INDEX

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Notice of Appeal.

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To Cassman & Gottlieb, Esqs., Attorneys of Plaintiff:

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Take notice, that the defendant appeals from the order made and entered, August 2, 1929, in the New Jersey Supreme Court, in the above-entitled cause, by Joseph A. Corio, Judge of the Court of Common Pleas of the County of Atlantic, sitting at a hearing on motion to dismiss the amended counter-claim filed in the New Jersey Supreme Court, and the whole thereof to the Court of Errors and Appeals in the last resort in all causes on the following grounds:

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1. The Judge sitting was without jurisdiction and was not competent to hear and determine the subject-matter of said order.

2. The matter was on a question of pleading in the Supreme Court and passed upon erroneously by a

Judge of the Common Pleas without sufficient power to hear and determine the matter.

3. The Court erred in making the order that the amended counter-claim be stricken out on the ground that it disclosed no cause of action and for other good and lawful reasons.

WM. S. DARNELL,
Attorney for Defendant,
10 *Edward C. McGarry.*

Dated: August 8th, 1929.

[ENDORSED]

Due and legal service of the within
20 notice of appeal is hereby acknowledged this 9th day of August, 1929.
Cassman & Gottlieb,
Attorney of Plaintiff.

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SUMMONS.

THE STATE OF NEW JERSEY, TO EDWARD C. MCGARRY: 10

(L. S.) You are summoned to answer the annexed complaint of Henry L. Lang Company, in an action at law in the Supreme Court. And take notice that unless you file your answer to the said complaint with the clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may 20 be entered against you.

Witness, HONORABLE WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this eighth day of March, nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

CASSMAN & GOTTLIEB,
Attorneys.

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COMPLAINT.

SUPREME COURT OF NEW JERSEY.
CAPE MAY COUNTY.

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10 HENRY L. LANG COMPANY, a corporation, *Plaintiff*, v. EDWARD C. MCGARRY, *Defendant*. } Action at Law. Complaint.

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20 The plaintiff, Henry L. Lang Company, a corporation under and by virtue of the laws of Pennsylvania, says that:

1. That it is a corporation under and by virtue of the laws of Pennsylvania and is authorized and empowered by its certificate of incorporation to act as agent or broker in the business of marine, fire, life, accident and fidelity insurance, and any other kind or class of insurance whatsoever.

30 2. In May, 1928, plaintiff, at the special instance and request of the defendant, caused and procured to be issued to the Lipkin Realty Company, a contract bond in the amount of $166,500 signed by the Continental Casualty Company of Chicago as surety, conditioned for the faithful performance by the defendant of a certain written contract dated the tenth

day of April, 1928, and executed by said defendant to the Lipkin Realty Company.

3. In consideration of the issuance of said bond and the work and labor of the plaintiff in that behalf, defendant promised and agreed that he would pay unto the Henry L. Lang Company a premium on said bond amounting to $2497.50.

4. Said premium of $2497.50 remains due and unpaid. 10

Plaintiff demands as damages the sum of $2497.50 together with interest and costs of suit.

CASSMAN & GOTTLIEB,
Attorneys of Plaintiff.

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NOTICE.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Notice.

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20 Cassman & Gottlieb, Esqs.,
Dear Sirs:

I demand on behalf of the defendant, Edward C. McGarry, that you declare to me forthwith, in writing, whether the summons issued in the above-stated cause was issued by you, or with your authority or privity, and also the place of the plaintiff's residence.

Yours respectfully,
WM. S. DARNELL,
Attorney of Defendant,
30 *Edward C. McGarry.*

Dated March 22nd, 1929.

DEMAND FOR SECURITY FOR COSTS.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Demand for Security for Costs.

20

Sirs:

You are hereby notified that the defendant, Edward C. McGarry, demands security for costs in the above-entitled cause, the plaintiff being a non-resident, and affidavit of the fact having been filed in the office of the clerk of said court.

Yours respectfully,
WM. S. DARNELL,
Attorney for Defendant,
Edward C. McGarry. 30

Dated: March 22nd, 1929.
To—Cassman & Gottlieb,
Attorneys of Plaintiff.

AFFIDAVIT OF MERITS.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Affidavit of Merits.

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20 STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } *ss.*

EDWARD C. MCGARRY, of full age, being duly sworn upon his oath according to law says; that he is the defendant in the above-stated cause and he believes that he has a just and legal defense to the said action on the merits of the defense.

Sworn and subscribed before me this 23rd day of
30 March, A. D. 1929.

MADELINE M. NEWELL,
(Seal) *Notary Public of N. J.*

NOTICE.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

HENRY L. LANG COMPANY, a corporation, *Plaintiff*, v. EDWARD C. MCGARRY, *Defendant*.	Action at Law. Notice.

20

To William S. Darnell, Esq.,

Dear Sir:

Take notice, that the plaintiff has filed security for costs in the above matter with Fred L. Bloodgood, clerk of the Supreme Court. The name of the surety is Continental Casualty Company, a corporation under and by virtue of the laws of the State of Indiana.

Yours respectfully, 30
CASSMAN & GOTTLIEB,
Attorneys of Plaintiff.

Dated: May 25, 1929.

ANSWER AND COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

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10 Between
HENRY L. LANG COMPANY,
Plaintiff,
and
EDWARD C. MCGARRY,
Defendant.

Action at Law.
Answer and Counter-claim.

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20 FIRST DEFENSE.

1. He admits the first paragraph of plaintiff's complaint filed in this cause, may be true but he has not any knowledge or information to form a belief.

2. He denies paragraphs 2, 3 and 4 of said complaint.

30 SECOND DEFENSE.

1. He repeats the statements in paragraph one, set forth in the defense hereinabove.

2 He denies that he is indebted or in anywise liable to plaintiff by reason of paragraph 2 of said complaint

3. He denies that he promised and agreed that he would pay unto the Henry L. Lang Company, the sum of $2497.50, as set forth in paragraph 3 of said complaint.

4. He denies that $2497.50 remains due and unpaid to plaintiff or that he is indebted to plaintiff in any sum.

5. By way of counter-claim against the plaintiff the defendant says that: 10

1. In May, 1928, plaintiff for a good and valuable consideration paid by defendant to it, agreed and undertook to insure and pay to defendant the sum of $166,500.00 in accordance with a certain building agreement between defendant and the Lipkin Realty Company, dated April 10, 1928, referred to in paragraph 2 of the complaint. 20

2. Plaintiff failed to perform and live up to and comply with the condition of said agreement as it agreed with defendant.

3. Defendant fully lived up to and performed said contract of agreement on his part.

4. Defendant, by reason of the failure to live up to and perform said agreement by plaintiff, suffered a loss on said building agreement of $16,000.00. 30

5. Plaintiff is indebted to defendant by its default in said agreement in the sum of $16,000.00.

Defendant counter-claims as damages the sum of $16,000.00.

Wm. S. Darnell,
Attorney of Defendant.

NOTICE OF MOTION FOR ORDER TO STRIKE OUT ANSWER AND COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Notice of Motion for Order to Strike Out Answer and Counter-claim.

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To William S. Darnell, Esq., Attorney of Defendant:

Dear Sir:

Please take notice, that I shall apply to His Honor, W. Frank Sooy, at the court room in the Guarantee Trust Building, Atlantic City, New Jersey, on the 21st day of June, 1929, at 10 o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard, for an order to strike
30 out the answer filed by you in the above-stated cause on the ground that the allegations contained in the same are untrue in fact and sham, and shall support my application by the affidavit of the plaintiff hereto attached.

I shall also at that time and place apply for an order to strike out the counter-claim contained in

the answer filed by you in the above-stated cause for the following reasons:

1. The defendant was no party of the contract of insurance and can claim no right thereunder.

2. The counter-claim was defective in that it sets forth legal conclusions and not facts.

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3. The counter-claim was defective in that it is so indefinite that it does not apprise the plaintiff of the facts which the defendant intends to prove at the trial.

CASSMAN & GOTTLIEB,
Attorneys of Plaintiff.

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AFFIDAVIT.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

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10 Between

HENRY L. LANG COMPANY, *Plaintiff*, and EDWARD C. MCGARRY, *Defendant*.	Action at Law. On Application for Summary Judgment. Affidavit.

STATE OF PENNSYLVANIA,
20 COUNTY OF PHILADELPHIA, } *ss.*

D. RUALEY REUBEN, being duly sworn on his oath says:

I am assistant treasurer of the Henry L. Lang Company, the plaintiff in the above-stated cause.

The plaintiff is a corporation under and by virtue of the laws of Pennsylvania and is authorized and empowered by its certificate of incorporation to act as agent or broker in the business of marine, fire,
30 life, accident and fidelity insurance and any other kind or class of insurance whatsoever.

In the month of May, 1928, plaintiff at the special instance and request of the defendant, caused and procured to be issued to the Lipkin Realty Company a contract bond in the amount of $166,500 signed by the Continental Casualty Company of Chicago, as

surety, conditioned for the faithful performance by the defendant of a certain written contract dated the tenth day of April, 1928, and executed by said defendant to the Lipkin Realty Company.

In consideration of the issuance of said bond and the work and labor of the plaintiff in that behalf, defendant promised and agreed that he would pay to the Henry L. Lang Company the premium on said bond amounting to $2497.50. Said premium of $2497.50 remains unpaid. I believe there is no defense to the action.

D. Rualey Reuben.

Sworn and subscribed to before me this 12th day of June, 1929.

Anne F. Vasey,
Notary Public.

My commission expires Feb. 12, 1933.

DEFENDANT'S AFFIDAVIT ON MOTION TO STRIKE.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Defendant's Affidavit on Motion to Strike.

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STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } *ss.*

EDWARD C. MCGARRY, of full age, being duly sworn upon his oath according to law says; that he is the defendant in the above-entitled cause; deponent denies that plaintiff at his instance and request secured and procured the said bond as alleged; that in the month of May, 1928, deponent was under a contract to construct buildings and structures known as "Sportland" in North Wildwood, New Jersey, with the Lipkin Realty Company, as owner; that plaintiff assured defendant that the Lipkin Realty Company was in sufficient funds or that they were available to pay defendant for construction of the buildings and structures to be erected by deponent

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as contractor for said Lipkin Realty Company, and that plaintiff would procure a contract bond of defendant to said Lipkin Realty Company upon condition that the monies to be paid by Lipkin Realty Company to defendant as contractor were to be deposited in the joint names of plaintiff and said Lipkin Realty Company and under plaintiff's control to be paid out to defendant or upon his order as provided for under his building contract with Lipkin Realty Company, dated April 10, 1928; that a large portion of said monies were so deposited jointly, but that plaintiff did not pay the same to defendant as was agreed upon between plaintiff and defendant; that relying upon the representation and assurance of plaintiff that said money was available, defendant completed his agreement and finished and delivered over to the Lipkin Realty Company the buildings and structures so by him erected; but did not receive from the said Lipkin Realty Company and plaintiff or either of them the monies promised and agreed to be paid to him by said plaintiff; that because of the violation of said agreement by plaintiff in neglecting or refusing to pay defendant what it had promised and agreed, defendant has suffered great loss and credit; that the consideration for making said agreement on the part of plaintiff was conditional upon its control of the payment of the funds and on the part of defendant the assurance of the plaintiff that said funds were to be paid to defendant, under his contract, were in hand or available and would be paid to defendant by plaintiff in accordance with said agreement; that a large part of said monies were diverted from said joint account by the said Lipkin Realty Company and plaintiff by their checks and paid to others which should have

been paid to deponent on account of his said contract; deponent denies that he promised to pay plaintiff the sum of $2497.00, or any other sum, except and until he received the full contract price of $166,500.00 from and through the said joint account of Lipkin Realty Company and plaintiff, and also denies that the sum of $2497.00, or any other sum is due plaintiff but deposes and says that a much
10 larger sum than that sued for is due from plaintiff to defendant for that it breached its contract and misled defendant; that defendant believes he has a good and meritorious defense to said action and that he is justly entitled and will be able to prove by full and competent evidence that plaintiff is indebted to defendant in a larger sum of money, amounting to $16,000.00.

EDWARD C. MCGARRY.

20 Sworn and subscribed to before me this 28 day of June, A. D. 1929.

MADELINE M. NEWELL,
Notary Public of N. J.

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AMENDED ANSWER AND COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Amended Answer and Counter-claim.

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FIRST DEFENSE. 20

1. He admits the first paragraph of plaintiff's complaint filed in this cause, may be true but he has not any knowledge or information to form a belief.

2. He denies paragraphs 2, 3 and 4 of said complaint.

SECOND DEFENSE. 30

1. He repeats the statements in paragraph one, set forth in the defense hereinabove.

2. He denies that he is indebted or in any wise liable to plaintiff by reason of paragraph 2 of said complaint.

3. He denies that he promised and agreed that he would pay unto the Henry L. Lang Company, the sum of $2497.50, as set forth in paragraph 3 of said complaint.

4. He denies that $2497.50 remains due and unpaid to plaintiff or that he is indebted to plaintiff in any sum.

10 5. By way of counter-claim against the plaintiff the defendant says that:

1. In May, 1928, plaintiff represented and assured defendant that the Lipkin Realty Company was in actual possession of and had resources of sufficient amount with which to pay to defendant the sum of $166,500.00, being the contract price for which the defendant, as contractor, was to erect and construct certain buildings and structures as mentioned and 20 contained in a certain contract made and executed between the defendant and the Lipkin Realty Company and that the said plaintiff had procured and caused to be issued for the said Lipkin Realty Company a contract bond to the mortgagee for construction purposes covering said amount and assured defendant that sufficient monies were available to complete the said buildings and structures to be erected by defendant under a certain contract dated April 10, 1928, made and executed between this de- 30 fendant and the Lipkin Realty Company, as referred to in paragraph 2 of said complaint.

2. Relying upon said assurances of the plaintiff to the defendant, the plaintiff and defendant entered into a certain agreement whereby it was agreed and the plaintiff undertook and promised to pay to de-

fendant from the funds deposited and to be deposited in the joint account of plaintiff and the said Lipkin Realty Company by the Lipkin Realty Company, or for its account, the sum of $166,500.00 upon the certificate of the said Lipkin Realty Company and to procure and have issued, in consideration of such assurances, a contract bond to the said Lipkin Realty Company for the faithful performance by defendant of said contract, dated April 10, 1928, for the erection and construction of said buildings and structures. 10

3. That said monies were so deposited in the joint account of the said plaintiff and Lipkin Realty Company.

4. Plaintiff failed and neglected to pay to defendant, or for his account, the sum or sums of money so agreed to be paid to him for completion of said contract. 20

5. The failure of the plaintiff to pay to defendant or for his account the said sum or sums of money so agreed to be paid and, by the breach of its contract with defendant, caused defendant to suffer great loss and injury by its failure to live up to and perform its agreement whereby defendant suffered great loss and injury and his credit was therefore greatly impaired.

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6. Plaintiff permitted and encouraged defendant to complete said buildings and structures, assuring him from time to time that the money was either in hand or available to pay for same.

7. The said monies for completion were neither

in hand or available and defendant has not received the same as agreed and promised by plaintiff.

8. Defendant fully lived up to and performed said contract on his part.

9. Defendant, by reason of the failure to live up to and perform said agreement by plaintiff, suffered a loss of $16,000.00.

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10. Plaintiff is indebted to defendant, by its default, in said agreement, in the sum of $16,000.00.

Defendant counter-claims as damages the sum of $16,000.00.

WM. S. DARNELL,
Attorney for Defendant.

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DEMAND FOR BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

Between HENRY L. LANG COMPANY, *Plaintiff,* and EDWARD C. MCGARRY, *Defendant.*	Action at Law. Demand for Bill of Particulars.

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To William S. Darnell, Esq., Attorney of Defendant:

Dear Sir:

Please take notice, that the plaintiff in the above-entitled cause demands within ten days from the service hereof, a bill of particulars of the defendant's counter-claim to wit:

1. On what day or days in the month of May, 1928, were the representations and assurances set forth in paragraph one of the counter-claim made? 30

2. What person or persons representing the plaintiff made the representations and assurances contained in paragraph one of the counter-claim?

3. Was the agreement alleged to have been made in paragraph two of the counter-claim the result of parol conversation, or was it in writing?

4. What person or persons representing the plaintiff made such agreement?

5. In what manner was the sum of $16,000 alleged as damages in paragraphs nine and ten of the counter-claim arrived at?

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CASSMAN & GOTTLIEB,
Attorneys of Plaintiff.

Dated: July 12, 1929.

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REPLY TO DEMAND FOR BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

HENRY L. LANG COMPANY, *Plaintiff*, v. EDWARD C. MCGARRY, *Defendant*.	Action at Law. Reply to Demand for Bill of Particulars.

To Cassman & Gottlieb, Esqs., Attorneys of Plaintiff: 20

Gentlemen:

Please take notice that the following are answers to the interrogatories contained in demand for bill of particulars served upon me July 15, 1929.

ANSWER TO FIRST INTERROGATORY.

On April 10, 1928, and on May 8, 1928, the said bond having been executed but held by plaintiff in escrow until such assurances could be and were made after a full and complete interrogation by plaintiff of the facts set forth in paragraph 1 of counter-claim as a condition precedent. 30

ANSWER TO SECOND INTERROGATORY.

Henry L. Lang and a Mr. S. Royden Fanning who together claimed to represent the plaintiff.

ANSWER TO THIRD INTERROGATORY.

The agreement was oral, resulting from parol con-
10 versations, and not in writing.

ANSWER TO FOURTH INTERROGATORY.

Both Mr. Henry L. Lang and Mr. S. Royden Fanning.

ANSWER TO FIFTH INTERROGATORY.

The failure on the part of plaintiff's breach of
20 contract as agreed upon between it and defendant.

Yours very respectfully,

WM. S. DARNELL,
Attorney of Defendant.

Dated July 22, 1929.

[ENDORSED]

30 Service of the within interrogatories is hereby acknowledged this 24th day of July, 1929.

Cassman & Gottlieb,
Attorneys for Plaintiff.

NOTICE TO STRIKE OUT AMENDED COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

HENRY L. LANG COMPANY, *Plaintiff,* v. EDWARD C. MCGARRY, *Defendant.*	Action at Law. Notice to Strike Out Amended Counter-Claim.

To William S. Darnell, Esq., Attorney of Defendant: 20

Please take notice that we shall apply to the Hon. Joseph A. Corio at the court room on the seventh floor of the Guarantee Trust Building, in Atlantic City, on Friday, August 2, 1929, at 10:00 o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard, for an order to strike out the amended counter-claim filed by you in the above-stated cause, on the following grounds: 30

1. It is so uncertain and indefinite that it does not reasonably apprise the plaintiff of the facts which the defendant intends to prove at the trial.

2. It is so framed as to embarrass and delay a fair trial.

3. It does not disclose a cause of action in that:

(a) The plaintiff, Henry L. Lang Company, was not a party to the agreement between the defendant and the Lipkin Realty Company and is not liable for any breach thereof.

(b) The plaintiff, Henry L. Lang Company, is
10 not bound or liable by reason of any statements or representations alleged to have been made by Henry L. Lang or S. Royden Fanning, or either or both of them.

CASSMAN & GOTTLIEB,
Attorneys of Plaintiff.

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ORDER.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

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HENRY L. LANG COMPANY, *Plaintiff,* v. EDWARD C. MCGARRY, *Defendant.*	Action at Law. Order.

Due notice having been given to the above-named defendant of a motion to strike out the amended 20 counter-claim of said defendant, and the same coming on for argument in the presence of Cassman & Gottlieb, attorneys of the plaintiff, and William S. Darnell, attorney of defendant, and it appearing to the Court that the said amended counter-claim discloses no cause of action.

It is, on this second day of August, 1929, on motion of Cassman & Gottlieb, attorneys of the plaintiff, ordered that said amended counter-claim be stricken out on the ground that it discloses no cause 30 of action.

JOSEPH A. CORIO,
Judge.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY L. LANG COMPANY,
Plaintiff-Respondent,
v.
EDWARD C. MCGARRY,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

BRIEF OF APPELLANT.

I.

1. On March 18th, 1929, the plaintiff Henry L. Lang Co., served its summons and complaint, in the Supreme Court of New Jersey, with venue laid in Cape May County, on the defendant in the present suit (line 10, page 3 and 4, State of the Case).

2. On March 25th, 1929, defendant filed affidavit of merits (line 10, page 8, State of the Case).

3. On March 23rd, 1929, defendant served upon plaintiff's attorneys a notice inquiring for the residence and authority to issue summons, and demand for security for costs (line 10, pages 6 and 7, State of the Case).

4. On May 27th, 1929, plaintiff served notice on defendant's attorney that security for costs had been filed (line 10, page 9, State of the Case).

5. Defendant filed his answer and counter-claim on June 5th, 1929, in the Supreme Court (line 10, page 10, State of the Case).

6. Plaintiff made application before Hon. W. Frank Sooy, Judge of the Circuit Court, to strike out the answer and counter-claim of defendant, on June 21, 1929 (line 10, page 12, State of the Case).

7. On return and argument before Judge Sooy, defendant was allowed to file amended answer and counter-claim (the subject of this appeal) (line 10, page 19, State of the Case), and the motion to strike was denied.

8. Plaintiff, subsequently, on July 25th, 1929, served defendant with notice of application before Judge Joseph A. Corio to strike out defendant's counter-claim and hearing was had, at which time defendant appeared and objected to the hearing (1) on the ground of the want of jurisdiction of the Court sitting (a Judge of the Atlantic County Court of Common Pleas) to pass upon the pleadings in a matter in the Supreme Court of New Jersey, and his incompetency to pass upon the same and (2) that said counter-claim was sufficiently set up to permit an issue between the parties to be raised by answer,

or if not plaintiff could on notice require defendant to serve it with a bill of particulars, but the Judge of the Court of Common Pleas, sitting, ignored the objections raised, and made the order appealed from. (Line 10, page 29, State of the Case.) Notice of appeal was duly served on August 9th, 1929, and filed (line 19, page 1, State of the Case).

II.

The order appealed from should be dismissed, and the cause be put at issue for trial on the counterclaim for the following reasons:

1. The Judge (Court of Common Pleas) sitting was without jurisdiction and was not competent to hear and determine the subject-matter of said order.

> "There is no power in a Circuit Judge (Common Pleas) to make an order for the entry of a judgment in the Supreme Court."
>
> *McConnell v. Alpha Portland Cement Co.*, 74 N. J. L. 727, 730.

2. The matter was a question of pleading in the Supreme Court and passed upon erroneously by a Judge of the Court of Common Pleas without sufficient power to hear and determine the matter.

> "The powers of the Circuit Court Judge (Common Pleas) under the act seem to be limited to the trial of the issues joined in the Supreme Court, which may be referred to him by the Justice of the Supreme Court holding the Circuit, and his relation to the trial of such issues the said Judge shall have the power to amend."
>
> Pamphlet Laws 1906, page 209.

"This enumeration of powers does not include that of striking out a sham or frivolous plea; a power which under the Practice Act, can be exercised by the Supreme Court Justice only upon four days' notice."

Practice Act, P. L. 1903, page 569.

(Citing also.)

McConnell v. Alpha Portland Cement Co., 74 N. J. L. 730;

Hubbard v. Montrose Shingle Co., 79 N. J. L. 208, 209.

3. The Court erred in making the order that the amended counter-claim be stricken out on the ground that it disclosed no cause of action.

"The powers of the Judges of the Circuit Court (Common Pleas), in relation to the trial of Supreme Court issues and the granting of rules to show cause, and the like, are entirely statutory, and no authority can be found within the statute, *nor indeed do we think it can be conferred by statute,* authorizing a Judge of the Circuit Court (Common Pleas) to enter a judgment in the Supreme Court."

McConnell v. Alpha Portland Cement Co., 74 N. J. L. 727, 730.

III.

It is, therefore, respectfully submitted that the order made by Judge Joseph A. Corio, appealed from, be declared to be erroneous, invalid and be set aside, dismissed and for nothing holden.

"The power to strike out a pleading in an

action in the Supreme Court is lodged solely in that Court, or in a Justice thereof, and is not possessed by a Circuit Court Judge to whom the cause has been referred for trial" * * * "A refusal to strike out a pleading cannot be made a part of the record so as to be reviewable on a writ of error. It is only when the motion to strike out has prevailed that Section 110 of Practice Act (P. L. 1903, page 569), permits error to be assigned thereon."

Dayton v. Boettner, 82 N. J. L. 421, 422.

WILLIAM S. DARNELL,
Attorney for Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY L. LANG COMPANY,
Plaintiff-Respondent,

v.

EDWARD C. MCGARRY,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

PLAINTIFF-RESPONDENT'S BRIEF.

PRELIMINARY STATEMENT.

This case is before this Court on appeal from an order of the Supreme Court made by Joseph A. Corio, Judge of the Atlantic County Common Pleas Court, striking out an amended counterclaim filed in a Supreme Court issue.

QUESTION OF LAW.

The only question of law involved in this case and the only question argued in the brief of the appellant is whether a Common Pleas Judge, who has been requested to sit in the stead of a Circuit Court Judge to whom, in turn, a Supreme Court issue has been referred by a Justice of the Supreme Court holding the Circuit, has a legal right to strike out a pleading filed in the Supreme Court.

ARGUMENT OF LAW.

> "The Judge of any of the Courts of Common Pleas is hereby required and empowered to hold any county Circuit Court when thereunto requested by the Justice of the Supreme Court within whose district the said Circuit Court shall be, and while exercising such jurisdiction the said Judge of Common Pleas shall have and possess all the powers and authority with which in that respect the said Justice of the Supreme Court is by the laws of this State invested."
>
> P. L. 1900, p. 357;
>
> 2 Comp. Stat., p. 1717, Sec. 56.

It might well be argued that the above Act has no application because in the present case the Common Pleas Judge was not requested by the Supreme Court Justice but by the Judge of the Circuit Court. This question arose in this court in *Higgins v. Egg,* 87 N. J. L. 185, where it was held that:

"By force of the Act of April 2, 1891 (page 276), and the revision of March 23, 1900 (page 349), Judges of the Common Pleas, by virtue of their appointment as such, become invested with power to hold the Circuit Court. This judicial authority is dependent solely upon the will of the Legislature expressed in these Acts and not upon the request of some member of the judicial department of this State."

This Court in the above case followed and applied the case of *Commonwealth Roofing Co. v. Palmer Leather Co.,* 67 N. J. L. 566, which held that:

"1. A Circuit Court held by a Judge of a Court of Common Pleas, in pursuance of the Act of March 23, 1900 (Pamph. L., p. 349, Sec. 37, 38), is constitutionally organized.

"2. Under that Act the Judge of the Court of Common Pleas derives his authority to hold the Circuit Court, not from the request of the Justice of the Supreme Court, but from his appointment as Judge of the Court of Common Pleas."

Since, therefore, a Judge of the Common Pleas Court has and possesses all the powers and authority that a Circuit Court Judge has, the only question remaining is whether or not a Circuit Court Judge has the authority to strike out a pleading filed in a Supreme Court issue.

It is true that prior to the enactment of the Practice Act of 1912, a Circuit Court Judge had no power to strike out a pleading filed in a Supreme Court issue.

Dayton v. Boettner, 82 N. J. L. 421;
Hubbard v. Montross Shingle Co., 79 Id. 208.

But the Legislature, by Rule 26 of the Practice Act of 1912 (now Rule No. 40 of the Supreme Court), authorized the procedure followed by the Court and counsel in the present case.

That rule reads:

> "Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counter-claim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at or after the trial, but the Court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case, the Court may give judgment for the successful party or make such order as may be just."

Of course, for present purposes, the rule must be considered and construed in the light of the provision of Chapter 118 of Pamphlet Laws of 1906, page 209, authorizing the trial of Supreme Court issues "by a Judge of the Circuit Court to whom the same may be referred by the Justice of the Supreme Court holding the circuit," and providing that "in relation to the trial of such issues the said Judge shall have the same powers as a Justice of the Supreme Court."

Relying on the above reasoning, this Court, in *Koppelon v. W. M. Ritter Flooring Corp.*, 97 N. J. L. 200, held:

> "Under Rule 26 of the Practice Act of 1912 (now Rule No. 40 of the Supreme Court), questions of law on the pleadings, formerly raised

by general demurrer, may be raised in the answering pleadings, and may be disposed of at the trial. And a Circuit Court Judge, to whom a Supreme Court issue has been referred for trial, as authorized by Chapter 118 of Pamphlet L. 1906, p. 209, has power, at the trial, to strike out a 'defense' on the ground that it discloses no defense when the objection is raised by the plaintiff's answering pleading.''

CONCLUSION.

It is therefore respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

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