Washington continuing) as set forth in exhibit sheet? What did you use as a basis?

30 Mr. Cole—I renew by objection.

The Court—I sustain the objection.

Mr. Washington—Allow me an exception.

The Court—Yes, sir.

Q. Mr. Conover, do you know the reasonable and customary charge of architects in Atlantic City?

A. Yes, sir.

Q. For doing the work?

A. Yes.

Q. For doing the work which you did as represented by the plans and sketches here offered in evidence?

A. Yes, I did.

Q. What is the reasonable customary charge—or what was the reasonable and customary charge of doing the work which you did at the time that you did it? 10

Mr. Cole—Now, I object on the ground there is no contract established here and that what such reasonable charge would be is not in accordance with the complaint to begin with, and it cannot be competent until some contract is established. I repeat that this is an averment of an express contract with Mr. Schroeder; and, moreover, may it please your Honor, the complaint expressly says that he was only to be paid when he did what? 20 When he prepared preliminary sketches, plans, drawings and specifications. There is no suggestion here of any specifications ever having been prepared. I am not saying that there may not be a recovery in some other case. I am talking about this case. Of course, Mr. Schroeder being dead, I am bound to try this case, not some other case.

The Court—The fact that the deceased may have gone over these plans with this architect does not establish an agreement on the part of the defendant to pay him for them, and it does not establish that he ordered them. He may have 30

gone over them for a number of reasons. There isn't any testimony in the case that the grandfather ordered this work done. I sustain the objection to the question.

Mr. Washington—Allow me an exception.

The Court—Yes.

10 (Witness excused.)

JOSIAH CONOVER, recalled, was examined and testified as follows:

Direct examination.

By Mr. Washington:

20

Q. Mr. Conover, do you know whether Mr. Schroeder hired your son to do all or any of the work represented by the plans and sketches that are all in evidence?

Mr. Cole—I object. It is a conclusion and is viciously leading.

30

Mr. Washington—This is offered in view of the objection that there is no testimony that this work was ordered by Mr. Schroeder.

Mr. Cole—The jury would be the ones to pass upon whether he was hired, based upon the testimony of what was heard by him.

The Court—I sustain the objection.

Mr. Washington—Exception.

Q. Mr. Conover, what conversation, if any, did you hear between Mr. Schroeder, the deceased, and your son, touching your son's preparing for him plans and specifications?

A. Mr. Schroeder came in the office and got out the plans for—that he had drawn previously and gave a building, and got my son to take them out and went over a section of them and told him to take and change that section and make the plan that corresponds with that plan there, in my presence, and also told him that he wanted the residence made after the other plans were made, in my presence. 10

Q. You heard him tell him to go ahead and make them?

A. Yes. They discussed the changes and all those things right there before me.

Q. Do you know whether these are the plans that were made in accordance with those instructions? 20

A. They were—they are.

Mr. Washington—Cross-examine.

Mr. Cole—No questions.

(Witness excused.)

30

CLARENCE H. CONOVER, recalled, was examined and testified as follows:

Direct examination.

By Mr. Washington:

10 Mr. Washington—I want to repeat a question or so which were ruled out.

Q. Mr. Conover, how did you compute the amount of the bill which you rendered against Mr. Schroeder?

Mr. Cole—That is objected to on the ground it is immaterial and irrelevant as to how he computed that bill.

The Court—I will permit it.

20

Mr. Cole—Exception.

A. Well, I computed according to the general practice. When work reaches a certain point there is a fixed charge, and when it proceeds beyond that point—that is one per cent for the sketch alone; when it proceeds beyond that point to the complete working drawings it is three per cent, and proceeding beyond that point it is five per cent for the plans and specifications and the supervision of any direction and building.

30 Q. Now, is the amount of your claim as set forth in Exhibit 1 in your complaint, more or less than the customary rate?

Mr. Cole—I object on the ground there is no

proof here of any contract such as is set forth in this complaint, and until the contract is established the question of how he computed the amount as to whether it is in accordance with the customary rates, is irrelevant and immaterial.

The Court—I will permit it in view of the testimony that the plans were offered.

Mr. Cole—Exception.

10

Q. (Repeated by the stenographer)—Now, is the amount of your claim as set forth in Exhibit 1 in your complaint, more or less than the customary rate?

A. No; it was the customary rate.

Q. It was the customary rate?

A. Yes.

Q. Have you been paid anything on account of the bill?

20

Mr. Cole—Objected to on the ground that it shows a transaction with or statement by the deceased.

Mr. Washington—I withdraw that. That is all.

(Witness excused.)

PLAINTIFF RESTS.

30

DEFENDANT RESTS.

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT.

Mr. Cole—The defendant asks for a direction of verdict on the following grounds:

10 There is no proof in this case sufficient to go to the jury to permit them finding either employment or performance.

20 Second, the agreement set up in the complaint is an express agreement to pay plaintiff for his services in preparing such sketches, plans, drawings and specifications, the reasonable and customary charges of architects in Atlantic City for such services. There is no proof of any such agreement; neither is there any proof that there were any specifications prepared and there is nothing in the complaint that excuses the failure to prepare the specifications. The recovery is based, according to the complaint, which is the only thing we have to meet, upon his doing all of the things, to wit: preparing the sketches, plans, drawings and specifications for what he says is the reasonable and customary charge, and the amount now claimed, at least upon the face of the complaint, is based upon all those things being done.

30 Mr. Washington—If your Honor please, as to one single point there, the only answer I have to that is that the defendant, before he died, filed an answer in which he said that he instructed the plaintiff to proceed no further with the work. It goes on further, but he says in his answer expressly that he instructed the plaintiff to go no further with it, that answer being filed before the defendant died.

Mr. Cole—But your proofs are all directed toward the contract set forth in the complaint.

Mr. Washington—Directed to what is the reasonable charge for the exhibits which are here, and expressly directed toward those exhibits.

The Court—Members of the jury, in this case the uncontradicted testimony on the part of the plaintiff establishes that the defendant ordered the plaintiff to perform certain services, such as have been described by the testimony in the preparation of these plans that have been introduced into evidence. 10

In the absence of an express agreement on the part of the defendant to pay for the services rendered, the law implies an obligation or an agreement upon him to pay what the services were reasonably worth. Therefore, it becomes your duty in this case, to determine as a fact what the service rendered by the plaintiff— 20

Mr. Cole—May it please your Honor, you have not ruled on my motion. My motion was for a direction. Are we to address the jury?

The Court—You may address the jury on the question of the amount of damages to be recovered by the plaintiff.

Mr. Cole—Your Honor will allow me an exception to the refusal to direct a verdict? 30

The Court—Yes.

(Mr. Washington opened the plaintiff's case to the jury.)

(Mr. Cole summed up for the defense.)

Mr. Cole—His Honor in this case has denied me the right to discuss the question as to whether or not there is any evidence to justify your finding that there was any such contract as is set up in this complaint. Since his Honor has done that, of course, I refrain from discussing the question of whether or not such a contract has been established as is set up in this complaint, and, of course, to his Honor's ruling in that regard, I respectfully take an exception.

(Mr. Washington summed up the plaintiff's case to the jury.)

20 The Court—Members of the jury: In this case the uncontradicted testimony on the part of the plaintiff establishes that the defendant ordered the plaintiff to perform certain services such as has been described by the testimony in the preparation of these plans that have been introduced into evidence.

In the absence of an express agreement on the part of the defendant to pay for the services rendered, the law implies an obligation or an agreement upon him to pay what the services were reasonably worth. Therefore, it becomes your duty in this case to determine what the services rendered by the plaintiff were reasonably worth. The defendant having ordered a certain service performed, ordered a certain service to be rendered to him, and having accepted the service, he is bound in law to pay what

the services are ordinarily and reasonably worth. So in this case it becomes your province and your duty to determine what the plaintiff should recover as a reasonable compensation for the service rendered by him in this case to the defendant.

You may retire.

(The jury retired.)

Mr. Cole—The defendant excepts to the statement of the Court as to the defendant having ordered and accepted the work, which amounted to decision on the fact which only the jury could decide; also to all that the Court said touching the reasonable worth of the plaintiff's services on the ground that there is no evidence in the case to show what reasonable worth is; also to all that the Court said which permitted the jury to find on an implied contract, the complaint being based on an express contract.

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20

30

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

10	CLARENCE H. CONOVER, <i>Plaintiff,</i>	}	Action at Law.
	vs.		Rule for Judgment.
	CHARLES E. SCHROEDER, <i>Defendant.</i>		

This action having come on for trial before Judge William H. Smathers, with a jury, on October 27, 1926, in the presence of the plaintiff, of Lee F. Washington, Esq., his attorney, and of Cole & Cole, Esqs., attorneys for the defendant, Charles E. Schroeder, and it being suggested to the Court by both the attorney for the plaintiff and the attorneys for Charles E. Schroeder, the defendant, that the said Charles E. Schroeder had died after said action was at issue and notice for trial, and it being further admitted that the said Charles E. Schroeder left a last will and testament wherein and whereby he named Atlantic Safe Deposit & Trust Company of Atlantic City, N. J., a corporation of New Jersey, as his executor and that said executor had duly qualified as such, and it being further stated to the Court that it was agreeable to attorneys for the said Charles E. Schroeder and to his executor that said Atlantic Safe Deposit & Trust Company of Atlantic City, N. J., executor of the last will and testament of Charles E. Schroeder, deceased,

be forthwith substituted as defendant in the place and stead of the said Charles E. Schroeder, deceased, and the Court having so ordered; and said action having been thereupon tried before said Judge and jury in the presence of the plaintiff, of Lee F. Washington, Esq., his attorney, and in the presence of Cole & Cole, Esqs., attorneys for said Atlantic Safe Deposit & Trust Company, executor as aforesaid; and the jury having returned a verdict in favor of the plaintiff for twelve hundred and twenty-five (\$1,225) dollars damages;

It is ordered, that judgment final be entered in favor of the plaintiff, Clarence H. Conover, and against the defendant, Atlantic Safe Deposit & Trust Company of Atlantic City, N. J., executor of the last will and testament of Charles E. Schroeder, deceased, for the sum of twelve hundred and twenty-five (\$1,225) dollars damages, besides plaintiff's costs to be taxed.

WM. H. SMATHERS,
Judge.

On motion of
LEE F. WASHINGTON,
Attorney for Plaintiff.

Filed and entered November 3, 1926, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

October Term, 1926.

10	CLARENCE H. CONOVER, <i>Plaintiff,</i>	}	Action at Law. On Verdict. Lee F. Washington, Atty.
vs.	CHARLES E. SCHROEDER, <i>Defendant.</i>		

Judgment entered Nov. 3, 1926, at 9 A. M.

20	Damages	\$1225.00
	Costs	65.98

Total	\$1290.98
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This action was tried before Judge Wm. H. Smathers, with a jury, on October 27, 1926, in the presence of counsel for the respective parties.

The cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiff and against the defendant.

30 Whereupon, it is ordered that the plaintiff, Clarence H. Conover, recover of the defendant, Atlantic Safe Deposit & Trust Company of Atlantic City, N. J., executor of the last will and testament of Charles E. Schroeder, deceased, the sum of one thousand two hundred and twenty-five dollars, damages, and sixty-five dollars and ninety-eight cents, costs of suit.

WILLIAM A. BLAIR,
Clerk.

County Circuit Judgment Book No. 14, page 499.

NOTICE AND GROUNDS OF APPEAL.
ATLANTIC COUNTY CIRCUIT COURT.

CLARENCE H. CONOVER, <i>Plaintiff,</i>	}	Action at Law. Notice and Grounds of Appeal.	10
vs.			
CHARLES E. SCHROEDER, <i>Defendant.</i>			

To the within named plaintiff:

Notice that the defendant appeals to the Supreme Court from the judgment on the verdict of the jury, on the following grounds: 20

1. The Court permitted witness, Schroeder, to answer the following question: "Do you know whether your father ever received a statement from Mr. Conover covering charges which the plaintiff claimed were due from your father to him in connection with the plans and sketches in question?"

2. The Court permitted witness, Conover, to answer 30 the following question: "How did you compute the amount of the bill which you rendered against Mr. Schroeder?"

3. The Court permitted witness, Conover, to answer the following question: "Now, is the amount of your

claim as set forth in Exhibit 1 in your complaint, more or less than the customary rate?"

4. The Court refused to direct a verdict in favor of the defendant.

5. The Court refused to permit counsel for the defendant to discuss with the jury any question except the amount of damages to be recovered.

10 6. The Court precluded the jury from considering the question of the contract by stating to them as follows: "Members of the jury: In this case the uncontradicted testimony on the part of the plaintiff establishes that the defendant ordered the plaintiff to perform certain services such as has been described by the testimony in the preparation of these plans that have been introduced into evidence."

20 7. The Court permitted the jury to find what plaintiff's services were reasonably worth when there was no evidence as to such worth.

8. The Court permitted the jury to find an implied contract when there was no evidence and when the complaint rested upon an express contract.

COLE & COLE,
Attorneys of Defendant.

30 Service of a copy of the within notice and grounds of appeal acknowledged this 8th day of Nov., 1926.

LEE F. WASHINGTON,
Attorney of Plaintiff.

Filed November 12, 1926, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

NEW JERSEY SUPREME COURT.

No. 37, January Term, 1927.

CLARENCE H. CONOVER,
Plaintiff-Respondent,
vs.
CHARLES E. SCHROEDER,
Defendant-Appellant.

10

OPINION

(Filed May 17, 1927.)

Argued January 18, 1927; Decided May 16, 1927. 20

On appeal from the Atlantic County Circuit Court.

Before Gummere, Chief Justice, and Justice Trenchard.

For the appellant, Cole & Cole.

For the respondent, Lee F. Washington.

PER CURIAM:

This is an appeal from a judgment of the Atlantic Circuit Court entered upon a verdict of a jury in favor of plaintiff, an architect, who sued Schroeder in his lifetime to recover for services alleged to have been performed in the preparation of plans, etc. Schroeder died, and his executor was substituted as defendant. 30

The complaint averred that the defendant agreed to pay plaintiff for his services the "reasonable and customary charge of architects in Atlantic City for such services"; that plaintiff prepared such preliminary plans for defendant's residence and garden almost to the point of final com-

pletion, when without legal cause, defendant notified plaintiff to go no further with the work.

The answer, as we view it, in effect denies that any work was done *pursuant to any agreement with defendant.*

On this appeal the defendant's main point is that there was error on the part of the trial court in precluding defendant's counsel from arguing to the jury any question except the amount of damages to be recovered, and in effect directing a verdict for the plaintiff so far as liability was concerned.

The trial judge took that position because he thought and said that the plaintiff's uncontradicted testimony showed that the defendant ordered the plaintiff to perform the services.

No *count* there was evidence from which the jury could have inferred, if it saw fit, that Schroeder employed the plaintiff to prepare the plans; but we do not think it was conclusive nor that it compelled the inference that such work as plaintiff did, he did under an employment by the defendant Schroeder. The evidence, by reason of the death of Schroeder, was necessarily circumstantial in character upon the question whether or not these plans were *ordered* by Schroeder in his lifetime. Varying inferences might reasonably have been drawn therefrom, and we think it was error to withdraw this question from the consideration of the jury, leaving only the question of damages.

The judgment will be reversed and a *venire de novo* awarded.

30

NEW JERSEY SUPREME COURT.

CLARENCE H. CONOVER,
Plaintiff-Respondent,

vs.

CHARLES E. SCHROEDER,
Defendant-Appellant.

10

RULE FOR JUDGMENT.

This cause having been argued by counsel of the respective parties, having been considered by the Court, and the Court having reached a conclusion that the judgment under review should be reversed and a *venire de novo* awarded,

20

IT IS on this 20th day of May, 1927, on motion of Cole & Cole, attorneys of appellant,

ORDERED that the judgment be, and the same is reversed, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered May 19, 1927.

30

On motion of
COLE & COLE,
Attorneys of Appellant.

A true copy.
EDWARD J. KELLEHER,
Clerk.

NEW JERSEY SUPREME COURT.

CLARENCE H. CONOVER,
Plaintiff-Respondent,

vs.

10 CHARLES E. SCHROEDER,
Defendant-Appellant.

} Action at Law.

NOTICE OF APPEAL.

(Filed Aug. 20, 1927.)

To Cole & Cole, Attorneys of Defendant:

20

Gentlemen:

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in our New Jersey Supreme Court in said cause.

Respectfully,
LEE F. WASHINGTON,
Attorney of Plaintiff.

30

Due and legal service of the foregoing Notice hereby acknowledged this 18th day of August, 1927.

COLE & COLE,
Attorneys for Defendant.

A true copy.
EDWARD J. KELLEHER,
Clerk.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CLARENCE H. CONOVER,
Plaintiff-Appellant,

vs.

CHARLES E. SCHROEDER,
Defendant-Respondent.

} Action at Law.

GROUNDS OF APPEAL.

(Filed Aug. 22, 1927.)

To Cole & Cole, Attorneys of Defendant:

Gentlemen:

Please take notice that the plaintiff assigns the following as grounds of appeal from the judgment entered in our New Jersey Supreme Court in this cause, to wit:

Because the Supreme Court erred in giving judgment for the defendant instead of the plaintiff.

Respectfully,
LEE F. WASHINGTON,
Attorney of Plaintiff.

Due and legal service of the foregoing grounds of appeal hereby acknowledged this nineteenth day of August, 1927.

COLE & COLE,
Attorneys of Defendant.

A true copy.
JOSEPH F. S. FITZPATRICK,
Clerk.

NEW JERSEY
Court of Errors and Appeals

CLARENCE H. CONOVER,
Plaintiff-Appellant,

vs.

CHARLES E. SCHROEDER,
Defendant-Respondent.

} On Appeal from
Supreme Court.

BRIEF OF APPELLANT

STATEMENT.

Appellant sued in Atlantic County Circuit Court for money which he claimed as due him from Schroeder for architect's services. Schroeder died after the case was at issue and before trial. His executor was substituted as defendant at the trial. The jury found for appellant for the full amount claimed by him. Thereafter defendant appealed to the Supreme Court, which reversed the judgment of the Circuit Court and ordered the record remitted to said Circuit Court to be proceeded with according to law and the practice of said Court.

The defendant claimed before the Supreme Court that the complaint stated an express contract, which plaintiff contended was not the fact, plaintiff insisting that the complaint, testimony and plaintiff's whole case were all based upon an implied contract to pay plaintiff the reasonable value of his services. We will accordingly first deal with the question, whether plaintiff's case was in fact based upon an implied contract and will

then endeavor to answer the other objections raised below by defendant.

ARGUMENT.

Was Plaintiff's Action Upon an Implied Contract?

The complaint alleged that plaintiff was employed to do certain work (Case, pages 2 and 3, pars. 2 and 3); that the work was "not quite completed when defendant, without any legal cause or excuse, notified plaintiff that he, plaintiff, should go no further with his work," and that plaintiff thereupon stopped all work as instructed (Case, p. 3, par. 4). The complaint also set forth "a correct copy of the account between plaintiff and defendant, for the work actually done by plaintiff for defendant"; and that the charges of plaintiff as computed were "based upon the reasonable and customary charge of architects in the City of Atlantic City, for such service."

The complaint, as above quoted, followed the theory of the old action upon contract with the common counts (*Jeffery's Law Precedents*, page 510), one of which counts used to allege a claim for "the price and value of work done . . . by the plaintiff for the defendant at his request . . . and the defendant afterwards . . . promised to pay the said . . . moneys to the plaintiff," etc.

The old common counts at common law were based upon a promise of the defendant to pay, implied by law from the fact that an act was performed, or consideration given, by plaintiff at defendant's request. *Risley v. Beaumont*, 71 N. J. L., 372, 59 Atl., 145, p. 146.

Under our present method of pleading, no particular words need be used. *Schwartz Bros. Co. v. Evening News Co.*, 84 N. J. L., 486, 87 Atl., 148. It is sufficient to state briefly facts from which a promise by the defendant to pay plaintiff will be inferred. *Westcott v.*

Sharp, 50 N. J. L., 392, 13 Atl. 243; *Nolan v. Manton*, 46 N. J. L., 231; *Sergeant v. Stryker*, 16 N. J. L., 464; *Paul v. Haber*, 88 N. J. L., 379, 96 Atl., 41.

In *Wooster v. Egan*, 88 N. J. L., 687, 97 Atl., 291, the complaint (set forth at length in Sheen's Practice Act, p. 530), had simply alleged that plaintiff rendered services to one Mary Egan; that for said services said Mary Egan "undertook and promised to pay plaintiff what the services were reasonably worth"; that the services "were reasonably worth" a named sum; that Mary Egan had paid plaintiff \$50 on account; that Mary Egan died; that the defendant was appointed her administratrix; that plaintiff had presented his claim; and that it was disputed. Plaintiff obtained a judgment below, which was sustained by Errors and Appeals.

A similar complaint (set forth in Sheen's Practice Act, p. 531), was sustained by Errors and Appeals in *Frean v. Hudson*, 87 N. J. L., 244, 93 Atl., 582.

In the two cases last cited, the complaints stated that the services "were reasonably worth" the sums claimed. In the case at bar, the complaint averred that the sum claimed was "based upon the reasonable and customary charge of architects in the City of Atlantic City, for such services" (Case, p. 4).

Upon the trial, plaintiff also flatly based his claim upon an implied contract (Case, p. 30). And the proof, as more fully hereinafter set forth, was limited and directed to the reasonable and customary charge of architects in Atlantic City, for the services actually rendered.

Upon the theory that the plaintiff's case was properly based upon an implied contract to pay plaintiff the reasonable value of the services actually rendered, we proceed to the other objections raised by defendant before the Supreme Court.

FIRST OBJECTION.

"1. The Court permitted witness Schroeder to answer the following question: 'Do you know whether your *father* ever received a statement from Mr. Conover covering charges which the plaintiff claimed were due from your *father* to him in connection with the plans and sketches in question?'"

The answer to this objection is that no such question was ever asked or answered. We cannot find it in the State of the Case. The nearest approach to it appears on page 22 of the State of the Case. The witness Schroeder, a grandson of the deceased defendant, was there permitted to testify that the plaintiff had rendered a bill to his *grandfather*, the defendant, after he was told to stop work. The answer filed by Schroeder in his lifetime (State of Case, page 7), expressly admitted that "he instructed plaintiff to proceed no further with his work," etc.

The complaint had alleged (State of Case, page 4), that plaintiff had made demand on Schroeder for the sums he claimed as due. We suggest that the question as actually asked and answered was relevant and proper.

However, the first ground of appeal below being based upon a question which was neither asked nor answered, we will devote no further time to this objection.

SECOND OBJECTION.

"2. The Court permitted witness Conover to answer the following question: 'How did you compute the amount of the bill which you rendered against Mr. Schroeder?'"

The question appears on page 34 of the State of the Case. The objection was stated as follows:

"Mr. Cole: That is objected to on the ground that it is immaterial and irrelevant as to how he computed that bill."

The only objections then raised were two, first, that it was immaterial, second that it was irrelevant. Defendant is now confined to the objections then raised. *Oliphant v. Brearly*, 54 N. J. L. 521, 24 Atl. 660; *Semkin v. Hollander*, 82 N. J. L. 485, 81 Atl. 980; *English v. Continental Box Co.*, 98 N. J. L. 438, 120 Atl. 14.

We contend that it was both material and relevant. The action was brought, as stated above, upon an implied contract to pay "the reasonable and customary charge of architects in the City of Atlantic City aforesaid, for such services" (State of Case, page 4). Plaintiff's case was tried upon the theory of an implied contract (State of Case, page 30). Both the relevancy and materiality of the evidence in question are shown by the answer: "A. Well, I computed according to the general practice. When work reaches a certain point there is a fixed charge and when it proceeds beyond that point—that is one per cent. for the sketch alone; when it proceeds beyond that point to the complete working drawings it is three per cent., and proceeding beyond that point it is five per cent. for the plans and specifications and the supervision of any direction (?) and building."

"Q. Now, is the amount of your claim as set forth in Exhibit I in your complaint, more or less than the customary rate?"

(Objection, etc.)

"A. No; it was the customary rate."

"Q. It was the customary rate?"

"A. Yes."

THIRD OBJECTION.

"3. The Court permitted witness Conover to answer the following question: 'Now, is the amount of your claim as set forth in Exhibit I, in your complaint, more or less than your customary rate.'"

This appears at page 35 of the State of the Case. It was objected to on the following grounds:

"Mr. Cole: I object on the ground that there is no proof here of any contract such as is set forth in this complaint, and until the contract is established the question of how he computed the amount as to whether it is in accordance with the customary rates is irrelevant and immaterial."

The attorney for plaintiff had previously clearly based his claim upon an implied contract. (See Complaint, State of Case, p. 2, etc., and State of Case, p. 30.)

Let us see if there was any evidence then before the Court as to the existence of a contract. See Complaint. (State of Case, pages 2-4). The answer, filed by Schroeder in his lifetime (State of Case, p. 7), admitted that he had instructed plaintiff to proceed no further with his work. He denied that this was without legal cause or excuse, but defense introduced no evidence whatsoever touching any excuse. The plans, etc., were prepared by plaintiff, brought to Schroeder at his house and examined by and discussed with him. (State of Case, pages 10, 11, 12.) Plaintiff called with the plans more than once (State of Case, p. 15). Schroeder had discussed the "living qualities of the plans" with his grandson (State of Case, p. 17). Schroeder had sent his grandson to plaintiff's office "to see how the plans were coming along" (State of Case, pages 18, 19, 20, 21). Conover had rendered a bill to Schroeder after he was told to stop work (State of Case, page 22). The bill annexed to the complaint (State of Case, page 5), gave Schroeder credit for a payment to plaintiff as follows: "Rec'd. on acct. 5/4/26—\$50." Schroeder's grandson testified (State of Case, p. 21) that during 1926, under instructions of his grandfather, he had drawn a check to the order of plaintiff for "\$50 on account." There were many other corroborating circumstances scattered through the record, including the plans, etc., themselves, too numerous to mention at length.

FOURTH OBJECTION.

"4. The Court refused to direct a verdict in favor of the defendant."

Defendant based its motion for a direction on the following grounds (State of Case, p. 36):

(1) That there was no proof in the case sufficient to go to the jury to permit them finding either employment or performance.

(2) That the complaint set up an "express agreement," and that there was no proof of any such agreement nor of its performance.

We suggest that these objections have been answered by what we have already said. We might call attention to paragraph 4 of the Complaint (State of Case, p. 3), and repeat that the answer admitted that Schroeder ordered plaintiff to stop (State of Case, p. 7).

The claim was only for the work actually done. (State of Case, page 3, par. 5.) The proof was limited to the allegation. (State of Case, pp. 31, 34 and 35.)

We contend that the motion to direct a verdict for the defendant was also properly denied for further reasons which we set forth in dealing with the remaining objections.

REMAINING OBJECTIONS.

We feel that the remaining objections 5 to 8 inclusive, (Case, p. 44), can best be dealt with together.

An examination of the record will show that the defendant did not call a witness and did not cross-examine a single witness offered by plaintiff (defendant's attorney only interjecting four questions, which were answered—Case, pages 26 and 27). Accordingly, such proof as was offered by plaintiff stood absolutely uncontradicted. If our contentions as above are correct, the trial court would have been fully justified in directing a verdict not for the defendant but for the plaintiff. If we are correct in this, the defendant should not be now

heard to complain that the trial court allowed his attorney to argue only as to damages; he had no right to argue any part of the issue, the facts being all against him; in reality he was accorded, without objection, more than his legal right.

DECISION OF SUPREME COURT.

Plaintiff, in his brief and argument, touched upon the foregoing objections before the Supreme Court. The defendant, in his brief and argument before said Court, confined himself to the three following points:

1st. That there was error on the part of the trial court in precluding defendant's counsel from discussing to the jury any question except the amount of damages to be recovered.

2nd. That it was error for the trial court to permit plaintiff to answer this question: "Now is the amount of your claim as set forth in Exhibit I of your claim more or less than the customary rate?"

3rd. That the trial court improperly permitted the jury to find what the plaintiff's services were reasonably worth.

All three of said objections were answered by the plaintiff before the Supreme Court as above.

The opinion of the Supreme Court (Case, pages 45-46), reversed the judgment of the Circuit Court on the following ground: "No doubt there was evidence from which the jury could have inferred, if it saw fit, that Schroeder employed the plaintiff to prepare the plans; but we do not think it was conclusive nor that it compelled the inference that such work as plaintiff did, he did under an employment by the defendant Schroeder. The evidence, by reason of the death of Schroeder, was necessarily circumstantial in character upon the question whether or not these plans were ordered by Schroeder in his lifetime. Varying inferences might reasonably have been drawn therefrom, and we think it was error

to withdraw this question from the consideration of the jury, leaving only the question of damages."

With all deference to our Supreme Court, we respectfully contend that the State of the Case discloses no evidence whatsoever which is susceptible of any other inference than that Schroeder ordered the work done, as claimed, in his lifetime; that, in the absence of any proof as to a special rate, the customary rate prevailed; and that any other finding by the jury would have been necessarily and promptly set aside by the trial court as unwarranted by the evidence. Plaintiff further contends, as above, that defendant should not be heard to complain that he was permitted to argue only part of the issue before the trial court, when, as a matter of fact, the evidence was so clear and uncontradicted that the trial court, on motion, would have been bound to direct a verdict for the plaintiff. Under the circumstances, we suggest that it would be a mere waste of time and money to send the action back to the Circuit for a new trial, but that instead, the judgment of the Supreme Court should be reversed and the judgment of the Circuit Court affirmed.

If defendant feels that the record discloses any evidence warranting any conclusion other than as above, we would ask that defendant point such doubtful testimony out to the Court.

Respectfully,

LEE F. WASHINGTON,
Attorney for Clarence H. Conover,
Plaintiff-Appellant.

29 FEB.T.1928

New Jersey Court of Errors and Appeals

CLARENCE H. CONOVER,
Plaintiff-Appellant,

v.

CHARLES E. SCHROEDER,
Defendant-Respondent.

ON APPEAL.

RESPONDENT'S BRIEF.

STATEMENT.

Appellant's statement and the opinion of the Supreme Court sufficiently show the point or points involved.

ARGUMENT.

The Judgment of the Supreme Court Should Be Affirmed.

It is conceded that the trial Court precluded counsel from arguing to the jury the question of whether Mr. Schroeder, now deceased, authorized the appel-

lant to prepare the plans and specifications or that he agreed to pay for them.

Paragraphs 2 and 3 of the complaint set forth two distinct contracts and they are clearly of an express nature. Paragraph 2 says:

"On or about the seventeenth day of August, 1925, the defendant, Charles E. Schroeder, employed plaintiff to prepare for him, the said defendant, preliminary sketches, plans, drawings and specifications for a two-story private residence, with a garden, which defendant then proposed constructing in Brigantine, near Atlantic City aforesaid, the defendant then agreeing to pay plaintiff for his services in preparing said sketches," &c.

Paragraph 3 is to like effect.

There was no evidence to establish an express contract, nor any evidence to establish that Schroeder had agreed to pay for the plans and specifications. Such was the view of the trial Court. At page 31 he says:

"The fact that the deceased may have gone over these plans with this architect does not establish an agreement on the part of the defendant to pay him for them, and it does not establish that he ordered them. He may have gone over them for a number of reasons. *There isn't any testimony in the case that the grandfather ordered this work done.*"

Notwithstanding this declaration of the trial Court, for some inconceivable reason he limited counsel's address to the jury to the question of damages. In order to escape the consequence of lack of proof counsel resorts to the plea of an implied contract. But for the purpose of the point it

is of no consequence whether the contract was an express one or implied. Respondent was entitled to argue to the jury that there was not so much as an implied contract, and as the opinion of the Supreme Court correctly states, the jury could have drawn varied inferences from the proofs submitted. It is not contended that the Court did not err in its action if there was a jury question upon the phase involved. The Court should have granted respondent's motion for a direction.

But independent of this question, there is manifest error in the case on a phase that the Supreme Court did not think necessary to discuss. In the face of the Court's declaration as above quoted he said to the jury, at page 38:

"In this case the uncontradicted testimony on the part of the plaintiff establishes that the defendant ordered the plaintiff to perform certain services such as has been described by the testimony in the preparation of these plans that have been introduced into evidence."

To this an exception was taken at page 39, and is set forth as a ground of appeal under No. 6. Now, there is not a line of proof that Mr. Schroeder ordered the plaintiff to perform services in the preparation of the plans. At best it is only a possible inference which necessarily made a question for the jury. The Court's charge withdrew that question from the jury and, therefore, there was error. This point is treated most generally and very lightly by counsel under "Remaining Objection" and as to the specific point there is utter silence. We refrain from discussing the other grounds of appeal and respectfully submit that for either of the two reasons here briefly discussed the judgment should be affirmed.

COLE & COLE,

Attorneys of Defendant-Respondent.