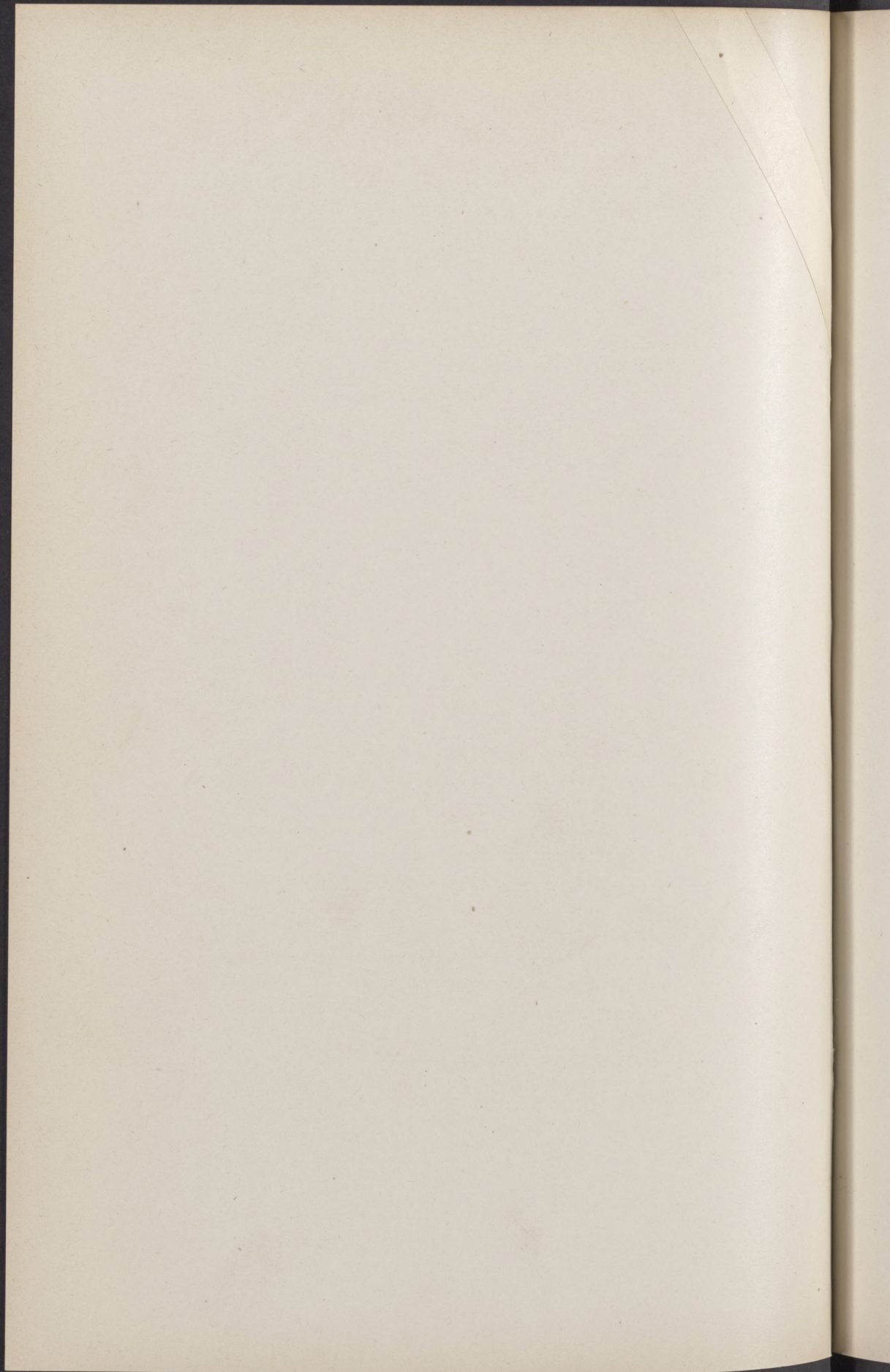


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Notice Of Appeal And Grounds
NEW JERSEY SUPREME COURT
HUDSON COUNTY

MEYER HILLEL, assignee of
ALEXANDER FLANNERY
Plaintiff,

vs.

BOROUGH OF EDGEWATER
Defendant.

Action At Law
Notice Of
Appeal And
Grounds

10

To William George,
Attorney for Plaintiff, Meyer Hillel,
Assignee of Alexander Flannery.

20

TAKE NOTICE that the defendant, Borough of Edgewater hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Court erroneously struck out the Answer of the Defendant.

30

2. Because the Court erroneously ordered final judgment entered in favor of the plaintiff and against the defendant.

3. Because the Court erroneously struck out the defendant's first separate defense.

4. Because the Court erroneously struck out the defendant's second separate defense.

5. Because the Court erroneously struck out the defendant's sixth separate defense.

40

Notice of Appeal and Grounds.

6. Because the Court erroneously struck out the defendant's eighth separate defense.

7. Because the Court erroneously struck out the defendant's ninth separate defense.

Respectfully yours,

William E. Ellis,

Attorney for defendant, Borough of Edgewater.

A true copy.

Fred L. Bloodgood,

Clerk.

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Summons

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

THE STATE OF NEW JERSEY TO BOROUGH 10
OF EDGEWATER:

You are summoned to answer the
annexed complaint of Meyer
Hillel, assignee of ALEXANDER
FLANNERY in an action at law
in the New Jersey Supreme
Court; AND TAKE NOTICE, that
unless you file your answer to 20
said complaint, with the Clerk of
the New Jersey Supreme Court, at Trenton, New
Jersey, within TWENTY DAYS after service upon
you of this writ and the annexed complaint, plain-
tiff may proceed in the suit and judgment may be
entered against you.

WILLIAM S. GUMMERE, ESQ.,
Chief Justice of the New Jersey Supreme Court, at
Trenton, N. J., this 5th day of March, A.D., 1929. 30

FRED L. BLOODGOOD,
Clerk.

WILLIAM GEORGE,
Attorney.

40

Complaint

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10

MEYER HILLEL, assignee of
ALEXANDER FLANNERY
Plaintiff,

vs.

BOROUGH OF EDGEWATER
Defendant.

Action At Law.
Complaint.

20

Plaintiff, MEYER HILLEL, residing in the Town of North Bergen, County of Hudson and State of New Jersey, says:

1. The Plaintiff's assignor now is and has been since the month of June, 1922, a Patrolman of the Borough of Edgewater, County of Bergen and State of New Jersey.

30

2. The annual salary of plaintiff's assignor as such Patrolman of the Borough of Edgewater as fixed by law, is and was during the times hereinafter stated, Two thousand five hundred and fifty (\$2,550.00) Dollars, payable semi-monthly, on the first and fifteenth days of each and every month.

40

3. Plaintiff's assignor was at all times herein stated ready, and willing to perform the services in due course of his duty as such Patrolman of the Borough of Edgewater but said plaintiff's assignor was not permitted by defendant so to do, but on the contrary, the defendant, without legal or justifiable cause, to wit, on February 15th, 1927, suspended plaintiff's assignor from the perform-

Complaint.

ance of said services, but thereafter the said defendant, being satisfied with the illegality and impropriety of such suspension did, on December 4th, 1928, reinstate plaintiff's assignor whereupon plaintiff's assignor entered upon his said duties as Patrolman from which date and until the present date plaintiff's assignor performed and still does perform the services required of him as such patrolman.

10

4. Defendant has failed to pay plaintiff's assignor his salary fixed by law for the period aforesaid, to wit, between February 15th, 1927 and December 4th, 1928, and during which period plaintiff's assignor was not permitted by defendant to perform the services aforesaid and the defendant is indebted to plaintiff's assignor therefor in the sum of Four thousand six hundred and four dollars and sixteen cents (\$4,604.16) representing the amount of salary due plaintiff's assignor for said period, less the sum of Ninety-two dollars and eight cents (\$92.08) representing two per centum (2%) of said salary, required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater.

20

5. The said Alexander Flannery, did, in writing, assign, transfer and set over to the said Meyer Hillel, the plaintiff herein, all his right, title and interest in and to the claim for damages aforesaid.

30

Plaintiff demands as damages the sum of Four thousand five hundred and twelve dollars and eight cents (\$4,512.08).

WILLIAM GEORGE,
Attorney for Plaintiff.

40

Answer

[Filed March 26, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

10

MEYER HILLEL, assignee of
ALEXANDER FLANNERY
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action At Law
Answer

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Defendant, a Municipal Corporation of the County of Bergen, in the State of New Jersey, says:

1. It denies Paragraphs 1 and 2 of the Complaint.

30

2. It denies Paragraph 3 of the Complaint, except that it admits that plaintiff's assignor was suspended on February 15, 1927, and that the plaintiff's assignor was reinstated on December 4, 1928, since which time plaintiff's assignor has performed the services required of him as a Patrolman.

3. It admits that it has not paid plaintiff's assignor any salary between February 15, 1927, and December 4, 1928, but denies the other allegations set forth in Paragraph 4 of the Complaint.

40

4. It has no knowledge or information, sufficient to form a belief, as to the matters contained in Paragraph 5 of the Complaint.

Answer.

FIRST SEPARATE DEFENSE

That on February 15, 1927, the Mayor and Council of the Borough of Edgewater, by Resolution, suspended plaintiff's assignor from performance of further duties as a Patrolman.

10

SECOND SEPARATE DEFENSE

Plaintiff's assignor failed and neglected to contest the aforesaid action of the Mayor and Council of the Borough of Edgewater, or resort to appropriate legal proceedings, and the action of said Mayor and Council remains undisputed and unreversed.

20

THIRD SEPARATE DEFENSE

Plaintiff's assignor was not, at all times, ready and willing to perform services as a Patrolman of the Borough of Edgewater, and did not, at any time, between February 15, 1927, and December 4, 1928, offer himself as ready and willing to perform such services, and did not report for duty as a Patrolman, at any time, between the dates hereinbefore mentioned.

30

FOURTH SEPARATE DEFENSE

During all the times mentioned in the Complaint, while plaintiff's assignor was under suspension, he was engaged in other employments and earned and received sums of money in excess of the compensation he would have been entitled to receive from the defendant, had he been continued in office, and, therefore, sustained no damage.

40

Answer.

FIFTH SEPARATE DEFENSE

10 The defendant was compelled to employ and pay another person to perform services as a Patrolman in the place and stead of the plaintiff's assignor.

SIXTH SEPARATE DEFENSE

Neither plaintiff, nor plaintiff's assignor, performed any services for defendant between February 15, 1927, and December 4, 1928.

SEVENTH SEPARATE DEFENSE

20 Plaintiff's assignor had, prior to the time of suspension, been adjudged guilty of a felony in the United States District Court for the Southern District of New York, and sentenced by the Honorable I. M. Meekin, one of the Judges thereof, to serve a term of nine months in the Westchester County Penitentiary, East View, New York.

30 By reason of the premises, plaintiff's assignor was no longer a citizen of the United States and was disqualified from holding any office or position.

EIGHTH SEPARATE DEFENSE

40 Defendant alleges, that plaintiff's assignor was legally convicted upon proper charges and suspended by the defendant, by resolution, which has never been set aside or reversed by a Court of competent jurisdiction, which action cannot be collaterally attacked in this cause.

Answer.

NINTH SEPARATE DEFENSE

The defendant is not in anywise indebted to the plaintiff.

TENTH SEPARATE DEFENSE

10

Defendant says, that plaintiff's assignor was without legal authority to assign his alleged claim to the plaintiff.

ELEVENTH SEPARATE DEFENSE

Either before, at, or during the trial, the defendant will move to strike out the Complaint, upon the ground that it does not disclose a good and sufficient cause of action, and also upon the ground that the Court has no jurisdiction to try the issues set forth in the Complaint.

20

WM. E. ELLIS,
Attorney for Defendant.

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Notice Of Motion To Strike Out Answer

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

10

MEYER HILLEL, assignee of
ALEXANDER FLANNERY,
Plaintiff,

vs.

BOROUGH OF EDGEWATER
Defendant.

Action At Law
Notice Of
Motion For
Order To Strike
Out Answer.

20

TO: WILLIAM E. ELLIS, ESQ.,
Attorney for Defendant.

30

SIR: PLEASE TAKE NOTICE, that I shall apply to his Honor Henry E. Ackerson, Jr., Judge of the Supreme Court, Hudson Circuit at the Court House, in Jersey City, New Jersey, on the 19th day of April, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the Answer and each and every separate defense therein set forth, filed by you on behalf of the above named defendant in the above stated cause, on the ground that said Answer and separate defenses, and each of them, are sham, or frivolous, or both, and shall support my application for such order by the affidavit of the plaintiff hereto attached.

40

Respectfully yours,
William George
ATTORNEY FOR PLAINTIFF.

Affidavit Of Alexander Flannery

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

<p>MEYER HILLEL, assignee of ALEXANDER FLANNERY</p> <p style="text-align: center;"><i>vs.</i></p> <p>BOROUGH OF EDGEWATER <i>Defendant.</i></p>	}	<p>Action At Law Affidavit</p>	<p>10</p>
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<p>STATE OF NEW JERSEY COUNTY OF HUDSON</p>	}	<p>SS</p>	<p>20</p>
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ALEXANDER FLANNERY, of full age being duly sworn upon his oath according to law, deposes and says:

I am the assignor of the plaintiff in the suit now pending in the New Jersey Supreme Court. Hudson County, in which said suit the defendant is the Borough of Edgewater, I was appointed a patrolman of the Edgewater Police Department in June, 1922 and am still a patrolman in said Department.

30

For some time prior and subsequent to February 15th, 1927, my annual salary as such Patrolman of the Police Department of the Borough of Edgewater was and still is twenty-five hundred and fifty (\$2,550.) Dollars, payable semi-monthly.

In the month of February, 1927, I, together with former Mayor Wissel, Chief of Police Dinan and Officer Edward Pickering, all of Edgewater, were convicted upon an indictment in the United States

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Affidavit of Alexander Flannery.

District Court for the Southern District of New York.

10 During all of the period that I was under indictment, to wit, from November, 1926, right up to my conviction, as well as thereafter, I continued the performance of my duties as a police officer, without official or other interference.

20 I appealed from said conviction to the United States Circuit Court of Appeals for the Second Circuit, which appeal was determined by said Appellant Court and my conviction and the conviction of those who were co-defendants with me, above named, was reversed, and revoked and the sentences theretofore imposed set aside, as evidenced by the order of reversal filed in the United States District Court for the Southern District of New York, on August 14th, 1928, a copy of which is hereto annexed.

30 At the time of my illegal conviction and for some time thereafter, I continued as theretofore to perform my duties as a member of the Police Department of the Borough of Edgewater and until I was suspended and prevented from further performance of said duties as such police officer by a Resolution of the Mayor and Council of the Borough of Edgewater, which said Resolution adopted the recommendation of suspension made to said Mayor and Council by one of the defendant's Councilmen, the Chairman of the Police Committee, a copy of which recommendation and resolution of suspension being hereto annexed.

40 During all the period of my suspension, to wit, from February 15th, 1927 to the date of my reinstatement on December 4th, 1928, I was ready, willing and able to perform my duties as such police officer but was prevented from doing so by reason of said suspension.

Affidavit of Alexander Flannery.

At no time during the whole period of my suspension was I ever served with charges of any kind or nature whatsoever, nor was I ever given a hearing upon any charges, nor were any charges filed or preferred against me.

I have repeatedly requested my reinstatement as a member of the Edgewater Police Department and repeated petition or requests were made in my behalf through my attorney, William George, all of which requests or petitions were refused until December 4th, 1928.

Prior to my reinstatement as aforesaid, and during the several occasions when I as well as my attorney were endeavoring to obtain my reinstatement, the defendant agreed to my reinstatement upon condition that I would waive the salary due me for the period of my suspension and I am reliably informed by my attorney that such proposal was made to him and was rejected by both my attorney and myself. Subsequently the proposal was made, by the Mayor and Council, and upon this I am also reliably informed by my attorney, that the defendant Mayor and Council would consent to reinstate me provided I waived half of the salary due me during the period of my suspension and this proposal was likewise rejected by me, through my said attorney.

As aforesaid, I was thereupon reinstated on December 4th, 1928 by a resolution adopted by the Mayor and Council of the Borough of Edgewater upon the recommendation of the Chairman of the Police Committee, which latter person is also a member of the Board of Council, a copy of which recommendation of the Police Commissioner and certified copy of the Resolution of reinstatement based upon said recommendation are hereto annexed.

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Affidavit of Alexander Flannery.

10 I have not received from the Borough of Edgewater any salary for the period of my suspension, to wit, from February 15th, 1927 to December 4th, 1928, though I have always been ready, willing and able to perform the duties required by me as such member of said Police Department of the Borough of Edgewater, but was prevented from performing said duties by reason of my suspension as aforesaid.

20 The amount due me from the Borough of Edgewater for such salary during the said period of suspension, less the sum of Ninety-two dollars and eight cents (\$92.08) representing two per cent (2%) of said salary required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater, amounts to Four thousand five hundred and twelve dollars and eight cents (\$4,512.08).

On March 4th, 1929, I assigned all of my right title and interest in the aforesaid sum due me from the Borough of Edgewater to Meyer Hillel.

30 Sworn and subscribed to }
before me this 28th } Alexander Flannery.
day of March, 1929. }

Margaret M. Driscoll
Notary Public of New Jersey.

At a stated term of the District Court of the United States for the Southern District of New York held on the day of August, 1928.

40 PRESENT:
HON.
United States District Judge.

Copy Of Mandate Of U. S. District Court

UNITED STATES OF AMERICA

—*against*—

HENRY WISSEL, JAMES A.
DINAN, ALEXANDER A. FLANNERY
AND EDWARD A. PICKERING.

C 46-69

10

This cause having heretofore come on for hearing before this Court for an indictment and the Henry Wissel, James A. Dinan, Alexander A. Flannery and Edward A. Pickering having pleaded not guilty to the said indictment, and the said indictment having duly come on before this court for trial, the trial having been had thereon and a verdict of guilty having been entered against the said defendants; and the said Henry Wissel and James A. Dinan having each been sentenced to the Federal Penitentiary at Atlanta for one year and one day, and the said Alexander A. Flannery and Edward A. Pickering having been sentenced to nine months, and the sentence of said Alexander A. Flannery and Edward A. Pickering having been suspended, and the said defendants having been placed upon probation by the Court.

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And the said defendants above named having thereafter sued out writs of error in the United States Circuit Court of Appeals for the Second Circuit to review the judgment and sentence made by the said Court as aforesaid, and having trans-

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Copy of Mandate of U. S. District Court.

mitted to this Court its mandate by which it appears that at the October Term of the said United States Circuit Court of Appeals for the year 1927, this cause came on to be heard by said Court and was argued therein, and on consideration of the said cause it was ordered, adjudged and decreed by the said United States Circuit Court of Appeals that the judgment of this court in this cause be reversed and set aside and the sentences therein imposed be set aside as to all of the defendants above named.

NOW, upon reading and filing the said mandate and on motion of David V. Cahill, attorney for said defendants, it is hereby

ORDERED, adjudged and decreed that the judgment and order of the United States Circuit Court of Appeals for the Second Circuit in this cause, be and the same hereby is made the judgment of this court, and that the judgment herein entered in this cause be, and the same hereby is reversed and revoked and the sentences heretofore imposed herein upon the defendants, Henry Wis-sel, James A. Dinan, Alexander A. Flannery and Edward A. Pickering be and they are hereby set aside.

I. M. MEEKINS,
United States District Judge.

SEAL

A TRUE COPY

(SIGNED) ALEX. GILCHRIST, Jr.,
CLERK.

O.K. McG Filed 8-14-28

**Copy Of Letter Of James J. Kennedy
Recommending Suspension**

BOROUGH OF EDGEWATER

NEW JERSEY

MUNICIPAL BUILDING

10

Peter F. O'Brien
Borough Clerk

EDGEWATER, N. J., February 15, 1927.

To The Honorable,
The Mayor and Council,
Borough of Edgewater,
Edgewater, N. J.

Gentlemen:—

20

I beg to advise that Chief of Police Dinan, and Officers Pickering, and Flannery were convicted, and sentenced for violation of a United States Statute, in the Federal Court for the Southern District of New York, and I suspend them, and recommend that the hearing of these three members of the Police Department upon this charge be withheld until the appeals have been completed.

Very truly yours,

(Signed), James J. Kennedy,
Police Commissioner.

30

I HEREBY CERTIFY that the foregoing is a true copy of a communication offered by Councilman James J. Kennedy, at a Regular Meeting of the Mayor and Council of the Borough of Edgewater, held February 15, 1927.

(Signed) PETER F. O'BRIEN,
BOROUGH CLERK.

(SEAL).

40

*Copy of Letter of James J. Kennedy,
Recommending Reinstatement.*

statement by former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, and in view of the fact that the convictions heretofore found against these persons have been set aside, and more than a year passed, and nothing has been done, so far as I can ascertain, I, therefore, recommend that former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department of the Borough of Edgewater.

10

Very truly yours,

(Signed) J. J. Kennedy.

I HEREBY CERTIFY, that the foregoing is a true copy of a communication received, and read at a Regular Meeting of the Mayor, and Council of the Borough of Edgewater, Edgewater, held December 4, 1928.

20

(Signed) PETER F. O'BRIEN.

(SEAL).

Resolution Of Reinstatement

BOROUGH OF EDGEWATER

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NEW JERSEY

RESOLUTION

EDGEWATER, N. J., December 4, 1928.

WHEREAS the Police Commissioner has recommended that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department. THEREFORE, BE IT RESOLVED, that the recommendation of

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Resolution of Reinstatement.

10 the Police Commissioner be approved, and adopted, and BE IT FURTHER RESOLVED that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the police department, said reinstatement to take effect immediately.

(Signed) J. J. KENNEDY.

Seconded by Mr. Scheld. On roll call the vote was as follows:

Mr. Kennedy, Yes; Mr. Moutenot, Pass; Mr. Finley, Yes; Mr. Murphy, Pass; Mr. Gaul, Yes; Mr. Scheld, Yes.

20 I HEREBY CERTIFY that the foregoing is a true copy of a resolution passed by the Mayor and Council of the Borough of Edgewater, at a Regular Meeting held December 4, 1928.

(Signed) PETER F. O'BRIEN.

(SEAL).

A true copy.

FRED L. BLOODGOOD,
CLERK.

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Affidavit Of James J. Kennedy

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

<p style="text-align: center;">MEYER HILLEL, assignee of ALEXANDER FLANNERY <i>Plaintiff,</i></p>	10
---	----

vs.

<p style="text-align: center;">BOROUGH OF EDGEWATER <i>Defendant.</i></p>	20
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} Action At Law
Affidavit

STATE OF NEW JERSEY }
COUNTY OF BERGEN } SS

JAMES J. KENNEDY, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am a member of the Borough Council of the Borough of Edgewater, the governing body of the Borough of Edgewater, the defendant in the above-entitled cause. 30

2. I am the Chairman of the Police Committee and Police Commissioner of the Borough Council of the Borough of Edgewater, and have been such Chairman and Police Commissioner since February 15, 1927, and for some time prior thereto.

3. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as a member of the Police Department of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928. 40

Affidavit of James J. Kennedy.

10 4. Plaintiff's assignor did not, at any time, file with me, as Chairman of the Police Committee or Police Commissioner, a written request requesting his reinstatement as a member of the Police Department of the Borough of Edgewater, between the date of his suspension as a member of the Police Department on February 15, 1927, until December 4, 1928, the day on which plaintiff's assignor was reinstated as a member of the Police Department of the Borough of Edgewater, by resolution adopted, on that day, by the Mayor and Council.

20 5. The proposition of reinstating the plaintiff's assignor as a member of the Police Department of the Borough of Edgewater, was discussed, in an informal way, between the Mayor, other members of the Borough Council, William George, the attorney for the plaintiff, and myself, sometime during the latter part of November, 1928, but no official action of any kind was taken by the Mayor and Council until the regular meeting of the Mayor and Council of the Borough of Edgewater, held on December 4, 1928, when the plaintiff's assignor was reinstated as a member of the Police Department of the Borough of Edgewater, by resolution adopted by the Mayor and Council of the Borough of Edgewater, on said day.

30

Sworn and Subscribed to }
before me this Fifth } James J. Kennedy.
day of April, 1929. }

Richard Gaul (Seal)
Notary Public of N. J.

40

Affidavit Of Peter F. O'Brien

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

<p>MEYER HILLEL, assignee of ALEXANDER FLANNERY <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOROUGH OF EDGEWATER <i>Defendant.</i></p>	}	<p>10</p> <p>Action At Law Affidavit</p> <p>20</p>
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STATE OF NEW JERSEY }
COUNTY OF BERGEN. } SS

PETER F. O'BRIEN, being duly sworn, according to law, on his oath deposes and says:

1. I am the Borough Clerk of the Borough of Edgewater, and have been Borough Clerk of said Borough for more than fourteen years last past, and have in my care and custody as Borough Clerk the minutes of all meetings of the Mayor and Council, and also all communications and other papers of the Borough of Edgewater. 30

2. I have examined the minutes of the meetings of the Mayor and Council of the Borough of Edgewater, between February 15, 1927, and December 4, 1928, and do not find any record of any resolution adopted by the Mayor and Council of the Borough of Edgewater whereby the Mayor and Council of the Borough of Edgewater agreed to reinstate the plaintiff's assignor upon condition 40

Affidavit of Peter F. O'Brien.

that he would waive any salary due him for the period of his suspension, or that the plaintiff's assignor would be reinstated on condition that he would waive half of the salary due him during the period of his suspension.

10 3. I have also examined said minutes between February 15, 1927, and December 4, 1928, to ascertain whether or not any legal proceedings were instituted by the plaintiff or the plaintiff's assignor to set aside or have declared illegal the resolution adopted by the Mayor and Council at a regular meeting held on February 15, 1927, whereby the Mayor and Council suspended the plaintiff's assignor, and do not find recorded therein any record of any legal proceedings having been instituted by the plaintiff or the plaintiff's assignor since February 15, 1927, to determine the validity of the resolution adopted by the Mayor and Council of the Borough of Edgewater, on February 15, 1927, neither do I find any communications on file as having been received from the plaintiff's assignor requesting his reinstatement as a member of the Police Department of the Borough of Edgewater.

30 Sworn and Subscribed to }
before me this Fifth } Peter F. O'Brien.
day of April, 1929.

Richard Gaul (Seal)
Notary Public of N. J.

Affidavit Of John F. Dinan

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

<p>MEYER HILLEL, assignee of ALEXANDER FLANNERY <i>Plaintiff,</i></p>	10
---	----

vs.

<p>BOROUGH OF EDGEWATER <i>Defendant.</i></p>	20
---	----

} Action At Law
} Affidavit

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } SS.:

JOHN F. DINAN, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am the Mayor of the Borough of Edgewater, in the County of Bergen and State of New Jersey.

2. I have not been served with any legal papers or process of any kind in any action instituted by or on behalf of the plaintiff's assignor in the above-entitled action, to set aside and vacate the resolution adopted February 15, 1927, by the Mayor and Council of the Borough of Edgewater, suspending plaintiff's assignor from services as a member of the Police Department of the Borough of Edgewater.

3. The proposition of reinstating the plaintiff's assignor, as a member of the Police Department of the Borough of Edgewater, was discussed, in an

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Affidavit of John F. Dinan.

informal way, between members of the Borough Council, William George, the attorney for the plaintiff, and myself, on two or three occasions, but no official action of any kind was taken by the Mayor and Council of the Borough of Edgewater until the regular meeting of the Mayor and Council held on December 4, 1928, at which time, a resolution was adopted approving a report of the Police Commissioner recommending reinstatement of the plaintiff's assignor.

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4. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as a member of the Police Department of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928, and the Borough of Edgewater is not, at this time, indebted to the plaintiff in any sum of money.

Sworn and Subscribed to }
before me this Fifth day } John F. Dinan.
of April, 1929.

30

Richard Gaul (Seal)
Notary Public of N. J.
A true copy.

Fred L. Bloodgood,
Clerk.

40

Order Striking Out Answer

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

<p>MEYER HILLEL, Assignee of ALEXANDER FLANNERY, <i>Plaintiff.</i></p>	10
--	----

vs.

<p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	20
--	----

Action at Law.

Order.

Due notice having been given to the above named defendant on a motion to strike out the answer filed by defendant, and the same coming on for argument in the presence of William George, Attorney of Plaintiff and William E. Ellis, Attorney of Defendant, and the Court having heard and considered the arguments of counsel to the respective parties, and having considered the affidavits and exhibits submitted by the respective parties, and it appearing to the Court that the said Answer is sham or frivolous, or both and discloses no defense to the said action, it is, on motion of the said William George, Attorney for said plaintiff, on this 24th day of May, 1929,

ORDERED, that the defendant's Answer be and the same is hereby stricken out as sham, or frivolous or both, and because said answer discloses no defense to the said action.

FRANK E. CLEARY,
Judge.

**Notice Of Motion For Order For Summary
Judgment**

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

MEYER HILLEL, Assignee of
ALEXANDER FLANNERY,
Plaintiff,

Action at Law.

vs.

Notice of
Motion.

BOROUGH OF EDGEWATER,
Defendant.

20

TO: WILLIAM E. ELLIS, ESQ.,
Attorney of Defendant.

30

SIR: TAKE NOTICE, that on Saturday, the 15th day of June, 1929, at ten o'clock (Daylight Saving Time) in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Honorable Samuel Kalisch, Justice of the Supreme Court, at the Court House, Jersey City, N. J., for an order for summary judgment in favor of the plaintiff and against the defendant in the above entitled cause.

Respectfully yours,

40

WILLIAM GEORGE,
Attorney of Plaintiff.

Affidavit Of William George

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

<p>MEYER HILLEL, assignee of ALEXANDER FLANNERY <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOROUGH OF EDGEWATER <i>Defendant.</i></p>	<p>} Action At Law Affidavit</p>	<p>10</p>
---	--------------------------------------	-----------

<p>STATE OF NEW JERSEY COUNTY OF HUDSON</p>	<p>}SS</p>	<p>20</p>
---	------------	-----------

WILLIAM GEORGE, of full age, being duly sworn according to law, on his oath deposes and says:

I am the attorney of the plaintiff in the above entitled cause. Defendant filed an answer to the complaint filed by me on behalf of the plaintiff. 30

Within due and proper time, I caused to be served on William E. Ellis, Attorney of the defendant, Borough of Edgewater, a notice of motion to strike out said answer filed by defendant, upon the ground that same was sham or frivolous or both and to which said notice of motion I annexed affidavits and exhibits for use upon the argument on said motion to strike out.

Said motion was duly argued, before Honorable Frank E. Cleary, sitting as Judge of the Hudson Circuit of New Jersey Supreme Court. Mr. Ellis, 40

Affidavit of William George.

Borough Attorney of defendant, Borough of Edgewater, was present at said argument and submitted his argument in opposition to the motion to strike out.

10 Upon said argument the affidavits in behalf of plaintiff and defendant were read and submitted to his Honor Judge Cleary.

By direction of Judge Cleary, memorandums were submitted by me on behalf of plaintiff and by Mr. Ellis on behalf of the defendant, Borough of Edgewater.

20 Judge Cleary, having considered the arguments of counsel to the respective parties, the affidavits and exhibits and the memorandums submitted by each of the parties did, thereupon on May 24th, 1929, make an order striking out defendant's answer as sham, or frivolous or both, and because said answer disclosed no defense to the said action.

Annexed hereto is the original of said order signed by Judge Cleary.

30 Sworn and subscribed to
before me this 17th day } William George.
of June, 1929.

Margaret M. Driscoll,
Notary Public of New Jersey
A true copy.

Fred L. Bloodgood,
Clerk.

Order For Summary Judgment

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

MEYER HILLEL, Assignee of
ALEXANDER FLANNERY,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.

Order for
Summary
Judgment.

10

20

Upon reading the affidavit of William George, Attorney of Plaintiff, and the order striking out the above named defendant's answer, and due notice of motion for an order for summary judgment having been served upon defendant's attorney.

It is, upon motion of William George, Attorney of Plaintiff, on this 15th day of June, 1929, ORDERED, that final judgment be and the same is hereby entered in favor of the plaintiff and against the defendant, for the sum of Four thousand five hundred and twelve dollars and eight cents (\$4,512.08), and costs.

30

SAMUEL KALISCH,
Justice Supreme Court.

40

Judgment Appealed From

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT

10

MEYER HILLEL, assignee of
ALEXANDER FLANNERY,
Plaintiff,

vs.

BOROUGH OF EDGEWATER
Defendant.

Action At Law
Judgment

20

Afterwards, upon proceedings duly had according to the Statute, the Court ordered the said answer to be stricken out as sham, or frivolous, or both, and because said answer disclosed no defense to the said action.

Whereupon it is adjudged that the plaintiff, Meyer Hillel, Assignee of Alexander Flannery, do recover of the said defendant, Borough of Edgewater, the sum of four thousand five hundred and twelve dollars and eight cents, together with his costs, which have been taxed at the sum of sixty-four dollars and fourteen cents, making in the whole the sum of four thousand five hundred and seventy-six dollars and twenty-two cents.

30

\$4,512.08
64.14

\$4,576.22

Judgement entered and signed June 18, 1929.

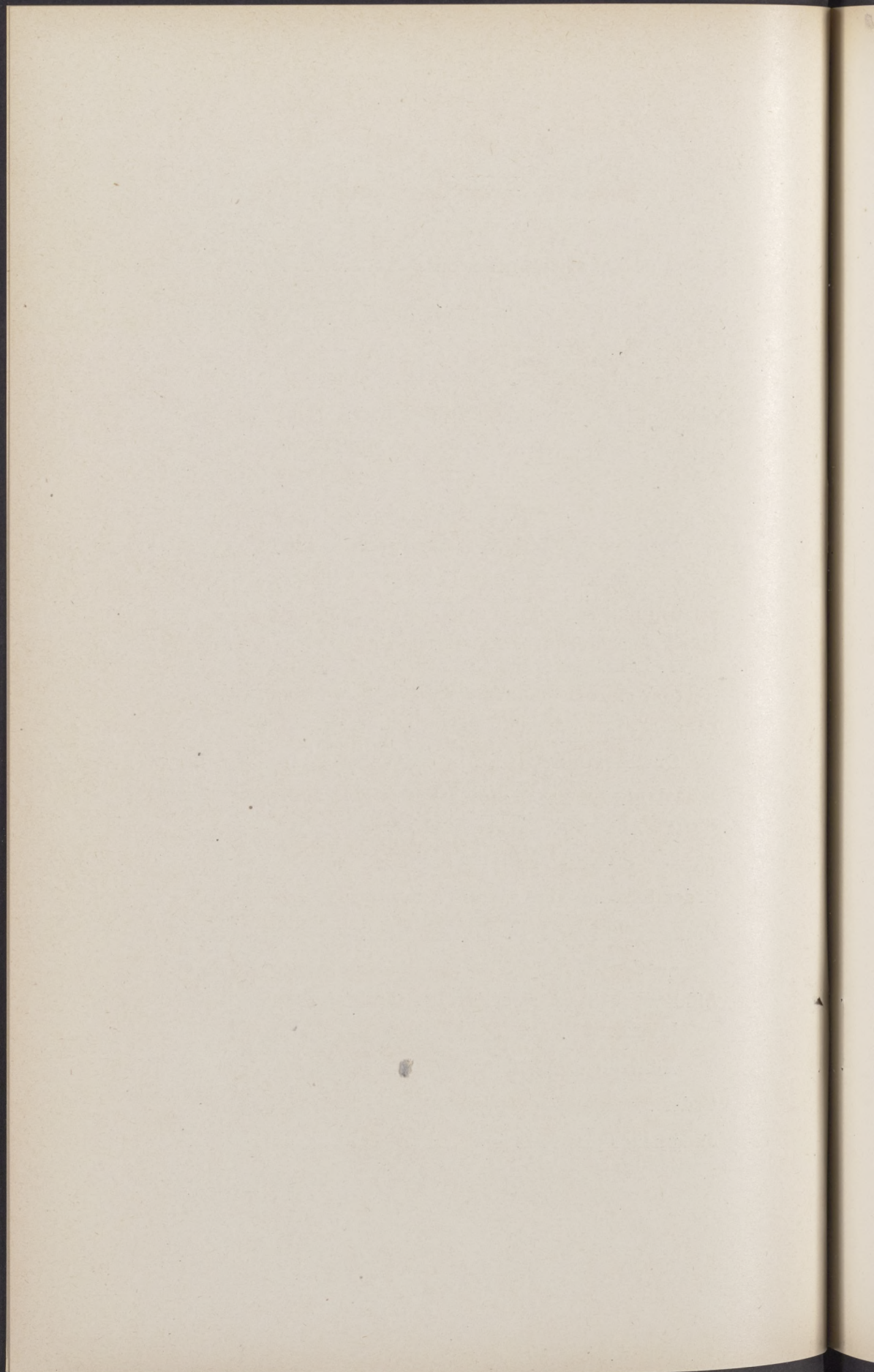
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A true copy.

Wm. S. Gummere,
C. J.
Fred L. Bloodgood,
Clerk.

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Notice Of Appeal And Grounds

NEW JERSEY SUPREME COURT
HUDSON COUNTY

MEYER HILLEL, Assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Notice of Appeal
and Grounds.

10

To William George, Attorney of Plaintiff, Meyer Hillel, Assignee of Edward Pickering:

20

TAKE NOTICE that the defendant, Borough of Edgewater hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Court erroneously struck out the Answer of the Defendant.

30

2. Because the Court erroneously ordered final judgment entered in favor of the plaintiff and against the defendant.

3. Because the Court erroneously struck out the defendant's first separate defense.

4. Because the Court erroneously struck out the defendant's second separate defense.

5. Because the Court erroneously struck out the defendant's sixth separate defense.

6. Because the Court erroneously struck out the defendant's eighth separate defense.

40

Notice of Appeal and Grounds.

7. Because the Court erroneously struck out the defendant's ninth separate defense.

Respectfully yours,

William E. Ellis,

Attorney for Defendant, Borough of Edgewater.

10 A true copy.

Fred L. Bloodgood, Clerk.

20

30

40

Summons

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTYTHE STATE OF NEW JERSEY TO
BOROUGH OF EDGEWATER: 10

You are summoned to answer the annexed complaint of MEYER HILLEL, assignee of EDWARD PICKERING, in an action at law in the New Jersey Supreme Court; AND TAKE NOTICE, that unless you file your answer to said complaint, with the Clerk of the New Jersey Supreme Court, at Trenton, 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. 20

WILLIAM S. GUMMERE, ESQ., Chief Justice of the New Jersey Supreme Court, at Trenton, N. J., this 5th day of March, A.D., 1929. 30

Fred L. Bloodgood,
Clerk.

William George,
Attorney.

Complaint

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action At Law
Complaint

20

Plaintiff, Meyer Hillel, assignee of Edward Pickering, residing in the Town of North Bergen, County of Hudson and State of New Jersey, says:

1. The plaintiff's assignor now is and has been since the month of May, 1916, a patrolman of the Borough of Edgewater, County of Bergen and State of New Jersey.

30

2. The annual salary of plaintiff's assignor as such Patrolman of the Borough of Edgewater as fixed by law, is and was during the times hereinafter stated, Two thousand five hundred and fifty (\$2,550.00) dollars, payable semi-monthly, on the first and fifteenth days of each and every month.

40

3. Plaintiff's assignor was at all times herein stated ready, and willing to perform the services in due course of his duty as such Patrolman of the Borough of Edgewater, but said plaintiff's assignor was not permitted by defendant so to do, but on the contrary, the defendant, without legal or justifiable cause, to wit, on February 15th, 1927,

Complaint.

suspended plaintiff's assignor from the performance of said services, but thereafter the said defendant, being satisfied with the illegality and impropriety of such suspension did, on December 4th, 1928, reinstate plaintiff's assignor, whereupon plaintiff's assignor entered upon his said duties as Patrolman from which date and until the present date plaintiff's assignor performed and still does perform the services required of him as such Patrolman.

10

4. Defendant has failed to pay plaintiff's assignor his salary fixed by law for the period aforesaid, to wit, between February 15th, 1927, and December 4th, 1928 and during which period plaintiff's assignor was not permitted by defendant to perform the services aforesaid and the defendant is indebted to plaintiff's assignor therefor in the sum of Four thousand six hundred and four dollars and sixteen cents (\$4,604.16), representing the amount of salary due plaintiff's assignor for said period, less the sum of Ninety-two dollars and eight cents (\$92.08) representing two per centum (2%) of said salary, required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater.

20

30

5. Edward Pickering did, in writing, assign, transfer and set over unto the said Meyer Hillel, the plaintiff herein all his right, title and interest in and to the claim for damages aforesaid.

Plaintiff demands as damages the sum of Four thousand five hundred and twelve dollars and eight cents (\$4,512.08).

William George,
Attorney for Plaintiff.

40

Answer

[Filed March 26, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action At Law
Answer

20

Defendant, a Municipal Corporation of the County of Bergen, in the State of New Jersey, says:

1. It denies Paragraphs 1 and 2 of the Complaint.

30

2. It denies Paragraph 3 of the Complaint, except that it admits the plaintiff's assignor was suspended on February 15, 1927, and that the plaintiff's assignor was reinstated on December 4, 1928, since which time plaintiff's assignor has performed the services required of him as a Patrolman.

3. It admits that it has not paid plaintiff's assignor any salary between February 15, 1927, and December 4, 1928, but denies the other allegations set forth in Paragraph 4 of the Complaint.

40

4. It has no knowledge or information, sufficient to form a belief, as to the matters contained in Paragraph 5 of the Complaint.

Answer.

FIRST SEPARATE DEFENSE

That on February 15, 1927, the Mayor and Council of the Borough of Edgewater, by Resolution, suspended plaintiff's assignor from performance of further duties as a Patrolman.

10

SECOND SEPARATE DEFENSE

Plaintiff's assignor failed and neglected to contest the aforesaid action of the Mayor and Council of the Borough of Edgewater, or resort to appropriate legal proceedings, and the action of said Mayor and Council remains undisputed and unreversed.

20

THIRD SEPARATE DEFENSE

Plaintiff's assignor was not, at all times, ready and willing to perform services as a Patrolman of the Borough of Edgewater, and did not, at any time, between February 15, 1927, and December 4, 1928, offer himself as ready and willing to perform such services, and did not report for duty as a Patrolman, at any time, between the dates hereinbefore mentioned.

30

FOURTH SEPARATE DEFENSE

During all the times mentioned in the Complaint, while plaintiff's assignor was under suspension, he was engaged in other employments and earned and received sums of money in excess of the compensation he would have been entitled to receive from the defendant, had he been continued in office, and, therefore, sustained no damage.

40

Answer.

FIFTH SEPARATE DEFENSE

10 The defendant was compelled to employ and pay another person to perform services as a Patrolman in the place and stead of the plaintiff's assignor.

SIXTH SEPARATE DEFENSE

Neither plaintiff, nor plaintiff's assignor, performed any services for defendant between February 15, 1927, and December 4, 1928.

SEVENTH SEPARATE DEFENSE

20 Plaintiff's assignor had, prior to the time of suspension, been adjudged guilty of a felony in the United States District Court for the Southern District of New York, and sentenced by the Honorable I. M. Meekin, one of the Judges thereof, to serve a term of nine months in the Westchester County Penitentiary, East View, New York.

30 By reason of the premises, plaintiff's assignor was no longer a citizen of the United States and was disqualified from holding any office or position.

EIGHTH SEPARATE DEFENSE

40 Defendant alleges, that plaintiff's assignor was legally convicted upon proper charges and suspended by the defendant, by resolution, which has never been set aside or reversed by a Court of competent jurisdiction, which action cannot be collaterally attacked in this cause.

Answer.

NINTH SEPARATE DEFENSE

The defendant is not in anywise indebted to the plaintiff.

TENTH SEPARATE DEFENSE

10

Defendant says, that plaintiff's assignor was without legal authority to assign his alleged claim to the plaintiff.

ELEVENTH SEPARATE DEFENSE

Either before, at, or during the trial, the defendant will move to strike out the Complaint, upon the ground that it does not disclose a good and sufficient cause of action, and also upon the ground that the Court has no jurisdiction to try the issues set forth in the Complaint.

20

William E. Ellis,
Attorney for Defendant.

30

40

Notice Of Motion To Strike Out Answer

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Notice of Motion
For
ORDER TO
STRIKE OUT
ANSWER.

20

TO: WILLIAM E. ELLIS, ESQ.,
Attorney for Defendant.

30

SIR: PLEASE TAKE NOTICE, that I shall apply to his Honor Henry E. Ackerson, Jr., Judge of the Supreme Court, Hudson Circuit at the Court House, in Jersey City, New Jersey, on the 19th day of April, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the Answer and each and every separate defense therein set forth, filed by you on behalf of the above named defendant in the above stated cause, on the ground that said Answer and separate defenses, and each of them, are sham, or frivolous, or both, and shall support my application for such order by the affidavit of the plaintiff hereto attached.

40

Respectfully yours,
William George,
Attorney for Plaintiff.

Affidavit Of Edward Pickering

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

10

Action at Law.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss:

20

EDWARD PICKERING, of full age, being duly sworn upon his oath according to law, deposes and says:

I am the assignor of the plaintiff in the suit now pending in the New Jersey Supreme Court, Hudson County, in which said suit the defendant is the Borough of Edgewater. I was appointed a patrolman of the Edgewater Police Department in May, 1916, and am still a patrolman in said department.

30

For some time prior and subsequent to February 15th, 1927 my annual salary as such Patrolman of the Police Department of the Borough of Edgewater was and still is Twenty-five hundred and fifty (\$2550.00) Dollars, payable semi-monthly.

In the month of February, 1927, I, together with former Mayor Wissel, Chief of Police Dinan and Alexander Flannery, all of Edgewater were convicted upon an indictment in the United States District Court for the Southern District of New York.

40

Affidavit of Edward Pickering.

During all of the period that I was under indictment, to wit, from November, 1926, right up to my conviction, as well as thereafter, I continued the performance of my duties as a police officer, without official or other interference.

10 I appealed from said conviction to the United States Circuit Court of Appeals for the Second Circuit, which appeal was determined by said Appellant Court and my conviction and the conviction of those who were co-defendants with me, above named, was reversed, and revoked and the sentences theretofore imposed set aside, as evidenced by the order of reversal filed in the United States District Court for the Southern District of New York, on August 14th, 1928, a copy of which is hereto annexed.

20 At the time of my illegal conviction and for some time thereafter, I continued as theretofore to perform my duties as a member of the Police Department of the Borough of Edgewater and until I was suspended and prevented from further performance of said duties as such police officer by a Resolution of the Mayor and Council of the Borough of Edgewater, which said Resolution adopted the recommendation of suspension made to said Mayor and Council by one of the defendant's Councilmen, the Chairman of the Police Committee, a copy of which recommendation and resolution of suspension being hereto annexed.

30 During all the period of my suspension, to wit, from February 15th, 1927 to the date of my reinstatement on December 4th, 1928, I was ready, willing and able to perform my duties as such police officer but was prevented from doing so by reason of said suspension.

40 At no time during the whole period of my suspension was I ever served with charges of any kind

Affidavit of Edward Pickering.

or nature whatsoever, nor was I ever given a hearing upon any charges, nor were any charges filed or preferred against me.

I have repeatedly requested my reinstatement as a member of the Edgewater Police Department and repeated petitions or requests were made in my behalf through my attorney, William George, all of which requests or petitions were refused until December 4th, 1928.

10

Prior to my reinstatement as aforesaid, and during the several occasions when I as well as my attorney were endeavoring to obtain my reinstatement, the defendant agreed to my reinstatement upon condition that I would waive the salary due me for the period of my suspension and I am reliably informed by my attorney that such proposal was made to him and was rejected by both my attorney and myself. Subsequently the proposal was made by the Mayor and Council, and upon this I am also reliably informed by my Attorney, that the defendant Mayor and Council would consent to reinstate me provided I waived half of the salary due me during the period of my suspension and this proposal was likewise rejected by me, through my said attorney.

20

As aforesaid, I was thereupon reinstated on December 4th, 1928, by a resolution adopted by the Mayor and Council of the Borough of Edgewater upon the recommendation of the Chairman of the Police Committee, which latter person is also a member of the Board of Council, a copy of which recommendation of the Police Commissioner and certified copy of the Resolution of reinstatement based upon said recommendation are hereto annexed.

30

I have not received from the Borough of Edgewater any salary for the period of my suspension,

40

Affidavit of Edward Pickering.

10 to wit, from February 15th, 1927, to December 4th, 1928, though I have always been ready, willing and able to perform the duties required by me as such member of said Police Department of the Borough of Edgewater, but was prevented from performing said duties by reason of my suspension, as aforesaid.

The amount due me from the Borough of Edgewater for such salary during said period of suspension, less the sum of Ninety-two dollars and eight cents (\$92.08) representing two per cent (2%) of said salary required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater, amounts to Four thousand five hundred and twelve dollars and eight cents (\$4,512.08).

20 On March 4th, 1929, I assigned all of my right, title and interest in the aforesaid sum due me from the Borough of Edgewater to Meyer Hillel.

Sworn and subscribed to }
before me this 28th day of } Edward Pickering.
March, 1929.

Margaret M. Driscoll,
Notary Public of New Jersey.

30

At a stated term of the District Court of the United States for the Southern District of New York held on the day of August, 1928.

PRESENT:

HON.

United States District Judge.

40

Copy Of Mandate Of U. S. District Court

UNITED STATES OF AMERICA,

—against—

HENRY WISSEL, JAMES A. DINAN,
ALEXANDER A. FLANNERY and
EDWARD A. PICKERING.

} C 46-69

10

This cause having heretofore come on for hearing before this Court for an indictment and the said Henry Wissel, James A. Dinan, Alexander A. Flannery and Edward A. Pickering having pleaded not guilty to the said indictment, and the said indictment having duly come on before this court for trial, the trial having been had thereon and a verdict of guilty having been entered against the said defendants: and the said Henry Wissel and James A. Dinan having each been sentenced to the Federal Penitentiary at Atlanta for one year and one day, and the said Alexander A. Flannery and Edward A. Pickering having been sentenced to nine months, and the sentence of said Alexander A. Flannery and Edward A. Pickering having been suspended, and the said defendants having been placed upon probation by the Court,

20

30

And the said defendants above named having thereafter sued out writs of error in the United States Circuit Court of Appeals for the Second Circuit to review the judgment and sentence made by the said Court as aforesaid, and having trans-

40

Copy of Mandate of U. S. District Court.

mitted to this Court its mandate by which it appears that at the October Term of the said United States Circuit Court of Appeals for the year 1927, this cause came on to be heard by said Court and was argued therein, and on consideration of the said cause it was ordered, adjudged and decreed by the said United States Circuit Court of Appeals that the judgment of this court in this cause be reversed and set aside and the sentences therein imposed be set aside as to all of the defendants above named.

NOW, upon reading and filing the said mandate and on motion of David V. Cahill, attorney for said defendants, it is hereby

ORDERED, adjudged and decreed that the judgment and order of the United States Circuit Court of Appeals for the Second Circuit in this cause, be and the same hereby is made the judgment of this court, and that the judgment herein entered in this cause be, and the same hereby is reversed and revoked and the sentences heretofore imposed herein upon the defendants Henry Wissel, James A. Dinan, Alexander A. Flannery, and Edward A. Pickering be and they are hereby set aside.

I. M. MEEKINS,
United States District Judge.

(SEAL)

A true copy.

(Signed) ALEX. GILCHRIST, JR., Clerk.

O.K.

McG

Filed

8/14/28

**Copy Of Letter Of James J. Kennedy
Recommending Suspension**

BOROUGH OF EDGEWATER

NEW JERSEY

MUNICIPAL BUILDING

Peter F. O'Brien,
Borough Clerk

10

Edgewater, N. J., February 15, 1927.

To The Honorable,
The Mayor and Council,
Borough of Edgewater,
Edgewater, N. J.

Gentlemen:

I beg to advise that Chief of Police Dinan, and
Officers Pickering, and Flannery were convicted,
and sentenced for violation of a United States
Statute, in the Federal Court for the Southern Dis-
trict of New York, and I suspend them, and recom-
mend that the hearing of these three members of
the Police Department upon this charge be with-
held until the appeals have been completed.

20

Very truly yours,
(Signed), James J. Kennedy,
Police Commissioner.

30

I HEREBY CERTIFY that the foregoing is a true
copy of a communication offered by Councilman
James J. Kennedy, at a Regular Meeting of the
Mayor and Council of the Borough of Edgewater
held February 15, 1927.

(Signed) PETER F. O'BRIEN,
Borough Clerk.

(SEAL)

40

Resolution Of Suspension
BOROUGH OF EDGEWATER
NEW JERSEY
RESOLUTION

Edgewater, N. J., February 15, 1927.

10

RESOLVED:

That the action of the Police Commissioner be approved; the recommendation adopted, and that Chief of Police Dinan, and Officers Pickering, and Flannery remain suspended until further notice. AND FURTHER RESOLVED, that this resolution shall take effect immediately.

(Signed) Henry R. Gaul.

20

Seconded by Mr. Sheld. All councilmen voting in favor.

I HEREBY CERTIFY, that the foregoing is a true copy of a resolution passed by the Mayor and Council of the Borough of Edgewater, at a Regular Meeting held February 15, 1927.

(Signed) PETER F. O'BRIEN,
Borough Clerk.

(SEAL).

30

**Copy Of Letter Of James J. Kennedy
Recommending Reinstatement**

BOROUGH OF EDGEWATER
NEW JERSEY
MUNICIPAL BUILDING

Peter F. O'Brien,
Borough Clerk.

EDGEWATER, N. J., December 4, 1928.

40

Honorable Mayor and Council,
Borough of Edgewater, N. J.

Gentlemen: —

I am in receipt of written applications for rein-

*Copy of Letter of James J. Kennedy,
Recommending Reinstatement.*

statement by former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, and in view of the fact that the convictions heretofore found against these persons have been set aside, and more than a year passed, and nothing has been done, so far as I can ascertain, I, therefore, recommend that former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department of the Borough of Edgewater.

10

Very truly yours,
(Signed) J. J. Kennedy.

I HEREBY CERTIFY, that the foregoing is a true copy of a communication received, and read at a Regular Meeting of the Mayor, and Council of the Borough of Edgewater, Edgewater, held December 4, 1928.

20

(Signed) PETER F. O'BRIEN.

(SEAL).

Resolution Of Reinstatement

30

BOROUGH OF EDGEWATER

NEW JERSEY

RESOLUTION

EDGEWATER, N. J., December 4, 1928.

WHEREAS the Police Commissioner has recommended that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department. THEREFORE, BE IT RESOLVED, that the recommendation of

40

Resolution of Reinstatement.

10 the Police Commissioner be approved, and adopted, and BE IT FURTHER RESOLVED that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the police department, said reinstatement to take effect immediately.

(Signed) J. J. KENNEDY.

Seconded by Mr. Scheld. On roll call the vote was as follows:

Mr. Kennedy, Yes; Mr. Moutenot, Pass; Mr. Finley, Yes; Mr. Murphy, Pass; Mr. Gaul, Yes; Mr. Scheld, Yes.

20 I HEREBY CERTIFY that the foregoing is a true copy of a resolution passed by the Mayor and Council of the Borough of Edgewater, at a Regular Meeting held December 4, 1928.

(Signed) PETER F. O'BRIEN.

(SEAL).

A true copy.

FRED L. BLOODGOOD,
CLERK.

30

40

Affidavit Of James J. Kennedy

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

<p style="text-align: center;">MEYER HILLEL, assignee of EDWARD PICKERING, <i>Plaintiff,</i></p>	}	10
--	---	----

vs.

<p style="text-align: center;">BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	}	Action at Law. Affidavit.
--	---	------------------------------

20

STATE OF NEW JERSEY, {
COUNTY OF BERGEN. } ss:

JAMES J. KENNEDY, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am a member of the Borough Council of the Borough of Edgewater, the governing body of the Borough of Edgewater, the defendant in the above-entitled cause. 30

2. I am the Chairman of the Police Committee and Police Commissioner of the Borough Council of the Borough of Edgewater, and have been such Chairman and Police Commissioner since February 15, 1927, and for some time prior thereto.

3. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as a member of the Police Department of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928. 40

Affidavit of James J. Kennedy.

10 4. Plaintiff's assignor did not, at any time, file with me, as Chairman of the Police Committee or Police Commissioner, a written request requesting his reinstatement as a member of the Police Department of the Borough of Edgewater, between the date of his suspension as a member of the Police Department on February 15, 1927, until December 4, 1928, the day on which plaintiff's assignor was reinstated as a member of the Police Department of the Borough of Edgewater, by resolution adopted, on that day, by the Mayor and Council.

20 5. The proposition of reinstating the plaintiff's assignor as a member of the Police Department of the Borough of Edgewater, was discussed, in an informal way, between the Mayor, other members of the Borough Council, William George, the attorney for the plaintiff, and myself, sometime during the latter part of November, 1928, but no official action of any kind was taken by the Mayor and Council until the regular meeting of the Mayor and Council of the Borough of Edgewater, held on December 4, 1928, when the plaintiff's assignor was
30 reinstated as a member of the Police Department of the Borough of Edgewater, by resolution adopted by the Mayor and Council of the Borough of Edgewater, on said day.

Sworn and Subscribed to
before me this Fifth day of } James J. Kennedy.
April, 1929. }

Richard Gaul,
Notary Public of N. J.
(SEAL)

Affidavit Of Peter F. O'Brien

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

10

Action at Law.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss:

20

PETER F. O'BRIEN, being duly sworn, according to law, on his oath deposes and says:

1. I am the Borough Clerk of the Borough of Edgewater, and have been Borough Clerk of said Borough for more than fourteen years last past, and have in my care and sustody as Borough Clerk the minutes of all meetings of the Mayor and Council, and also all communications and other papers of the Borough of Edgewater.

30

2. I have examined the minutes of the meetings of the Mayor and Council of the Borough of Edgewater, between February 15, 1927, and December 4, 1928, and do not find any record of any resolution adopted by the Mayor and Council of the Borough of Edgewater whereby the Mayor and Council of the Borough of Edgewater agreed to reinstate the plaintiff's assignor upon condition that he would waive any salary due him for the period of his suspension, or that the plaintiff's assignor

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Affidavit of Peter F. O'Brien.

would be reinstated on condition that he would waive half of the salary due him during the period of his suspension.

10 3. I have also examined said minutes between February 15, 1927, and December 4, 1928, to ascertain whether or not any legal proceedings were instituted by the plaintiff or the plaintiff's assignor to set aside or have declared illegal the resolution adopted by the Mayor and Council at a regular meeting held on February 15, 1927, whereby the Mayor and Council suspended the plaintiff's assignor, and do not find recorded therein any record of any legal proceedings having been instituted by the plaintiff or the plaintiff's assignor since February 15, 1927, to determine the validity of the resolution adopted by the Mayor and Council of the Borough of Edgewater, on February 15, 1927, neither do I find any communications on file as having been received from the plaintiff's assignor requesting his reinstatement as a member of the Police Department of the Borough of Edgewater.

20

30 Sworn and Subscribed to }
before me this Fifth day of } Peter F. O'Brien.
April, 1929. }

Richard Gaul,
Notary Public of N. J.
(SEAL)

Affidavit Of John F. Dinan

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT
HUDSON COUNTY

<p>MEYER HILLEL, assignee of EDWARD PICKERING, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	}	<p>Action at Law. Affidavit.</p>
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STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } ss:

JOHN F. DINAN, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am the Mayor of the Borough of Edgewater, in the County of Bergen and State of New Jersey.

30

2. I have not been served with any legal papers or process of any kind in any action instituted by or on behalf of the plaintiff's assignor in the above-entitled action, to set aside and vacate the resolution adopted February 15, 1927, by the Mayor and Council of the Borough of Edgewater, suspending plaintiff's assignor from services as a member of the Police Department of the Borough of Edgewater.

3. The proposition of reinstating the plaintiff's assignor, as a member of the Police Department of the Borough of Edgewater, was discussed, in an

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Affidavit of John F. Dinan.

informal way, between members of the Borough Council, William George, the attorney for the plaintiff, and myself, on two or three occasions, but no official action of any kind was taken by the Mayor and Council of the Borough of Edgewater until the regular meeting of the Mayor and Council held on December 4, 1928, at which time, a resolution was adopted approving a report of the Police Commissioner recommending reinstatement of the plaintiff's assignor.

4. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as a member of the Police Department of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928, and the Borough of Edgewater is not, at this time, indebted to the plaintiff in any sum of money.

Sworn and Subscribed to
before me this Fifth day of
April, 1929. } John F. Dinan.

Richard Gaul,
Notary Public of N. J.

(SEAL)

A true copy.

Fred L. Bloodgood, Clerk.

Order Striking Out Answer

[Filed June 15, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

<p>MEYER HILLEL, assignee of EDWARD PICKERING, <i>Plaintiff,</i></p>	10
--	----

vs.

<p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	20
--	----

Action At Law
Order

Due notice having been given to the above named defendant on a motion to strike out the answer filed by defendant, and the same coming on for argument in the presence of William George, Attorney of Plaintiff and William E. Ellis, attorney of defendant, and the Court having heard and considered the arguments of counsel to the respective parties, and having considered the affidavits and exhibits submitted by the respective parties, and it appearing to the Court that the said Answer is sham or frivolous, or both, and discloses no defense to the said action, it is, on motion of the said William George, Attorney for said Plaintiff, on this 24th day of May, 1929.

ORDERED, that the defendant's answer be and the same is hereby stricken out as sham, or frivolous or both, and because said answer discloses no defense to the said action.

Frank E. Cleary,
Judge.

Notice Of Motion For Order For Summary Judgment

NEW JERSEY SUPREME COURT

HUDSON COUNTY

10

MEYER HILLEL, assignee of
EDWARD PICKERING,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

20

Action At Law
Notice of Motion

To: WILLIAM E. ELLIS, ESQ.,
Attorney of Defendant.

30

SIR: TAKE NOTICE, that on Saturday, the 15th day of June, 1929, at ten o'clock (Daylight Saving Time) in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Honorable Samuel Kalisch, Justice of the Supreme Court, at the Court House, Jersey City, N. J., for an order for summary judgment in favor of the plaintiff and against the defendant in the above entitled cause.

Respectfully yours,
William George,
Attorney of Plaintiff.

40

Affidavit Of William George

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

<p style="text-align: center;">MEYER HILLEL, assignee of EDWARD PICKERING, <i>Plaintiff,</i></p>	10
--	----

vs.

<p style="text-align: center;">BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	20
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} Action At Law
} Affidavit

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS

WILLIAM GEORGE, of full age, being duly sworn according to law, on his oath, deposes and says:

I am the Attorney of the plaintiff in the above entitled cause. Defendant filed an answer to the complaint filed by me on behalf of the plaintiff. 30

Within due and proper time, I caused to be served on William E. Ellis, Attorney of the defendant, Borough of Edgewater, a notice of motion to strike out said answer filed by defendant, upon the ground that same was sham or frivolous or both and to which said notice of motion I annexed affidavits and exhibits for use upon the argument on said motion to strike out. 40

Said motion was duly argued before Honorable Frank E. Cleary, sitting as Judge of the Hudson Circuit of New Jersey Supreme Court. Mr. Ellis,

Affidavit of William George.

Borough Attorney of defendant, Borough of Edgewater, was present at said argument and submitted his argument in opposition to the motion to strike out.

10 Upon said argument the affidavits in behalf of plaintiff and defendant were read and submitted to his Honor Judge Cleary.

By direction of Judge Cleary, memorandums were submitted by me on behalf of plaintiff and by Mr. Ellis on behalf of the defendant, Borough of Edgewater.

20 Judge Cleary, having considered the arguments of counsel to the respective parties, the affidavits and exhibits and the memorandums submitted by each of the parties did, thereupon on May 24th, 1929, make an order striking out defendant's answer as sham, or frivolous or both, and because said answer disclosed no defense to the said action.

Annexed hereto is the original of said order signed by Judge Cleary.

30 Sworn and subscribed to }
before me this 7th day of } William George.
June, 1929. }

Margaret M. Driscall,
Notary Public of New Jersey.

Order For Summary Judgment

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT

HUDSON COUNTY

10

MEYER HILLEL, assignee of
EDWARD PICKERING,

Plaintiff,

vs.

BOROUGH OF EDGEWATER,

Defendant.

Action At Law
Order For
Summary
Judgment

20

Upon reading the affidavit of William George, Attorney of plaintiff, and the order striking out the above named defendant's answer, and due notice of motion for an order for summary judgment having been served upon defendant's attorney,

It is, upon motion of William George, Attorney of plaintiff, on this 15th day of June, 1929, ORDERED, that final judgment be and the same is hereby entered in favor of the plaintiff and against the defendant, for the sum of Four thousand five hundred and twelve dollars and eight cents (\$4,512.08) and costs.

30

Samuel Kalisch,
Justice Supreme Court.

40

Judgment Appealed From

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT

10	<p>MEYER HILLEL, assignee of EDWARD PICKERING, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	<p>Action At Law</p> <p>Judgment</p>
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20 Afterwards, upon proceedings duly had according to the Statute, the Court ordered the said answer to be stricken out as sham, or frivolous, or both, and because said answer disclosed no defense to the said action.

30 Whereupon it is adjudged that the plaintiff, Meyer Hillel, Assignee of Edward Pickering, do recover of the said defendant, Borough of Edgewater, the sum of four thousand five hundred and twelve dollars and eight cents, together with his costs, which have been taxed at the sum of sixty-four dollars and fourteen cents, making in the whole the sum of four thousand five hundred and seventy-six dollars and twenty-two cents.

\$4,512.08
64.14

\$4,576.22

Judgement entered and signed June 18, 1929.

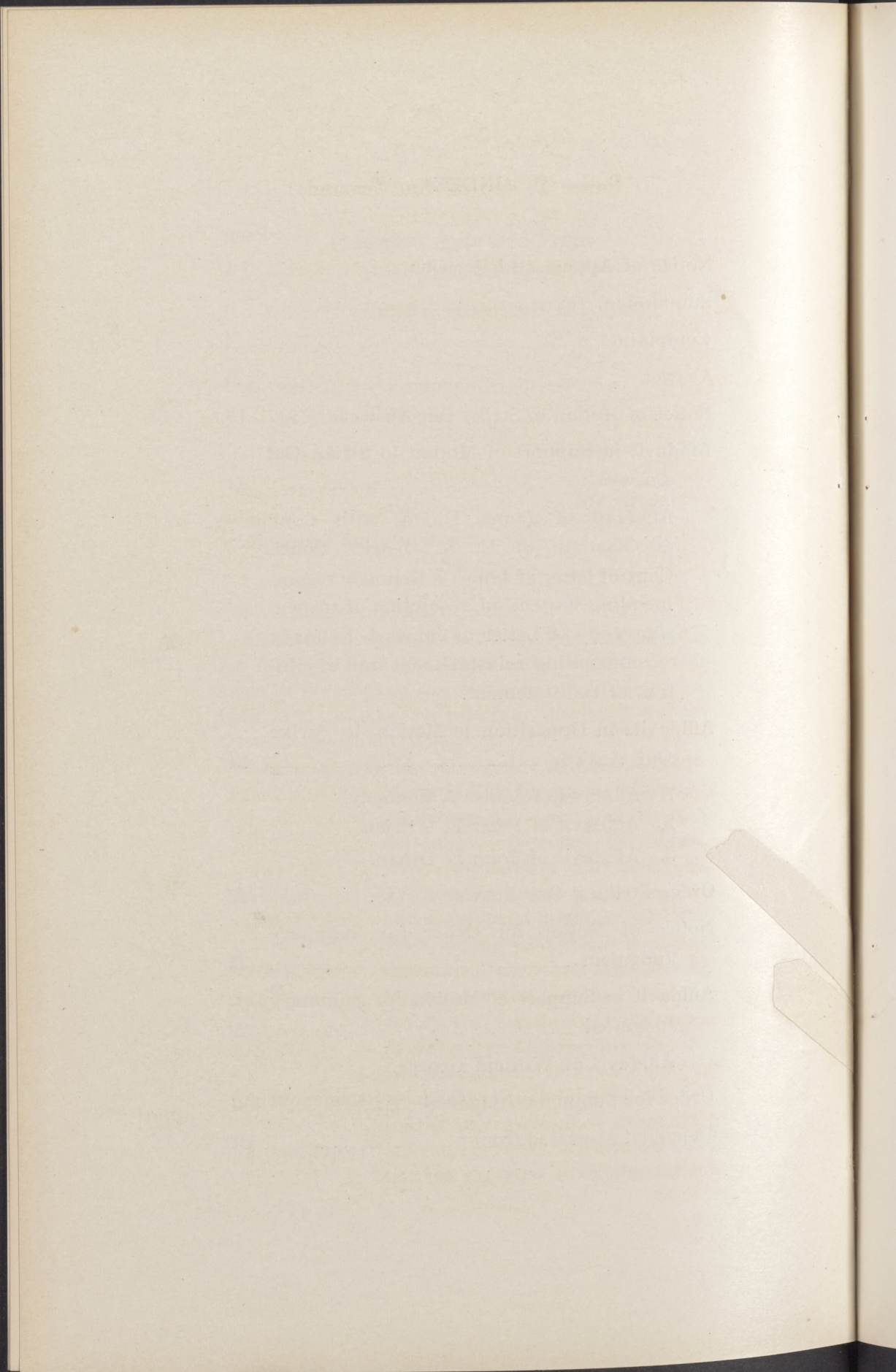
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A true copy.

Wm. S. Gummere,
Chief Justice.
Fred L. Bloodgood,
Clerk.

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Notice Of Appeal And Grounds

[Filed July 25, 1929]

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

10

Action at Law.
Notice of Appeal
and Grounds.

20

To William George, Attorney of Plaintiff, Meyer Hillel, Assignee of James Dinan:

TAKE NOTICE that the defendant, Borough of Edgewater hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

30

1. Because the Court erroneously struck out the answer of the Defendant.

2. Because the Court erroneously ordered final judgment entered in favor of the plaintiff and against the Defendant.

3. Because the Court erroneously struck out the defendant's first separate defense.

4. Because the Court erroneously struck out the defendant's second separate defense.

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5. Because the Court erroneously struck out the defendant's sixth separate defense.

Notice of Appeal and Grounds.

6. Because the Court erroneously struck out the defendant's eighth separate defense.

7. Because the Court erroneously struck out the defendant's ninth separate defense.

10

Respectfully yours,

WILLIAM E. ELLIS,

Attorney for Defendant, Borough of Edgewater.

A true copy.

FRED L. BLOODGOOD, Clerk.

20

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Summons

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.THE STATE OF NEW JERSEY To BOROUGH OF
EDGEWATER:

10

You are summoned to answer the annexed complaint of MEYER HILLEL, assignee of JAMES DINAN, in an action at law in the New Jersey Supreme Court; AND TAKE NOTICE, that unless you file your answer to said complaint, with the Clerk of the New Jersey Supreme Court, at Trenton, 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.

20

WILLIAM S. GUMMERE, ESQ.,

Chief Justice of the New Jersey Supreme Court,
at Trenton, N. J., this 5th day of March, A. D.,
1929.

30

FRED L. BLOODGOOD,
Clerk.WILLIAM GEORGE,
Attorney.

40

Complaint

[Filed March 22, 1929]

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

MEYER HILLEL, Assignee of
 JAMES DINAN,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
 Complaint.

20

Plaintiff, Meyer Hillel, assignee of James Dinan, residing in the Town of North Bergen, County of Hudson and State of New Jersey, says:

1. The plaintiff's assignor now is and has been since October 5th, 1926, Chief of Police of the Borough of Edgewater, County of Bergen and State of New Jersey.

30

2. The annual salary of plaintiff's assignor as such Chief of Police of the Borough of Edgewater as fixed by law, is and was during the times hereinafter stated, Three thousand two hundred and fifty (\$3,250.) Dollars, payable semi-monthly, on the first and fifteenth days of each and every month.

40

3. Plaintiff's assignor was at all times herein stated ready, and willing to perform the services in due course of his duty as such Chief of Police of the Borough of Edgewater, but said plaintiff's assignor was not permitted by defendant so to do, but on the contrary, the defendant, without legal or justifiable cause to wit, on February 15th, 1927,

Complaint.

suspended plaintiff's assignor from the performance of said services, but thereafter the said defendant, being satisfied with the illegality and impropriety of such suspension did, on December 4th, 1928, reinstate plaintiff's assignor, whereupon plaintiff's assignor entered upon his said duties as Chief of Police from which date and until the present date plaintiff's assignor performed and still does perform the services required of him as such Chief of Police.

10

4. Defendant has failed to pay plaintiff's assignor his salary fixed by law for the period aforesaid, to wit, between February 15th, 1927 and December 4th, 1928, and during which period plaintiff's assignor was not permitted by defendant to perform the services aforesaid and the defendant is indebted to plaintiff's assignor therefor in the sum of Five thousand eight hundred and sixty-seven dollars and ninety-five cents (\$5,867.95) representing the amount of salary due plaintiff's assignor for said period, less the sum of One hundred and seventeen dollars and thirty-six cents (\$117.36) representing two per centum (2%) of said salary, required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater.

20

30

5. The said James Dinan, did, in writing, assign, transfer and set over to the said Meyer Hillel, the plaintiff herein, all his right, title and interest in and to the claim for damages aforesaid.

Plaintiff demands as damages the sum of Five thousand seven hundred and fifty dollars and fifty-nine cents (\$5,750.59).

WILLIAM GEORGE,
Attorney for Plaintiff.

40

Answer

[Filed March 26, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff.

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Answer.

20

Defendant, a Municipal Corporation of the County of Bergen, in the State of New Jersey, says:

1. It denies Paragraph 1 of the Complaint.
2. It denies Paragraph 2 of the Complaint, except that it admits that the annual salary of the Chief of Police of the Borough of Edgewater is \$3,250., payable in semi-monthly payments.
- 30 3. It denies Paragraph 3 of the Complaint, except that it admits that plaintiff's assignor was suspended on February 15, 1927, and that the plaintiff's assignor was reinstated on December 4, 1928, since which time plaintiff's assignor has performed the services required of him as Chief of Police.
4. It admits that it has not paid plaintiff's assignor any salary between February 15, 1927, and December 4, 1928, but denies the other allegations set forth in Paragraph 4 of the Complaint.
- 40 5. It has no knowledge or information sufficient to form a belief, as to the matters contained in Paragraph 5 of the Complaint.

Answer.

FIRST SEPARATE DEFENSE

That on February 15, 1927, the Mayor and Council of the Borough of Edgewater, by resolution, suspended plaintiff's assignor from performance of further duties as Chief of Police.

10

SECOND SEPARATE DEFENSE

Plaintiff's assignor failed and neglected to contest the aforesaid action of the Mayor and Council of the Borough of Edgewater, or resort to appropriate legal proceedings, and the action of said Mayor and Council remains undisputed and unreversed.

20

THIRD SEPARATE DEFENSE

Plaintiff's assignor was not, at all times, ready and willing to perform services as Chief of Police of the Borough of Edgewater, and did not, at any time, between February 15, 1927 and December 4, 1928, offer himself as ready and willing to perform such services, and did not report for duty as Chief of Police, at any time, between the dates hereinbefore mentioned.

30

FOURTH SEPARATE DEFENSE

During all the times mentioned in the Complaint, while plaintiff's assignor was under suspension, he was engaged in other employments and earned and received sums of money in excess, of the compensation he would have been entitled to receive from the defendant, had he been continued in office, and, therefore, sustained no damage.

40

Answer.

FIFTH SEPARATE DEFENSE

10 The defendant was compelled to employ and pay another person to perform services as Chief of Police in the place and stead of the plaintiff's assignor.

SIXTH SEPARATE DEFENSE

Neither plaintiff, nor plaintiff's assignor, performed any services for defendant between February 15, 1927 and December 4, 1928.

SEVENTH SEPARATE DEFENSE

20 Plaintiff's assignor had, prior to the time of suspension, been adjudged guilty of a felony in the United States District Court for the Southern District of New York, and sentenced by the Honorable I. M. Meekin, one of the Judges thereof, to serve a term of one year and one day in the United States Penitentiary, at Atlanta, Georgia.

30 By reason of the premises, plaintiff's assignor was no longer a citizen of the United States and was disqualified from holding any office or position.

EIGHTH SEPARATE DEFENSE

40 Defendant alleges, that plaintiff's assignor was legally convicted upon proper charges and suspended by the defendant, by resolution, which has never been set aside or reversed by a Court of competent jurisdiction, which action cannot be collaterally attacked in this cause.

Answer.

NINTH SEPARATE DEFENSE

The defendant is not in anywise indebted to the plaintiff.

TENTH SEPARATE DEFENSE

10

Defendant says, that plaintiff's assignor was without legal authority to assign his alleged claim to the plaintiff.

ELEVENTH SEPARATE DEFENSE

Either before, at, or during the trial, the defendant will move to strike out the Complaint, upon the ground that it does not disclose a good and sufficient cause of action, and also upon the ground that the Court has no jurisdiction to try the issues set forth in the Complaint.

20

WILLIAM E. ELLIS,
Attorney for Defendant.

30

40

Notice Of Motion To Strike Out Answer

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Notice of Motion
For Order to
Strike Out
Answer.

20

TO: WILLIAM E. ELLIS, ESQ.,
Attorney for Defendant.

30

SIR: PLEASE TAKE NOTICE, that I shall apply to his Honor Henry E. Ackerson, Jr., Judge of the Supreme Court, Hudson Circuit at the Court House, in Jersey City, New Jersey, on the 19th day of April, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the Answer and each and every separate defense therein set forth, filed by you on behalf of the above named defendant in the above stated cause, on the ground that said Answer and separate defenses, and each of them, are sham, or frivolous, or both, and shall support my application for such order by the affidavit of the plaintiff hereto attached.

40

Respectfully yours,
WILLIAM GEORGE,
Attorney for Plaintiff.

Affidavit Of James Dinan

[Filed May 29, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff.

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Affidavit.

10

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON. }ss:

JAMES DINAN, of full age, being duly sworn upon his oath, according to law, deposes and says:

I am the assignor of the plaintiff in the suit now pending in the New Jersey Supreme Court, Hudson County, in which said suit the defendant is the Borough of Edgewater. I was appointed Chief of Police of the Edgewater Police Department in October, 1926, and am still Chief of Police of said department.

30

For some time prior and subsequent to February 15th, 1927 my annual salary as such Chief of Police of the Borough of Edgewater was and still is Three thousand two hundred and fifty (\$3,250.00) Dollars, payable semi-monthly.

In the month of February, 1927, I, together with former Mayor Wissel, Edward Pickering and Alexander Flannery, all of Edgewater, were convicted upon an indictment in the United States

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Affidavit of James Dinan.

District Court for the Southern District of New York.

10 During all of the period that I was under indictment, to wit, from November, 1926, right up to my conviction, as well as thereafter, I continued the performance of my duties as a Chief of Police, without official or other interference.

20 I appealed from said conviction to the United States Circuit Court of Appeals for the Second Circuit, which appeal was determined by said Appellant Court and my conviction and the conviction of those who were co-defendants with me, above named, was reversed, and revoked and the sentences theretofore imposed set aside, as evidenced by the order of reversal filed in the United States District Court, for the Southern District of New York, on August 14th, 1928, a certified copy of which is hereto annexed.

30 At the time of my illegal conviction and for some time thereafter, I continued as theretofore to perform my duties as a member of the Police Department of the Borough of Edgewater and until I was suspended and prevented from further performance of said duties as such police officer by a Resolution of the Mayor and Council of the Borough of Edgewater, which said Resolution adopted the recommendation or suspension made to said Mayor and Council by one of the defendant's Councilmen, the Chairman of the Police Committee, a certified copy of which recommendation and resolution or suspension being hereto annexed.

40 During all the period of my suspension, to wit, from February 15th, 1927, to the date of my reinstatement on December 4th, 1928, I was ready, willing and able to perform my duties as such police officer but was prevented from doing so by reason of said suspension.

Affidavit of James Dinan.

At no time during the whole period of my suspension was I ever served with charges of any kind or nature whatsoever, nor was I ever given a hearing upon any charges, nor were any charges filed or preferred against me.

I have repeatedly requested my reinstatement as a member of the Edgewater Police Department and repeated petitions or requests were made in my behalf through my attorney, William George, all of which requests or petitions were refused until December 4th, 1928. 10

Prior to my reinstatement as aforesaid, and during the several occasions when I as well as my attorney were endeavoring to obtain my reinstatement, the defendant agreed to my reinstatement upon condition that I would waive the salary due me for the period of my suspension and I am reliably informed by my Attorney that such proposal was made to him and was rejected by both my attorney and myself. Subsequently the proposal was made by the Mayor and Council, and upon this I am also reliably informed by my attorney, that the defendant Mayor and Council would consent to reinstate me provided I waived half of the salary due me during the period of my suspension and this proposal was likewise rejected by me, through my said attorney. 20 30

As aforesaid, I was thereupon reinstated on December 4th, 1928 by a resolution adopted by the Mayor and Council of the Borough of Edgewater upon the recommendation of the Chairman of the Police Committee, which latter person is also a member of the Board of Council, a certified copy of which recommendation of the Police Commissioner and certified copy of the Resolution of reinstatement based upon said recommendation are hereto annexed. 40

Affidavit of James Dinan.

10 I have not received from the Borough of Edgewater any salary for the period of my suspension, to wit, February 15th, 1927 to December 4th, 1928, though I have always been ready, willing and able to perform the duties required by me as such member of said Police Department of the Borough of Edgewater, but was prevented from performing said duties by reason of my suspension as aforesaid.

20 The amount due me from the Borough of Edgewater for such salary during said period of suspension, less the sum of One hundred and seventeen dollars and thirty-six cents (\$117.36) representing two per cent (2%) of said salary required by law to be deducted for the Pension Fund Commission of the Borough of Edgewater, amounts to Five thousand eight hundred and sixty-seven dollars and ninety-five cents (\$5,867.95).

On March 4th, 1929, I assigned all of my right, title and interest in the aforesaid sum due me from the Borough of Edgewater to Meyer Hillel.

30 Sworn and Subscribed to }
before me this 28th day of } James Dinan.
March, 1929. }

Margaret M. Driscoll,
Notary Public of New Jersey.

At a stated term of the District Court of the United States for the Southern District of New York held on the — day of August, 1928.

40 PRESENT:
HON.

United States District Judge.

Copy Of Mandate Of U. S. District Court

UNITED STATES OF AMERICA

—against—

HENRY WISSEL, JAMES A. DINAN, } C46-69
ALEXANDER A. FLANNERY, and
EDWARD A. PICKERING.

10

This cause having heretofore come on for hearing before this court for an indictment and the said Henry Wissel, James A. Dinan, Alexander A. Flannery and Edward A. Pickering having pleaded not guilty to the said indictment, and the said indictment having duly come on before this court for trial, the trial having been had thereon and a verdict of guilty having been entered against the said defendants: and the said Henry Wissel and James A. Dinan having each been sentenced to the Federal Penitentiary at Atlanta for one year and one day, and the said Alexander A. Flannery and Edward A. Pickering having been sentenced to nine months, and the sentence of said Alexander A. Flannery and Edward A. Pickering having been suspended, and the said defendants having been placed upon probation by the Court,

20

30

And the said defendants above named having thereafter sued out writs of error in the United States Circuit Court of Appeals for the Second Circuit to review the judgment and sentence made by the said court as aforesaid, and having transmitted to this court its mandate by which it appears that at the October Term of the said United States Circuit Court of Appeals for the year 1927, this cause came on to be heard by said court and was argued therein, and on consideration of the

40

Copy of Mandate of U. S. District Court.

said cause it was ordered, adjudged and decreed by the said United States Circuit Court of Appeals that the judgment of this court in this cause be reversed and set aside and the sentences therein imposed be set aside as to all of the defendants above named.

10

NOW, upon reading and filing the said mandate and on motion of David V. Cahill, attorney for said defendants, it is hereby

20

ORDERED, adjudged and decreed that the judgment and order of the United States Circuit Court of Appeals for the Second Circuit in this cause, be and the same hereby is made the judgment of this court, and that the judgment herein entered in this cause be, and the same hereby is rversed and revoked and the sentences heretofore imposed herein upon the defendants, Henry Wissel, James A. Dinan, Alexander A. Flannery and Edward A. Pickering be and they are hereby set aside.

I. M. MEEKINS,
United States District Judge.

A True Copy.

30

ALEX. GILCHRIST, JR., Clerk.

(SEAL)

O.K.

M.C.G.

8/14/28

Filed

40

**Copy Of Letter Of James J. Kennedy
Recommending Suspension**

BOROUGH OF EDGEWATER
NEW JERSEY

Municipal Building

(SEAL)

Peter F. O'Brien,
Borough Clerk

10

Edgewater, N. J., February 15, 1927

To The Honorable,
The Mayor and Council,
Borough of Edgewater,
Edgewater, N. J.
Gentlemen:

20

I beg to advise that Chief of Police Dinan, and Officers Pickering, and Flannery were convicted, and sentenced for violation of a United States Statute, in the Federal Court for the Southern District of New York, and I suspend them, and recommend that the hearing of these three members of the Police Department upon this charge be withheld until the appeals have been completed.

Very truly yours,

30

(Signed) JAMES J. KENNEDY,

Police Commissioner.

I HEREBY CERTIFY that the foregoing is a true copy of a communication offered by Councilman James J. Kennedy, at a Regular Meeting of the Mayor and Council of the Borough of Edgewater, held February 15, 1927.

40

(SEAL)

PETER F. O'BRIEN,
Borough Clerk.

Resolution Of Suspension

BOROUGH OF EDGEWATER
NEW JERSEY

(SEAL) RESOLUTION

Edgewater, N. J., February 15, 1927

10 RESOLVED:

That the action of the Police Commissioner be approved; the recommendation adopted, and that Chief of Police Dinan, and Officers Pickering, and Flannery remain suspended until further notice. AND FURTHER RESOLVED, that this resolution shall take effect immediately.

(Signed), HENRY R. GAUL.

Seconded by Mr. Scheld. All Councilmen voting in favor.

20

I HEREBY CERTIFY, that the foregoing is a true copy of a resolution passed by the Mayor and Council of the Borough of Edgewater, at a Regular Meeting held February 15, 1927.

PETER F. O'BRIEN,

(SEAL)

Borough Clerk.

Copy Of Letter Of James J. Kennedy Recommending Reinstatement

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BOROUGH OF EDGEWATER
NEW JERSEY

Municipal Building

(SEAL)

Peter F. O'Brien,
Borough Clerk.

Edgewater, N. J., December 4, 1923.

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Honorable Mayor and Council,
Borough of Edgewater, N. J.
Gentlemen:

I am in receipt of written applications for re-

*Copy of Letter of James J. Kennedy,
Recommending Reinstatement.*

instatement by former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, and in view of the fact that the convictions heretofore found against these persons have been set aside, and more than a year passed, and nothing has been done, so far as I can ascertain, I, therefore, recommend that former Chief of Police James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department of the Borough of Edgewater.

Very truly yours,

(Signed) J. J. KENNEDY.

I HEREBY CERTIFY, that the foregoing is a true copy of a communication received, and read at a Regular Meeting of the Mayor, and Council of the Borough of Edgewater, Edgewater, held December 4, 1928.

PETER F. O'BRIEN,

(SEAL)

Borough Clerk.

Resolution Of Reinstatement

BOROUGH OF EDGEWATER

NEW JERSEY

(SEAL)

RESOLUTION

Edgewater, N. J., December 4, 1928.

WHEREAS the Police Commissioner has recommended that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department. THEREFORE, BE IT RESOLVED, that the recommendation of the

Resolution of Reinstatement.

10 Police Commissioner be approved, and adopted, and BE IT FURTHER RESOLVED, that former Chief of Police, James Dinan, and Officers Edward Pickering, and Alexander Flannery, be reinstated to their former positions in the Police Department, said reinstatement to take effect immediately.

(Signed) J. J. KENNEDY.

Seconded by Mr. Scheld. On roll call the vote was as follows: Mr. Kennedy, Yes; Mr. Moutenot, Pass; Mr. Finley, Yes; Mr. Murphy, Pass; Mr. Gaul, Yes; Mr. Scheld, Yes.

20 I HEREBY CERTIFY, that the foregoing is a true copy of a resolution passed by the Mayor and Council of the Borough of Edgewater, at a regular meeting held December 4, 1928.

PETER F. O'BRIEN,

(SEAL)

Borough Clerk.

A true copy.

FRED L. BLOODGOOD, Clerk.

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Affidavit Of James J. Kennedy

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p>MEYER HILLEL, Assignee of JAMES DINAN, <i>Plaintiff,</i></p>	10
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vs.

<p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	20
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Action at Law.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } ss:

JAMES J. KENNEDY, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am a member of the Borough Council of the Borough of Edgewater, the governing body of the Borough of Edgewater, the defendant in the above-entitled cause. 30

2. I am the Chairman of the Police Committee and Police Commissioner of the Borough Council of the Borough of Edgewater, and have been such Chairman and Police Commissioner since February 15, 1927, and for sometime prior thereto.

3. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as Chief of Police of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928. 40

Affidavit of James J. Kennedy.

10 4. Plaintiff's assignor did not, at any time, file with me, as Chairman of the Police Committee or Police Commissioner, a written request requesting his reinstatement as Chief of Police of the Borough of Edgewater, between the date of his suspension as such Chief of Police on February 15, 1927, until December 4, 1928, the day on which plaintiff's assignor was reinstated as Chief of Police of the Borough of Edgewater, by resolution adopted, on that day, by the Mayor and Council.

20 5. The proposition of reinstating the plaintiff's assignor as Chief of Police of the Borough of Edgewater, was discussed, in an informal way, between the Mayor, other members of the Borough Council, William George, the attorney for the plaintiff, and myself, sometime during the latter part of November, 1928, but no official action of any kind was taken by the Mayor and Council until the regular meeting of the Mayor and Council of the Borough of Edgewater, held on December 4, 1928, when the plaintiff's assignor was reinstated as Chief of Police of the Borough of Edgewater, by resolution adopted by the Mayor and Council of the Borough of Edgewater on said day.

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Sworn and subscribed to
before me this Fifth day of } James J. Kennedy.
April, 1929. }

Richard Gaul,
Notary Public of N. J.
(SEAL)

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Affidavit Of Peter F. O'Brien

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p>MEYER HILLEL, Assignee of JAMES DINAN, <i>Plaintiff,</i></p>	<p>Action at Law. Affidavit.</p>
<p>vs.</p>	
<p>- BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	

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STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } ss:

PETER F. O'BRIEN, being duly sworn, according to law, on his oath deposes and says:

1. I am the Borough Clerk of the Borough of Edgewater, and have been Borough Clerk of said Borough for more than fourteen years last past, and have in my care and custody as Borough Clerk the minutes of all meetings of the Mayor and Council, and also all communications and other papers of the Borough of Edgewater.

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2. I have examined the minutes of the meetings of the Mayor and Council of the Borough of Edgewater, between February 15, 1927, and December 4, 1928, and do not find any record of any resolution adopted by the Mayor and Council of the Borough of Edgewater whereby the Mayor and Council of the Borough of Edgewater agreed to reinstate the plaintiff's assignor upon condition

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Affidavit of Peter F. O'Brien.

that he would waive any salary due him for the period of his suspension, or that the plaintiff's assignor would be reinstated on condition that he would waive half of the salary due him during the period of his suspension.

10 3. I have also examined said minutes between February 15, 1927, and December 4, 1928, to ascertain whether or not any legal proceedings were instituted by the plaintiff or the plaintiff's assignor to set aside or have declared illegal the resolution adopted by the Mayor and Council at a regular meeting held on February 15, 1927, whereby the Mayor and Council suspended the plaintiff's assignor, and do not find
 20 recorded therein any record of any legal proceedings having been instituted by the plaintiff or the plaintiff's assignor since February 15, 1927, to determine the validity of the resolution adopted by the Mayor and Council of the Borough of Edgewater, on February 15, 1927, neither do I find any communications on file as having been received from the plaintiff's assignor requesting his reinstatement as Chief of Police of the Borough of Edgewater.

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Sworn and Subscribed to
 before me this Fifth day of } Peter F. O'Brien.
 April, 1929.

Richard Gaul,
 Notary Public of N. J.
 (SEAL)

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Affidavit Of John F. Dinan

[Filed June 11, 1929]

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

<p>MEYER HILLEL, Assignee of JAMES DINAN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	<p>} Action at Law. Affidavit.</p>	<p>10</p> <p>20</p>
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STATE OF NEW JERSEY, } ss:
COUNTY OF BERGEN. }

JOHN F. DINAN, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am the Mayor of the Borough of Edgewater, in the County of Bergen and State of New Jersey. 30
2. I have not been served with any legal papers or process of any kind in any action instituted by or on behalf of the plaintiff's assignor in the above-entitled action, to set aside and vacate the resolution adopted February 15, 1927, by the Mayor and Council of the Borough of Edgewater, suspending plaintiff's assignor from services as Chief of Police.
3. The proposition of reinstating the plaintiff's assignor as Chief of Police of the Borough of Edgewater, was discussed, in an informal way, between members of the Borough Council, William George, 40

Affidavit of John F. Dinan.

10 the attorney for the plaintiff, and myself, on two or three occasions, but no official action of any kind was taken by the Mayor and Council of the Borough of Edgewater until the regular meeting of the Mayor and Council held on December 4, 1928, at which time a resolution was adopted approving a report of the Police Commissioner recommending reinstatement of the plaintiff's assignor.

4. Neither the plaintiff, nor the plaintiff's assignor, in the above-entitled cause, performed any services for the Borough of Edgewater, as Chief of Police of the Borough of Edgewater, or otherwise, between February 15, 1927, and December 4, 1928, and the Borough of Edgewater is not, at this time, indebted to the plaintiff in any sum of money.

20 Sworn and Subscribed to }
before me this Fifth day of } John F. Dinan.
April, 1929.

Richard Gaul,
Nctary Public of N. J.
(SEAL)
A true copy.

30 FRED L. BLOODGOOD, Clerk.

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Order Striking Out Answer

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

MEYER HILLEL, Assignee of
JAMES DINAN,

Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

Action at Law.
Order
Striking Out
Answer.

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Due notice having been given to the above named defendant on a motion to strike out answer filed by defendant, and the same coming on for argument in the presence of William George, Attorney of Plaintiff and William E. Ellis, Attorney of Defendant, and the Court having heard and considered the arguments of counsel to the respective parties, and having considered the affidavits and exhibits submitted by the respective parties, and it appearing to the Court that the said Answer is sham or frivolous, or both and disclosed no defense to the said action, it is, on motion of the said William George, Attorney for said Plaintiff, on this 24th day of May, 1929,

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ORDERED, that the defendant's answer be and the same is hereby stricken out as sham, or frivolous or both, and because said answer discloses no defense to the said action.

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FRANK E. CLEARY,

Judge.

**Notice Of Motion For Order For Summary
Judgment**

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

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MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff,

vs.

BOROUGH OF EDGEWATER,
Defendant.

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} Action at Law.
} Notice of
} Motion.

To: William E. Ellis, Esq.,
Attorney of Defendant.

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SIR: TAKE NOTICE that on Saturday, the 15th day of June, 1929, at ten o'clock (Daylight Saving Time) in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Honorable Samuel Kalisch, Justice of the Supreme Court, at the Court House, Jersey City, New Jersey, for an order for summary judgment in favor of the plaintiff and against the defendant in the above entitled cause.

Respectfully yours,

WILLIAM GEORGE,
Attorney of Plaintiff.

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Affidavit Of William George

[Filed June 18, 1929]

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p style="text-align: center;">MEYER HILLEL, Assignee of JAMES DINAN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	}	<p style="text-align: center;">Action at Law, Affidavit.</p>
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STATE OF NEW JERSEY, } ss:
COUNTY OF HUDSON. }

WILLIAM GEORGE, of full age, being duly sworn according to law, on his oath, deposes and says:

I am the Attorney of the plaintiff in the above entitled cause. Defendant filed an answer to the complaint filed by me on behalf of the plaintiff.

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Within due and proper time, I caused to be served on William E. Ellis, Attorney of the defendant, Borough of Edgewater, a notice of motion to strike out said answer filed by defendant, upon the ground that same was sham or frivolous or both and to which said notice of motion I annexed affidavits and exhibits for use upon the argument on said motion to strike out.

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Said motion was duly argued before Honorable

Affidavit of William George.

Frank E. Cleary, sitting as Judge of the Hudson Circuit of New Jersey Supreme Court. Mr. Ellis, Borough Attorney of defendant, Borough of Edgewater, was present at said argument and submitted his argument in opposition to the motion to strike out.

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Upon said argument the affidavits in behalf of plaintiff and defendant were read and submitted to his Honor Judge Cleary.

By direction of Judge Cleary, memorandums were submitted by me on behalf of the plaintiff and by Mr. Ellis on behalf of the defendant, Borough of Edgewater.

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Judge Cleary, having considered the arguments of counsel to the respective parties, the affidavits and exhibits and the memorandums submitted by each of the parties did, thereupon on May 24th, 1929, make an order striking out defendant's answer as sham, or frivolous or both, and because said answer disclosed no defense to the said action.

Annexed hereto is the original of said order signed by Judge Cleary.

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Sworn and subscribed to
before me this 7th day of } William George.
June, 1929.

Margaret M. Driscoll,
Notary Public of New Jersey.

A true copy.

FRED L. BLOODGOOD, Clerk.

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Order For Summary Judgment
NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

<p>MEYER HILLEL, Assignee of JAMES DINAN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>BOROUGH OF EDGEWATER, <i>Defendant.</i></p>	<p>Action at Law. Order for Summary Judgment.</p>
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Upon reading the affidavit of William George, Attorney of plaintiff, and the order striking out the above named defendant's answer, and due notice of motion for an order for summary judgment having been served upon defendant's attorney,

It is, upon motion of William George, Attorney of plaintiff, on this 15th day of June, 1929, ORDERED, that final judgment be and the same is hereby entered in favor of the plaintiff and against the defendant, for the sum of Five thousand seven hundred and fifty dollars and fifty-nine cents (\$5,750.59) and costs.

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SAMUEL KALISCH,
Justice, Supreme Court.

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New Jersey Court of Errors and Appeals

MEYER HILLEL, Assignee of
JAMES DINAN,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant,

MEYER HILLEL, Assignee of
EDWARD PICKERING,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant.

MEYER HILLEL, Assignee of
ALEXANDER FLANNERY,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant.

ON APPEAL

FROM

SUPREME

COURT.

BRIEF OF DEFENDANT-APPELLANT STATEMENT

This is an Appeal from a judgment entered in the Supreme Court, as a result of a Motion to strike out the Answer filed by the defendant-appellant (P. 27, L. 1). The readily admitted facts are that the Assignor of the plaintiff appellee,

prior to the 15th day of February, 1927, was a Police Officer in the Borough of Edgewater, Bergen County, who, on the day mentioned, by resolution of the Borough Council, was suspended upon the recommendation of the Police Commissioner (P. 18, L. 10), in consequence of his conviction by a jury in the United States District Court for the Southern District of New York, upon a trial had on an Indictment for conspiracy with others to commit an offense against the United States in bringing into the United States large quantities of intoxicating liquor, contrary to the provisions of the National Prohibition Act of October 28th, 1919, and the Acts amendatory thereof and supplemental thereto (P. 15, L. 10-35).

The assignor of the plaintiff-appellee had been retained as a Police Officer in the performance of his duties from the time of his indictment (being admitted to bail) up to and for several days after the time of his conviction, and until the next regular meeting of the Mayor and Council of the Borough of Edgewater, held on February 15th, 1927.

On August 14th, 1928, by Mandate of the United States District Court, for the Southern District of New York, by virtue of a judgment of the United States Circuit Court of Appeals for the Second Circuit, which had been transmitted to the District Court for the Southern District aforesaid, the judgment of conviction above mentioned was reversed (P. 16, L. 20). There is no record of the indictment above referred to ever having been *nolle prossed*.

This suit was then instituted by the plaintiff-appellee to recover the salary to which he claimed the assignor of the plaintiff-appellee was entitled, for the period between the time of the suspension and his reinstatement.

Prior to the institution of this action the assignor of the plaintiff-appellee had been reinstated as a police officer by the Borough Council. (P. 19, L. 30).

The action in the Supreme Court was commenced March 5, 1929. (P. 3).

An Answer was filed by the Borough of Edgewater on March 22, 1929. (P. 6), which, after denying the material allegations of the complaint, set up eleven separate defenses. The 3rd, 4th, 5th, 7th and 10th separate defenses, however, were abandoned by the defendant-appellant, upon the argument of the motion to strike out the Answer.

On or about April 1, 1929, plaintiff-appellee served a Notice of Motion upon the attorney for the defendant-appellant, that he would move to strike out the Answer and apply for final judgment in the case on the ground that "said Answer and Separate Defenses and each of them *are sham*, or *frivolous*, or *both*" and the Supreme Court, by order of Mr. Justice Kalisch, approved the Order theretofore made by Circuit Court Judge Cleary striking out the Answer and signed the Order of June 15th, 1929, directing judgment final to be entered, (P. 31, L. 20 to 40) in favor of the plaintiff-appellee.

POINT 1

To Strike Out The Answer As Being SHAM Or FRIVOULOUS Or BOTH, Is Contrary To The Practice Act Of 1912, Was Illegal And Without Authority.

In the recent case of National Surety Co., vs. Mulligan (146 Atl. Rep. 372) the Court of Errors and Appeals, in an opinion written by his honor, the Chancellor, declared that:

"An Answer may be condemned as either sham or frivolous and can be struck out upon either ground, but cannot be summarily dealt with upon both grounds; but where the order recites that the defendant fails to show such facts as entitle the party to defend, the Order (although striking out the Answer as sham and frivolous) will be treated as striking it out as frivolous, when no ground of Appeal challenges it for the reason that it was struck out as both, when it should have been on one or the other head."

We seriously attack the Order which was made by the Circuit Court Judge (P. 27, L. 36) because the wording of the Order is as follows:

"Ordered, that the defendant's Answer be and the same is hereby stricken out as *sham*, or *frivolous* or *both*, and because said Answer discloses no defense to the said action,"

and because the Order *did not hold or recite that the defendant failed to show such facts as entitled it to defend.*

In the case just cited, the Court relied upon the following cases:

In re *Beam*, 93 N. J. *Equity* 593; *Fidelity & Co. v. Wilkes Barre*, 98 N. J. L. 507; *Milberg v. Keuthe*, 98 N. J. L. 779; *Sculthorpe v. Commonwealth Cas. Co.*, 98 N. J. L. 845-847.

In the case above noted, the learned Chancellor held that:

"No judgment shall be reversed or new trial granted for error of procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party."

It will be seen in the printed cases that the total amount involved in the three suits amounts to

Fourteen Thousand and Seven Hundred and Seventy-four Dollars and Seventy-five Cents (\$14,774.-75), and the substantial rights of the Borough, the defendant-appellant, would be seriously affected by judgments totaling the amount stated, if the judgments are permitted to stand.

POINT 2

The Cases Of Jardot V. Rahway, And McIntyre, Jr. V. Rahway, (127 Atl. Page 799), Which Were Relied Upon On The Motion To Strike Out, Do Not Apply To The Case SUB JUDICE, In That In The Jardot And McIntyre Cases The Relators Applied For Alternative Writs Of Mandamus, Which Were Allowed.

In the cases just cited, a Motion was made to strike out parts of the Return to each Writ. The facts in the case, as outlined in the *per curiam* opinion, recites that, on March 31, 1923, Jardot and McIntyre, who were police officers, were suspended pending charges of a serious nature against them; it was charged that they assisted in robbing a truck loaded with "Nero" supposed to be beer; they were arrested, taken to the Rahway Police Court and arraigned before the Magistrate, who discharged them for failure of proof connecting them with the robbery; subsequently, however, the charges against the officers were investigated by the Grand Jury of Union County, at the May Term 1923, and an Indictment was presented against them; the case was set down for trial; on the day fixed the relators appeared with their witnesses, ready for trial but at the instance of the State the case was postponed to another day; the Relators with their witnesses again appearing, ready for trial, and the State having no evidence to sustain the charges, the case was *nolle prosequed*. It ap-

peared that within a month after the suspension of the relators, and after the hearing an dismissal of the charges against them in the Police Court, Counsel wrote a letter to the Board of Commissioners, requesting that the relators be reinstated. On November 27, 1923, after the Indictment against the accused had been *nolle prossed*, the same request was repeated but no heed was taken. Application was then made for Alternative Writs of Mandamus. The case at bar differs very materially from the cases of Jardot and McIntyre (*supra*) in that in the Jardot and McIntyre cases there had been an arrest and charges, Indictment, and lack of proof to sustain the Indictment, and the entering of the *nolle prosequi* which disposed of the cases. As stated above there is no record of the *nolle prosequi* of the Indictment of the assignor or the plaintiff-appellee.

In the present case there was an arrest, Indictment by the Federal Grand Jury, Trial of the Indictment and the conviction of the assignor of plaintiff-appellee. Notwithstanding there was a reversal of the conviction, the language of Manton, Circuit Judge, who wrote the opinion for the United States Circuit Court of Appeals for the Second Circuit, (22 Fed. Rep. (Second Series) page 468, recites the following:

“These convictions would be affirmed *but for errors committed in the charge of the District Judge* which require our reversal of the judgment below.”

“* * * This court in *Seiden v. U. S.* (16 Fed. Second Ed. page 197) supplied the phrase which the learned court used in the charge now objected to. Its use, however, while appropriate for the questions presented in the *Seiden* case, was inappropriate here, particularly at the stage of the trial when it was used by the trial Judge. Its use could not have been designed as helpful in assisting the jury in arriving at its unbiased judgment.

However correct the legal statement was in that opinion, the use made by the trial Judge at this important hour of the jury's debate in effect and substance told them a verdict of Not Guilty was setting at defiance law and reason. It was by indirection doing what the law forbids a Judge to do directly—direct a verdict of guilty”, citing *Peterson v. United States* 213 Fed. 920; *Atchison, Topeka & Santa Fe v. United States*, 172 Fed. 194; *United States v. Taylor*, 11 Fed. 470.

“* * * Throughout the trial the plaintiffs-in-error were accompanied by the presumption of innocence, with their guilt to be established beyond a reasonable doubt, and they were denying guilt of the charge and disputing by cross-examination and counsel's representations, their connection with the crime of conspiracy. They did not testify. They relied upon the claimed uncertain character of the Government's witnesses and the alleged inconsistencies and contradiction of proof. No Judge has the power or authority by indirection to visit punishment upon anyone through forcing a jury's verdict.
* * * The supplementary instructions were effective but a breach of the right of the plaintiffs-in-error to an impartial charge, free from animated argument and coercive entreaties. What occurred deprived the plaintiffs-in-error of that fair and impartial trial the law accords to them; no matter how convincing their guilt may appear”.

It will be noted that there is a pronounced distinction between the *Jardot* and *McIntyre* cases (*supra*), because the relators faced the charges made against them and were ready for trial, but through the inability of the State to produce a case against them, the Indictments were *nolle prosequi*.

In the case of the assignor of the plaintiff-appellee, as pointed out by Judge Manton in the appeal of the assignor of the plaintiff-appellee from his conviction (*supra*), the assignor of plaintiff-appellee did not take the stand in his own defense nor deny under oath the allegations

of the Indictment; and as further pointed out by Judge Manton

“these convictions would be affirmed *but for errors committed in the charge of the District Judge* which require our reversal of the judgment below”.

POINT 3

The Assignor Of The Plaintiff-Appellee, Having Been Appointed To Public Office, Did Not Enter Into Contract With The Borough, Defendant-Appellant, And His Right To Recover Is Dependant Upon The Rendition Of The Services In The Office To Which He Was Appointed.

In Fitzpatrick, *et al* v. Passaic (143 Atl. Rep. 728) Justice Lloyd, who delivered the opinion of the Supreme Court, referred to the case of Erwin v. Jersey City (60 N. J. L. 141) and cited the case of Stuhr v. Curran (44 N. J. L. 181) wherein it was said that:

“The right to the office or compensation does not grow out of any contract between the Government and the officer, but arises from the rendition of the services”.

and cites the cases of Roberts v. Orange (102 N. J. L. 721) Hoboken v. Gear (27 N. J. L. 265) and Stuhr v. Curran (44 N. J. L. 181), stating that Roberts v. Orange, Hoboken v. Gear and Stuhr v. Curran are cited with approval, and held that from a consideration of the cases cited the right to emoluments in public office

“must be regarded as having no legal existence except as arising out of the rendition of service for which they are compensatory”.

In Fitzpatrick v. Passaic (*supra*), the Court held

“at most (plaintiff-respondent Fitzpatrick) held title to the office and nothing more” and “having performed no service there was nothing upon which they could predicate a right to compensation”.

POINT 4

There Is A Broad Distinction Between The DISMISSAL Of A Person Holding A Public Office Or Position And The SUSPENSION Of A Person Holding A Like Office Or Position.

In the case of *Van Sant v. Atlantic City* (68 N. J. L. 449), Justice Fort delivered the opinion of the Supreme Court. This was an appeal from an action brought to recover the salary of a police officer in the City of Atlantic City, and there was a demurrer to the declaration, and the Supreme Court held that “whether there was or was not a proper proceeding for dismissal cannot be inquired into collaterally. It must be reversed by a direct proceeding to set aside the illegal removal before suit for salary can be maintained, or by a mandamus to compel the City to restore him to the office,” citing *Hoboken v. Gear*, (27 N. J. L. 265).

“Aside from the objection that there was no contract between the parties, upon which the plaintiff can rely for a recovery, the action cannot be sustained upon reasons of public policy.”

“It is a new mode of trying, in a collateral way, by an action for the salary, the title to a public office.”

It will be noted in the case above cited, that the Court based the opinion upon the fact that there had been a *dismissal* of the plaintiff. If the Court goes so far as to sustain the City in its refusal to pay the salary of one who is dismissed,

how clear it must be that a broad latitude is allowed a City, or I might say any municipality, when the person was *suspended only*.

It will be noted that the Assignor of the Plaintiff-Appellee was dealt with very liberally by the Borough Council in that he was not suspended until *after* his conviction by the jury. Thus being kept in his position until he was tried by the Federal Jury indicates that, instead of attempting to oppress the assignor of plaintiff-appellee, the Borough Council afforded him every opportunity to continue in his office pending his trial.

Upon his conviction, as above noted, the Borough Council was fully justified, upon the recommendation of the Police Commissioner (P. 17 L. 20 to 30), to suspend the assignor of plaintiff-appellee "Until further Notice," as provided for in the resolution ordering his suspension, (P. 18 L. 10 to 20).

In *Keegle v. County of Hudson* (99 N. J. L. 26) affirmed in (102 N. J. L. 219) upon the opinion of the Supreme Court, the case of *Van Sant v. Atlantic City* (*supra*) was cited with approval. In the case of *Keegle v. County of Hudson* (*supra*), the Supreme Court said:

"We think that public policy forbids the settlement of contested issues as to the legality of municipal action in the matter of offices or positions in a suit for salary where the right to salary is dependent on the legality of a discharge, especially in a case where the Civil Service Act provides a prompt and effective method to settle the question before bringing suit for salary. The rule seems to be well settled in this State that in the absence of any judicial ascertainment of the illegality of the discharge, or any agreement that it was illegal, no suit for salary for any period when the plaintiff did not actually perform the service will lie until the illegality is admitted, or ascertained by a proper proceeding."

The rule enunciated in the case of *Keegle v. County of Hudson* (*supra*) was recognized and made the basis of decision in the case of *Lillis v. County of Hudson*, reported with the *Keegle* Case (*supra*) and also affirmed by the Court of Errors on the opinion of the Supreme Court (102 N. J. L. 220).

In *Hoboken v. Gear* (27 N. J. L. 265) a suit was brought by a police officer for his salary after removal, as he alleged without cause, and Chief Justice Green stated the rule to be that:

“Aside from the objection that there is no contract between the parties, upon which the plaintiff can rely for a recovery, the action ought not to be sustained upon principles of public policy. It is a new mode of trying, in a collateral way, by an action for the salary, the title to a public office.”

“ * * * * If the plaintiff was improperly removed, the law furnishes other and more efficient and appropriate remedies.”

It will be observed that this case also was one to recover salary for dismissal. This was referred to in *Keegle v. County of Hudson*, and *Lillis v. County of Hudson*, above noted.

In *Dinkel v. County of Hudson*, which is the latest judicial expression of our Courts upon the subject, (136 Atl. Rep. 420), which was affirmed by the Court of Errors (141 Atl. Rep. 919), upon the opinion of the Supreme Court; the Supreme Court said:

“As was pointed out by this Court in the case of *Van Sant v. Atlantic City*, (68 N. J. L. 449), the official or body ‘charged with the duty of discharging an employee or person holding a position is acting judicially when so doing. His action is subject to review, and may be reversed. Until reversed, it stands. Whether there was or was not a proper proceeding for dismissal cannot be inquired into

collaterally. It must be reversed by a direct proceeding to set aside the illegal removal before suit for salary can be maintained, or by a mandamus to compel the municipality to restore his position or employment.' This principle was reiterated by this court in the case of *Keegle v. Hudson County*, (*supra*); affirmed on opinion below (*supra*), the opinion rendered in that case stating that 'public policy forbids the settlement of contested issues, as to the legality of municipal action in the matter of offices or positions, in a suit for salary, where the right to salary is dependent upon the legality of a discharge. * * *

The rule seems to be well settled in this State that, in the absence of any judicial ascertainment of the illegality of the discharge, or any agreement that it was illegal, no suit for salary for any period when the plaintiff did not actually perform the service will lie until the illegality is admitted or ascertained by a proper proceeding.' The decisions referred to are dispositive of the question now under consideration."

POINT 5

The Assignee Of The Claim For Salary Stood In No Better Position Than The Assignor, But Took The Assignment Subject To Any Defenses The Defendant Had Against The Claim.

"The assignee acquires by reason of assignment no greater rights against the debtor than those of the assignor against the debtor at the time of notice to him" (5 C. J. 962) and cases therein cited.

"All contracts for the sale and conveyance of lands and all judgments and decrees recovered in any court of this or any other State or of the United States, or of any territory of the United States, or of the District of Columbia, and all choses in action arising on contract shall be assignable at law and the assignee may sue thereon in his own name, but in such action there shall be allowed all set-offs, discounts and defenses not only against the plaintiff but against the assignor

before notice of such assignment shall be given to the defendant;" Compiled Statutes p. 4056 Sec. 19.

POINT 6

The Acts On The Part Of The Governing Body Of A Municipal Corporation Can Only Be Called Lawful When Done At A Regularly Convened Meeting. Individual Expressions Of Members Outside Of A Regularly Convened Meeting Have No Binding Effect Upon The Municipality.

The affidavit in support of the motion to strike out the Answer alleges that the defendant-appellant, agreed to reinstate the assignor of the plaintiff-appellee upon condition that any salary due for the period of suspension be waived and that this proposal was rejected, and that subsequently the proposal was made by the defendant-appellant, that the assignor of plaintiff-appellee would be reinstated provided one-half of the salary due for the period of suspension was waived and which proposal was also rejected (P. 13 L. 10-30). These allegations are denied in the affidavits in opposition to the motion to strike out answer. (P. 22 L. 17-30), (P. 25 L. 40 and P. 26, L. 1-15), (P. 23 L. 35-40); and (P. 24 L. 1-5).

"The affairs of a corporate body can be transacted only at a corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it; and its purposes or will can be expressed only by a vote embodied in some distinct and definite form. Their only existence is as a board, and they can do no valid act except as a board, and such act must be by ordinance or resolution, or something equivalent thereto," *Schumm v. Seymour, et. al* (24 N. J. Eq. 143).

In *Dey v. Mayor, etc. of Jersey City* (19 N. J. Eq.

at page 416), the Court held, among other things that:

“These provisions, as well as the object and nature of its creation show that the common council is a body or board, and must act, and can only act, as such; that it must act when assembled at stated or special meetings, and organized with a president to conduct, and a clerk to record, its proceedings. Such body can hardly act in any other manner than by ordinance or resolution. Every act must be by a vote of the members present; and whether it is called an Order, Direction, or Determination, it is still a resolution, because it must be resolved on, upon a motion made by some member.”

In conclusion, the defendant-appellant, Borough of Edgewater, points out to this court that the assignor of the plaintiff-appellee, after his conviction and sentence in the United States District Court for the Southern District of New York, was legally suspended from the performance of his duties as a Police Officer; that he did not take any proceedings to determine the validity of the resolution suspending him; that he did not render any services to the defendant-appellant, Borough of Edgewater, during the time for which the salary is claimed, for which this action was brought, and for the reasons pointed out in the cases above discussed and cited, there is no justification for the ~~assignment~~ plaintiff-appellee being paid for services his assignor did not perform.

His sentence and conviction was the result of no fault of the Borough of Edgewater, defendant-appellant, but was caused by his own complicity in a crime against the United States, and his conviction would have been sustained as pointed out by Judge Manton (22 Fed. Rep. (2nd Series) P. 468).

“But for errors committed in the charge of the District Judge which require our reversal of the judgment below.”

Defendant-Appellant respectfully submits that the judgment in each case should be reversed.

Respectfully submitted,

WILLIAM E. ELLIS,

Attorney for and of Counsel
with defendant-appellant.

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WILLIAM E. ELLIS

Attorney for and of Counsel
with defendant-appellant.

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New Jersey Court of Errors and Appeals

MEYER HILLEL, ASSIGNEE OF
JAMES DINAN,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant.

MEYER HILLEL, ASSIGNEE OF
EDWARD PICKERING,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant.

MEYER HILLEL, ASSIGNEE OF
ALEXANDER FLANNERY,
Plaintiff-Appellee,

vs.

BOROUGH OF EDGEWATER,
Defendant-Appellant.

ACTION AT
LAW.
ON APPEAL.

BRIEF OF PLAINTIFF-APPELLEE.

By stipulation between counsel for the respective parties to the three above entitled actions, and with the permission of the Court, said actions are consolidated for the purpose of argument of the above appeals inasmuch as all three cases involve the same questions of law and fact.

We respectfully beg leave of the Court to refer to the plaintiff's assignor, James Dinan, solely, in the course of this brief, without making reference to the assignors Alexander Flannery and Edward Pickering, for the reason that all of the proceedings referred to in these actions are identical as to dates and questions of law and fact involved.

Facts.

James Dinan, for several years prior to February 15th, 1927, was Chief of Police of the Borough of Edgewater (Case, p. 11, l. 29). He was indicted by the Federal Grand Jury for the Southern District of New York, in November, 1926, for an alleged violation of the Prohibition Law. Notwithstanding said indictment, however, the said Chief Dinan was permitted from the date thereof, to wit, November, 1926, to continue in the performance of his duties as Chief of the Police Department of said Borough of Edgewater without suspension or otherwise until after his trial and conviction, which occurred on February 9th, 1927 (Case, p. 12, l. 3). Immediately upon said conviction Chief Dinan appealed from said conviction to the United States Circuit Court of Appeals (Case, p. 12, l. 12).

On February 15th, 1927, and while Chief Dinan was under conviction, as aforesaid, the chairman of the Police Committee filed a recommendation with the Mayor and Council of the Borough of Edgewater recommending, that inasmuch as Chief Dinan had been convicted of a crime, the latter be suspended "*until further notice and until his appeal shall be determined*" (Case, p. 17).

The appeal of Chief Dinan was argued and thereafter the United States Circuit Court of Appeals reversed and set aside said conviction

as illegal (Case, pp. 15 and 16). Subsequently, to wit, on December 4th, 1928, and without any further proceedings taken by the Borough of Edgewater, defendant-appellant, or the Police Committee, the said Chief Dinan was, by resolution duly adopted, reinstated to his position as Chief of Police of the said Borough of Edgewater (Case, p. 19, l. 30). Said resolution of reinstatement was adopted upon recommendation for reinstatement as contained in the letter of the Police Commissioner addressed to the defendant-appellant (Case, p. 18, l. 30). The said Chief Dinan from said date of reinstatement, to wit, December 4th, 1928, has continued in the performance of his duty as Chief of Police of the defendant-appellant, Borough of Edgewater, down to the present date (Case, p. 13, l. 33). The said Chief Dinan, as well as Officers Alexander Flannery and Edward Pickering, who also were and still are members of the Edgewater Police Department, have not received their salary due them, as required by law, for the period between February 15th, 1927, and December 4th, 1928, though demand was made for same (Case, p. 13, top of page).

Actions were instituted by plaintiff as assignee of Dinan, Pickering and Flannery in the New Jersey Supreme Court, Hudson Circuit, on March 22nd, 1929 (Case, p. 4). Thereafter defendant-appellant filed answers to said complaint (Case, pp. 6, 7, 8, and 9). Said answers set up eleven separate defenses.

The plaintiff, upon due notice to defendant-appellant, moved to strike out defendant's answer as sham or frivolous or both and for the reason that said answers disclosed no defense to the said action (Case, p. 27, l. 22).

Upon the filing with the trial Judge the affidavits of the respective parties and after hear-

ing arguments by counsel to said parties, the Court below made an order striking out said answers as sham, or frivolous or both, and because said answers disclosed no defense to plaintiff's action (Case, p. 27, l. 36). Subsequently, to wit, on June 15th, 1929, Mr. Justice Kalisch, sitting in the Supreme Court, upon due notice, made an order for summary judgment in favor of the plaintiff in each of three said causes of action (Case, p. 31).

Of the said eleven separate defenses set up in defendant's answers the defendant, upon the argument of said motion to strike out defendant's answer, abandoned the third, fourth, fifth, seventh and tenth separate defenses. While this fact does not appear in the State of Case, we respectfully refer to appellant's admission thereof as contained in its Brief on page 3, line 9 and the argument was thus confined, by agreement between counsel to the respective parties to the first, second, sixth, eighth, ninth and eleventh defenses, which constitute the substance of this appeal.

The first separate defense is as follows (Case, p. 7, top of page):

“That on February 15, 1927, the Mayor and Council of the Borough of Edgewater, by Resolution, suspended plaintiff's assignor from performance of further duties as Chief of Police.”

This defense being merely declaratory and, of course, admitted by defendant-appellant does not constitute a defense, as such, and forms no basis of a defense to the action.

The second separate defense is as follows (Case, p. 7, l. 12):

“Plaintiff's assignor failed and neglected to contest the aforesaid action of the Mayor and Council of the Borough of Edgewater,

or resort to appropriate legal proceedings, and the action of said Mayor and Council remains undisputed and unreversed."

The Police Commissioner suspended plaintiff's assignor and recommended "*that hearing of these three members of the Police Department upon this charge be withheld until the appeals have been completed*" (Case, p. 17, l. 25), and the action of the Police Commissioner was adopted by formal resolution of the defendant-appellant (Case, p. 18, l. 14), and the said Police Officers were to "*remain suspended until further notice.*"

Thus, no charges having been served upon the plaintiff's assignors, and no hearing granted to them, and subsequently, to wit, on December 4th, 1928, their reinstatement having been ordered, by a resolution of the defendant-appellant (Case, p. 19, l. 30) there was nothing which the plaintiff could or should contest nor any proceedings required to be resorted to. We would readily concede the validity of such a defense if the Borough of Edgewater did not, by its voluntary action, reinstate plaintiff's assignors.

The sixth separate defense is as follows (Case, p. 8, l. 11):

"Neither plaintiff, nor plaintiff's assignor, performed any services for defendant between February 15, 1927, and December 4, 1928."

Chief Dinan was at all times ready, willing and able to perform the duties required of him as such member of said Police Department (Case, p. 14, l. 5), but was prevented from performing said duties by reason of his suspension, as aforesaid (Case, pp. 17 and 18). May we add here that the proof of the readiness and willingness and ability of Chief Dinan and the fact that he was prevented from performing his duties as a member of said

Police Department remains undisputed by the defendant-appellant?

Defendant-appellant's eighth separate defense is as follows (Case, p. 8, l. 35):

"Defendant alleges that plaintiff's assignor was legally convicted upon proper charges and suspended by the defendant, by resolution, which has never been set aside or reversed by a Court of competent jurisdiction, which action cannot be collaterally attacked in this cause."

The defense that plaintiff's assignor was legally convicted is disposed of by the reversal of conviction (Case, p. 15) and which reversal even formed the basis upon which the defendant-appellant reinstated plaintiff's assignors. The action of the defendant-appellant in reinstating plaintiff's assignors is based upon the recommendation of its Police Commissioner, as follows (Case, p. 19, l. 3):

"* * * and in view of the fact that the convictions heretofore found against these persons have been set aside, and more than a year passed, and nothing has been done, so far as I can ascertain, I, therefore, recommend that former Chief of Police James Dinan, and Officers Edward Pickering and Alexander Flannery, be reinstated to their former positions in the Police Department of the Borough of Edgewater."

The above recommendation was adopted in the form of a resolution, as follows (Case, p. 19, bottom of page):

"* * * BE IT RESOLVED, that the recommendation of the Police Commissioner be approved and adopted, and BE IT FURTHER RESOLVED that former Chief of Police James Dinan, and Officers Edward Pickering and Alexander Flannery be reinstated to their former positions in the police department, said reinstatement to take effect immediately."

The ninth separate defense is as follows (Case, p. 9, top of page):

“The defendant is not in anywise indebted to the plaintiff.”

This separate defense constitutes a generality or conclusion of law, and may, we respectfully submit, be passed, at least for the time being.

The eleventh separate defense (Case, p. 9, l. 15) does not constitute a defense but is a notice that the defendant will, either before, at, or during the trial, move to strike out the complaint, upon the ground that it does not disclose a good and sufficient cause of action, etc. No such motion was ever made.

This, we respectfully submit, does not constitute a defense, the striking out of which, by the Court below, can be complained of on this appeal.

Appellant relies upon the case of *Fitzpatrick et al. v. Passaic*, 143 Atlantic Reporter 728. We are thoroughly familiar with this case for the reason that the undersigned was counsel therein and we respectfully submit that the *Fitzpatrick* case has no application here for the reason that in that case a number of promotions were made by the Director of Public Safety shortly before the expiration of his term of office and the persons promoted had never performed services commensurate with the new rank.

In the case *sub judice* the plaintiff's assignors were suspended and by reason of such suspension were unable and not permitted to perform the services which they were then and always ready, willing and able to perform.

Defendant-appellant makes the point that the answer of the defendant in these cases having been struck out as sham, or frivolous or both constitutes reversible error, citing the case of *Na-*

tional Surety Co. v. Mulligan, 146 Atlantic Rep. 372.

In the case at bar, a sufficient compliance with the rule laid down in the case above cited is found in the fact that the order striking out defendant's answer provides "that the defendant's answer be and the same is hereby stricken out as sham, or frivolous or both, and because said answer discloses no defense to the said action."

In *Sculthorpe v. Commonwealth Casualty Co.*, 121 Atlantic Rep., page 751, the Court held that "striking an answer as 'sham,' when it should have been stricken as 'frivolous,' does not constitute cause for reversal."

But, even if it were to be conceded, which, of course, we cannot do, that procedural error was committed by the Court below in striking out defendant's answer as sham and frivolous, we contend that there should be no reversal for the very reason that the *National Surety* case, above cited by defendant in its brief, further holds, "No judgment shall be reversed or new trial granted for error of procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party."

We respectfully submit that defendant-appellant presents a specious argument in its endeavor to meet the statement of law above cited, when it suggests that the amount of salary involved being large, "the substantial rights of the Borough would be seriously affected by judgments totaling the amounts stated, if the judgments are permitted to stand."

We believe that the statement of the learned Chancellor in the *National Surety* case, dealing with substantial rights of a party, dealt with substantial *legal* rights and not rights of convenience.

The same case further held that "The essential thing was striking out the answer, not that it was done for such and such a reason."

In the case above cited the answer was struck out as sham *and* frivolous. In the case at Bar the answer was struck out as "sham *or* frivolous or both, and because said answer discloses no *defense to the said action*" (Case, bottom of page 27).

Defendant-appellant under Point 4 in its Brief, cites *Van Sant vs. Atlantic City*, 68 N. J. L., 499, as authority for reversal and makes the captioned remark that "There is a broad distinction between the *dismissal* of a person holding a public office or position and the *suspension* of a person holding a like office or position."

We concede this distinction and more, urge it in the case at Bar for the reason that the *Van Sant* case as well as the cases of *Keegal and Lillis vs. County of Hudson*, 102 N. J. L., 219; *Hoboken vs. Gear*, 27 N. J. L., 265, and *Dinkel vs. County of Hudson*, 141 Atl., 919, all cited by defendant-appellant in its Brief, involve such cases in which the attempt to recover salary followed a *dismissal* of the plaintiffs from their offices or positions in those cases. We are compelled to agree that if the plaintiff's assignors in the case at Bar were dismissed or still remained under suspension that the actions to recover salary would be premature, in the case of dismissal, until the legality of such dismissal would have been determined and would not lie at all during the pendency of a suspension.

The cases above referred to, as cited by defendant-appellant in its Brief, all hold that in an action to recover salary for dismissal, such proceeding for dismissal cannot be inquired into collaterally and must be reversed by a direct proceeding to set aside the illegal removal before suit for salary can be maintained, or by a Man-

damus to compel the municipality to restore his position or employment. To all of this we fully agree as being sound, but in the case at Bar there has been no dismissal nor is there any attempt to try, collaterally, the title to office, for the reason that the plaintiff's assignors were, by the official act of the defendant, reinstated to their position (Case, p. 19, l. 30).

Defendant-appellant conceded on the argument that the positions of the members of the Police Department of the Borough of Edgewater are governed by tenure of office, providing, among other things, that no such officer may be removed, dismissed, fined or reduced in rank without having first been duly served with written charges and the opportunity for a full and impartial hearing on said charges given to any such accused.

It is undisputed that at no time between the date of suspension of plaintiff's assignors and the date of their reinstatement, were charges of any kind served upon them for any violation of the rules or regulations of the Department or for any offense whatsoever, nor were they ever at any time given a hearing of any kind (Case, top of page 13).

We respectfully cite *Jardot vs. City of Rahway*, 127 Atl., 799, (also cited by defendant-appellant in its Brief under Point 2).

In this case two members of the Police Department of Rahway were suspended pending charges of a serious nature against them. They were arrested and later indicted and subsequently the indictments were *nolle prosequed*. Demand was made for reinstatement, which demand was repeated and always refused. While the said officers were under suspension alternative writs of Mandamus were applied for and allowed. After the service of these writs on the respondent, writ-

ten charges against the officers were served upon them, and, later, and *one day before* the writs were returnable at Trenton, the officers were acquitted by the defendant.

The Mandamus proceeding in that case was brought to compel the City of Rahway to reinstate the relators as patrolmen.

The Court held that "*When an officer, entitled by law to a fixed annual salary has been prevented for a time, through no fault of his own, from performing the duties of his office and during that time earned wages in another and different employment he cannot be compelled in an action to recover his unpaid salary to deduct the amount earned.*"

And further, "A police officer, * * * unlawfully removed from office, *but afterwards reinstated* * * * *could properly recover from the Municipality the salary accruing during his suspension without allowing any deduction for his earnings from other sources.*"

In the *Jardot* case the Court cited with approval the case of *Fitzsimmons vs. City of Brooklyn*, 102 N. Y. 536, which held that "The question was whether the plaintiff, who was a police officer, and had been unlawfully removed from office, *but was afterwards reinstated, and who, during his suspension worked for others and earned wages could properly recover from the Municipality the salary accrued during his suspension without allowing any deduction for his earnings from other sources, and the Court held that he could.*"

Our Supreme Court further said, in the *Jardot* case, "We adopt the reasoning of Finch, J., (in the *Fitzsimmons* case above cited), where he says, "We have often held that there is no contract between the officer and the State or Municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so

long as he holds it; and when improperly held he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of contract, but because the law attaches it to the office.”

Chapter 419 of the Laws of 1919, page 323, provides, *inter alia*, that “Whenever any Municipal Officer or Employee has been or shall be illegally dismissed from such office or employment *and the said dismissal has been or shall be set aside as illegal*, by a Court of competent jurisdiction, such officer or employee shall be entitled to recover the salary of such office or employment for the period covered by such illegal dismissal.”

In the case at Bar there was no dismissal but a voluntary reinstatement of plaintiff’s assignors by the defendant-appellant which, we respectfully submit, has the legal attribute of the statute above cited as being no worse than a dismissal and subsequent declaration by a Court of competent jurisdiction that such dismissal was illegal, for, in the case at Bar, the defendant-appellant in legal effect, by its official reinstatement of plaintiff’s assignors, confirmed the rights of the latter to their salary during said period of suspension.

The defendant-appellant has intimated that an action at law was not the proper remedy for the establishment of the rights of plaintiff.

In *Erion vs. Pension Commission of Hoboken*, 141 Atl. 569, the Court held, “Where relator’s rights to pension as widow of deceased city fireman required determination of legal questions, * * * and other matters * * * application for an alternative or peremptory mandamus writ to require City Pension Commissioner to pay pension would be denied, since Mandamus will not issue where relator’s legal right is in doubt, but such right must first be established *by action at law or writ of certiorari*.”

This case is dispositive of any suggestion that Mandamus would be the proper remedy. Clearly, certiorari would not lie, and, inasmuch as defendant-appellant reinstated plaintiff's assignors, the former's action cannot, or certainly would not, be attacked by us.

The case of *Butler vs. Plainfield*, 135 Atl. 559, also held that "Ordinary procedure for assertion of right to salary denied is ordinary suit at law therefor, and mandamus is not proper remedy."

Defendant-appellant urges in its Brief for a reversal of the judgment that "Notwithstanding there was a reversal of the conviction, the language of Manton, Circuit Judge, who wrote the opinion for the United States Circuit Court of Appeals, for the Second Circuit, etc." says, "These convictions would be affirmed but for errors committed in the charge of the District Judge which require our reversal of the judgment below."

We feel constrained to look upon the pronouncement of the Circuit Judge in the opinion above referred to as being dicta. It is sufficient that the Appellate Court reversed the conviction (Case, pp. 15 and 16) and this reversal of conviction of the plaintiff's assignors was sufficient authority for the defendant-appellant to voluntarily reinstate plaintiff's assignors to their positions (Case, p. 19, line 30) and which reinstatement was done upon the recommendation of the Police Commissioner (Case, p. 19), as follows: "* * * In view of the fact that the convictions heretofore found against these persons (plaintiff's assignors) have been set aside and more than a year passed, and nothing has been done, so far as I can ascertain, I, therefore recommend that former Chief of Police James Dinan, and Officers Edward Pickering and Alexander Flannery, be reinstated to their former positions in the Police Department of the Borough of Edgewater."

Conclusion.

The plaintiff's assignors having been suspended by the defendant-appellant, and having never been served with charges of any kind, nor having been granted a hearing upon any charges, and having subsequently been reinstated by the defendant-appellant, and having during all of the period of their suspension been ready, willing and able to perform the duties required of them as members of the Police Department of the defendant-appellant, but having been prevented by such suspension from performing said duties, and having made demand upon defendant-appellant for the salary due them as fixed by law, for the period of their suspension, the judgments in favor of said assignee, as rendered in the Court below, we respectfully submit, should be affirmed.

Respectfully submitted,

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