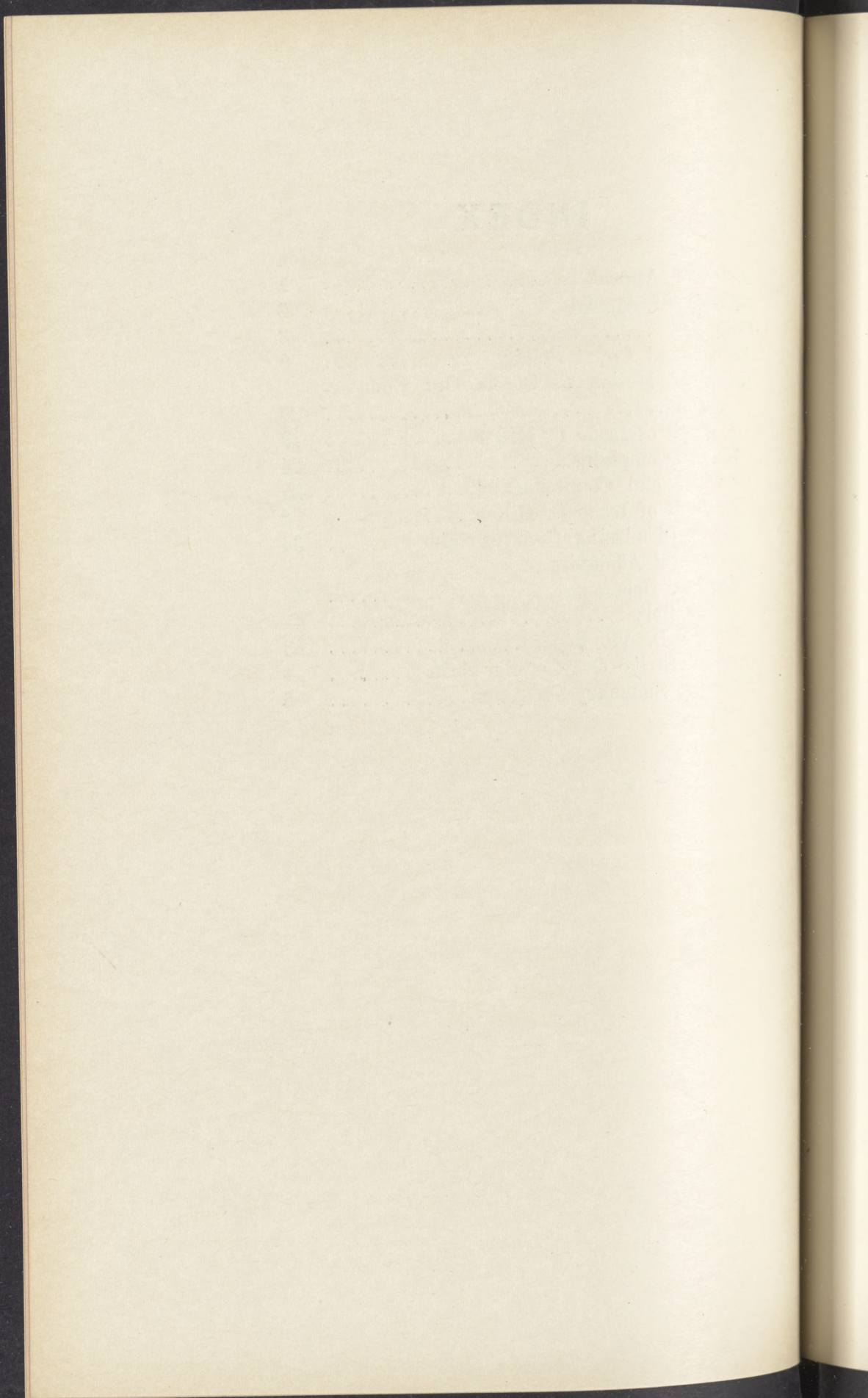


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NOTICE OF APPEAL.

Filed October 7, 1929.

New Jersey Supreme Court

SOMERSET COUNTY.

10

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

*Action
at Law.*

vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,

Defendants.

*Notice
of Appeal.*

20

To David Lesnik, attorney for Third Parties,
972 Broad street, Newark, New Jersey.

SIR:

PLEASE TAKE NOTICE that the defendants in
the above-entitled cause appeal to the Court of
Errors and Appeals in the last resort in all
causes in New Jersey from the whole of the
judgment entered in this cause.

30

Dated October 2, 1929.

ERNEST P. BIRO,
Attorney for Defendants.

40

GROUNDS OF APPEAL.

Filed October 23, 1929.

New Jersey Court of Errors and Appeals

10	<p style="text-align: center;">SIMON AND DIAMOND COAL AND LUMBER COMPANY, INC., a cor- poration, and MEYER LOBSENZ, <i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">EMIL O. BELZ and LOUISE BELZ, his wife, <i>Defendants-Appellants.</i></p>	<p style="font-size: 4em; line-height: 1;">}</p> <p style="text-align: center;"><i>Action at Law.</i></p> <p style="text-align: center;"><i>Grounds of Appeal.</i></p>
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20 The appellants state the following grounds of appeal:

1. The Supreme Court erroneously struck out the counter-claim of the appellants against Ida Miller and Isaac D. Miller, third parties.

2. The Supreme Court found in favor of Ida Miller and Isaac D. Miller, third parties, instead of the appellants.

30 Dated October 21, 1929.

ERNEST P. BIRO,
Attorney of Appellants.

COMPLAINT.

Filed May 29, 1929.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

10

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

vs.

EMIL O. BELZ and LOUISE BELZ,
Defendants.

*Action
at Law.**Complaint.*

20

Plaintiffs, Simon and Diamond Coal and Lum-
ber Company, Inc., a corporation of the State of
New Jersey, having its office and principal place
of business in the City of Clifton, County of
Passaic, and State of New Jersey, and Meyer
Lobsenz, of the City of Paterson, Passaic County,
New Jersey, say that:

1. On July 8, 1926, the defendants, Emil O.
Belz and Louise Belz, his wife, executed to Ida
Miller a bond of that date in the penal sum of
\$12,000.00, payable on July 1, 1930, conditioned
to pay the principal sum of \$6,000.00, together
with interest thereon from July 1, 1926.

30

2. To secure the payment of the said bond,
the said Emil O. Belz and Louise Belz, his wife,
executed to the said Ida Miller a purchase money
mortgage of even date with the said bond upon
lands and premises owned by them and situated
in the Township of North Plainfield, in the

40

Complaint.

County of Somerset and State of New Jersey,
and described as follows:

10 BEGINNING at a stake and stone heap in
or near the southerly side line of the old
road leading from Washington Rock to War-
renville and at the corner of property be-
longing to one Davis; thence running along
land of said Davis in a magnetic course
North thirteen degrees and eleven minutes
West a distance of seven hundred and
twenty-nine and fifty-three one-hundredths
feet to a stake and stone heap being an-
other corner of said Davis' land; thence still
along land of said Davis North twelve de-
grees and three minutes West a distance of
20 twelve hundred and eighty-six and fifteen
one-hundredths feet to a stake and stone
heap for a corner in line of property belong-
ing to S. H. Schlieff; thence running along
land of said Schlieff South sixty-one degrees
and fifty minutes West a distance of four
hundred and forty-three and fifty-two one-
hundredths feet to a stake heap in a corner
of land formerly owned by Stephen O.
Staats; thence running along land of said
Staats South fourteen degrees twenty-two
30 minutes East a distance of two thousand
and twenty and twenty-one hundredths feet
to a stone for a corner in or near the south-
erly side of said road leading from Wash-
ington Rock to Warrenville; thence running
along or near the southerly side line of said
road and along land belonging to Joseph
Tetlow and also along land belonging to
W. S. McCauley North fifty-nine degrees and
four minutes East a distance of three hun-
dred and eighty-four and fifteen one-hun-
40 dredths feet to the place of BEGINNING.

Complaint.

Containing 18 and 191/1000 acres of land more or less.

3. On or about September 17, 1927, the said Ida Miller assigned the said bond and mortgage to the Simon and Diamond Coal and Lumber Company, Inc., one of the plaintiffs herein.

10

4. On or about November 1, 1927, the said Simon and Diamond Coal and Lumber Company, Inc., assigned the said bond and mortgage to Meyer Lobsenz.

5. Said assignment to Meyer Lobsenz was given to secure a note dated November 1, 1927, to Meyer Lobsenz, in the sum of \$3,500.00, with interest at the rate of six per cent. per annum and also any payments and renewals thereof. The amount due to said Meyer Lobsenz has been reduced to the sum of \$2,600.00.

20

6. The said mortgage above described is a first mortgage upon the property above described.

7. The said mortgage was foreclosed by Simon and Diamond Coal and Lumber Company, Inc., and Meyer Lobsenz and on November 13, 1928, a final decree for the sale of the said lands and premises and the foreclosure of the said mortgage was made in the Court of Chancery of New Jersey in a suit brought by the Simon and Diamond Coal and Lumber Company, Inc., and Meyer Lobsenz against the defendants herein.

30

8. The said decree adjudged that there was then due on the said bond and mortgage the sum of \$6,476.00 and interest thereon to be computed from October 18, 1928, the date of the Master's report, together with the complainants'

40

Complaint.

taxed costs in the sum of \$200.34, and ordered that a writ of *feri facias* be issued to the Sheriff of the County of Somerset for the sale of the mortgaged premises to meet the sum due, together with interest and costs.

10 9. On January 7, 1929, and within six months of the commencement of this action, the sheriff of the said county under authority of the said writ sold the said premises at public sale according to law, to the Simon and Diamond Coal and Lumber Company, Inc., it being the highest bidder at the sale, for the sum of \$150.00.

20 10. The said sum of \$6,476.00 and interest thereon from October 18, 1928, and also \$200.34 taxed costs, has not nor any part thereof been paid to the plaintiffs, and defendants are entitled to no credits against the same, other than the said sum of \$150.00, for which said mortgaged premises were sold.

11. This action of the plaintiffs against the defendants was commenced within six months from the sale of the mortgaged premises.

30 12. Prior to the beginning of this action, to wit, on May 24, 1929, there was filed in the office of the Clerk of Common Pleas of the County of Somerset, said county being the county in which the lands described in said mortgage given with said bond are situate, a written notice of this action setting forth the Court in which it was proposed to begin this action, the names of the parties to said bond and to this action, the book and page of the record of the said mortgage, together with a description of the lands or real estate described therein.

Complaint.

Plaintiffs demand the amount of deficiency caused by the sale of the said property, being \$6,476.00, and interest from October 18, 1928, and \$200.34 taxed costs, and the costs of this suit less \$150.00.

WHITING & MOORE, 10
Attorneys for Plaintiffs.

20

30

40

ANSWER AND COUNTER-CLAIM.

Filed June 20, 1929.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

10

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

*Action
at Law.*

vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,

*Answer and
Counter-
claim.*

20

Defendants.

Defendants, who reside in the Town of Irving-
ton, County of Essex and State of New Jersey,
say that:

GENERAL DEFENSE.

1. They admit the truth of the allegations
contained in the first, second and sixth para-
graphs of the complaint filed herein.

30

2. They believe the averments in paragraphs
3, 4, 5, 6, 7, 8, 9, 11 and 12 to be true and leave
plaintiffs to their proof.

3. Paragraph 10 is denied except as herein
admitted.

4. They deny any indebtedness on said bond
caused by the deficiency on the sale of said
property.

40

Answer and Counter-claim.

FIRST SEPARATE DEFENSE.

That the assignor of the plaintiffs, Ida Miller and her agent, servant or employee, knowingly made false representations of the location and topography of the land described in the complaint filed herein with the intent to deceive and defraud defendants. By reason of said misrepresentations and untrue statements, and in reliance thereon, defendants were induced to execute said bond as alleged in the complaint and have been damaged by the false and fraudulent representations made as aforesaid. 10

SECOND SEPARATE DEFENSE.

That consideration for said bond has wholly failed, wherefore said bond is void and unenforceable. 20

THIRD SEPARATE DEFENSE.

That defendants executed said bond without consideration therefor, and said want and absence of consideration vitiated and destroyed any indebtedness thereon.

FOURTH SEPARATE DEFENSE.

That by virtue of certain agreement in writing dated June 26, 1926, wherein the assignor of the plaintiffs, said Ida Miller, promised and agreed for a valuable consideration to extend the time for payment of the alleged indebtedness after its due date for a period of one and one-half years, no present debt exists and the commencement of the present action is premature. 30

Answer and Counter-claim.

OBJECTION AND POINT OF LAW.

Defendants reserve the right to move to strike out the complaint filed in the above-entitled action at or before trial on the ground that same fails to disclose a cause of action.

- 10 By way of counter-claim against plaintiffs and Ida Miller and Isaac Miller, third parties, defendants say that:

FIRST COUNT.

20 1. On or about the 26th day of June, 1926, Ida Miller, third party and assignor of plaintiffs, entered into a certain contract in writing, wherein said Ida Miller agreed to sell, grant, convey and exchange to defendants certain lands owned by said Ida Miller and situated in the Township of North Plainfield, Somerset County, New Jersey, and more particularly described in the complaint filed herein.

30 2. Said contract also contained an agreement by defendants to sell, grant and convey to said Ida Miller in exchange for the above-mentioned property, certain lands and premises owned by the said defendants and situated in Essex County, New Jersey, being two six-family dwellings known and designated as Nos. 58-62 Ridgewood avenue, Newark, New Jersey.

3. On July 8, 1926, said contract was consummated and in all things performed by the parties therein except that the deed executed by said Ida Miller conveying lands in North Plainfield, Somerset County, New Jersey, to the defendants was not delivered to said defendants until June 20, 1928.

Answer and Counter-claim.

4. Sometime prior to said 26th day of June, 1926, Isaac Miller, third party herein, acting as agent, servant or employee of said Ida Miller and in the course of his employment, wilfully misrepresented and falsely pointed out and fraudulently designated the location of the lands described in the first paragraph herein and situated in North Plainfield, Somerset County, New Jersey, with intent to deceive and defraud said defendants. 10

5. Said Isaac Miller knew the essential falsity of his fraudulent representations, made with the intent that it be acted upon, and that said lands falsely exhibited to the defendants were entirely different land and not the land proposed in the negotiations of sale and exchange. 20

6. Said lands falsely and fraudulently exhibited to defendants as aforesaid were of enhanced value by virtue of its location, topography and proximity to a public school. 20

7. Defendants were strangers to and unacquainted with said locality which was peculiarly within the knowledge of said Isaac Miller and believed and relied upon the said representations fraudulently made as aforesaid, and were induced thereby to execute certain bond and mortgage contemporaneously with said contract as aforesaid, and transfer and convey said property owned by the said defendants and situated in Newark, Essex County, New Jersey, to said Ida Miller, all on to their damage. 30

8. Said Isaac Miller perpetrated said fraud deliberately and maliciously as aforesaid, and in the course of his employment and for the benefit of the said Ida Miller, his employer. Said Ida 40

Answer and Counter-claim.

Miller ratified and confirmed said contract and retained the benefit thereunder.

10 9. Defendants repudiated and refused to confirm and ratify said transaction and mutual transfer of respective titles and immediately on discovery of said fraud and deceit, tendered and hereby tenders surrender of said contract and demanded return of money paid thereon.

20 10. By deed of assignment dated September 17, 1927, said Ida Miller transferred and assigned to Simon and Diamond Coal and Lumber Company, Inc., said bond and mortgage hereinabove alleged in paragraph 7 and constituted and appointed said Simon and Diamond Coal and Lumber Co., Inc., her true and lawful attorney, irrevocable, to institute suit for the recovery of all said money and interest, said money and interest having accrued by virtue of said contract executed by said defendants as aforesaid.

11. On November 1, 1927, said Simon and Diamond Coal and Lumber Co., Inc., made a partial assignment of its interest to Meyer Lobsenz, plaintiff herein.

30 12. Said assignments were not made in good faith and for value and said Simon and Diamond Coal and Lumber Co., Inc., and Meyer Lobsenz, plaintiffs herein, received same subject to existing set-offs, discounts and defenses.

WHEREFORE, defendants demand judgment on the counter-claim in the sum of \$575 paid on said contract and the sum of \$49,475 with interest from July 8, 1926, and cost of suit or the return of the two six-family dwellings conveyed to said Ida Miller.

Answer and Counter-claim.

SECOND COUNT.

1. On or about the 26th day of June, 1926, Ida Miller third party and assignor of plaintiffs, entered into a certain contract in writing, wherein said Ida Miller agreed to sell, grant, convey and exchange to defendants certain lands owned by said Ida Miller and situated in the township of North Plainfield, Somerset County, New Jersey and more particularly described in the complaint filed herein. 10

2. Said contract also contained an agreement by defendants to sell, grant and convey to said Ida Miller in exchange for the above-mentioned property, certain lands and premises owned by the said defendants and situated in Essex County, New Jersey, being two six-family dwellings known and designated as Nos. 58-62 Ridgewood avenue, Newark, New Jersey. 20

3. On July 8, 1926, said contract was consummated and in all things performed by the parties therein except that the deed executed by said Ida Miller conveying lands in North Plainfield, Somerset County, New Jersey, to the defendants was not delivered to said defendants until June 20, 1928.

4. Some time prior to said 26th day of June, 1926, Isaac Miller, third party herein, acting as agent, servant or employee of said Ida Miller and in the course of his employment, wilfully misrepresented and falsely pointed out and fraudulently designated the location of the lands described in the first paragraph herein and situated in North Plainfield, Somerset County, New Jersey, with intent to deceive and defraud said defendants. 30

Answer and Counter-claim.

5. Said Isaac Miller knew the essential falsity of his fraudulent representations, made with the intent that it be acted upon, and that said lands falsely exhibited to the defendants was entirely different land and not the land proposed in the negotiations of sell and exchange.

10 6. Said lands falsely and fraudulently exhibited to defendants as aforesaid were of enhanced value by virtue of its location, topography and proximity to a public school.

20 7. Defendants were strangers to and unacquainted with said locality which was peculiarly within the knowledge of said Isaac Miller and believed and relied upon the said representations fraudulently made as aforesaid, and were induced thereby to execute certain bond and mortgage contemporaneously with said contract as aforesaid, and transfer and convey said property owned by the said defendants and situated in Newark, Essex County, New Jersey to said Ida Miller, all on to their damage.

30 8. Said Isaac Miller perpetrated said fraud deliberately and maliciously as aforesaid, and in the course of his employment and for the benefit of the said Ida Miller, his employer. Said Ida Miller ratified and confirmed said contract and retained the benefit thereunder.

40 9. By deed of assignment dated September 17, 1927, said Ida Miller transferred and assigned to Simon and Diamond Coal and Lumber Company, Inc., said bond and mortgage hereinabove alleged in paragraph 7 and constituted and appointed said Simon and Diamond Coal and Lumber Co., Inc., her true and lawful attorney, irrevocable to institute suit for the recovery of all said money and interest, said money and interest

Answer and Counter-claim.

having accrued by virtue of said contract executed by said defendants as aforesaid.

10. On November 1, 1927 said Simon and Diamond Coal and Lumber Co., Inc., made a partial assignment of its interest to Meyer Lobsenz, plaintiff herein.

10

11. Said assignments were not made in good faith and for value and said Simom and Diamond Coal and Lumber Co., Inc., and Meyer Lobsenz, plaintiff herein, received same subject to existing set-offs, discounts and defenses.

WHEREFORE defendants demand judgment on the counter-claim against the plaintiffs and Ida Miller and Isaac Miller in the sum of \$10,000 with cost of suit.

20

THIRD COUNT.

1. On or about the 26th day of June, 1926, Ida Miller third party and assignor of plaintiffs, entered into a certain contract in writing, wherein said Ida Miller agreed to sell, grant, convey and exchange to defendants certain lands owned by said Ida Miller and situated in the Township of North Plainfield, Somerset County, New Jersey and more particularly described in the complaint filed herein.

30

2. Said contract also contained an agreement by defendants to sell, grant and convey to said Ida Miller in exchange for the above mentioned property, certain lands and premises owned by the said defendants and situated in Essex County, New Jersey, being two six-family dwellings known and designated as Nos. 58-62 Ridgewood avenue, Newark, New Jersey.

40

Answer and Counter-claim.

3. On July 8, 1926, said contract was consummated and in all things performed by the parties therein except that the deed executed by said Ida Miller conveying lands in North Plainfield, Somerset County, New Jersey, to the defendants was not delivered to said defendants until June
10 20, 1928.

4. Some time prior to said 26th day of June, 1926, Isaac Miller, third party herein, acting as agent, servant or employee of said Ida Miller and in the course of his employment, wilfully misrepresented and falsely pointed out and fraudulently designated the location of the lands described in the first paragraph herein and situated in North Plainfield, Somerset County, New Jersey, with intent to deceive and defraud said
20 defendants.

5. Said Isaac Miller knew the essential falsity of his fraudulent representations, made with the intent that it be acted upon, and that said lands falsely exhibited to the defendants was entirely different land and not the land proposed in the negotiations of sell and exchange.

6. Said lands falsely and fraudulently exhibited to defendants as aforesaid were of enhanced value by virtue of its location, topography
30 and proximity to a public school.

7. Defendants were strangers to and unacquainted with said locality which was peculiarly within the knowledge of said Isaac Miller and believed and relied upon the said representations fraudulently made as aforesaid, and were induced thereby to execute certain bond and mortgage contemporaneously with said contract as aforesaid, and transfer and convey said property
40 owned by the said defendants and situated in

Answer and Counter-claim.

Newark, Essex County, New Jersey to said Ida Miller, on to their damage.

8. Said Isaac Miller perpetrated said fraud deliberately and maliciously as aforesaid, and in the course of his employment and for the benefit of the said Ida Miller, his employer. Said Ida Miller ratified and confirmed said contract and retained the benefit thereunder. 10

9. By deed of assignment dated September 17, 1927, said Ida Miller transferred and assigned to Simon and Diamond Coal and Lumber Company, Inc., her true and lawful attorney, irrevocable to institute suit for the recovery of all said money and interest, said money and interest having accrued by virtue of said contract executed by said defendants as aforesaid. 20

10. On November 1, 1927, said Simon and Diamond Coal and Lumber Co., Inc., made a partial assignment of its interest to Meyer Lobsenz, plaintiff herein.

11. Said assignments were not made in good faith and for value and said Simon and Diamond Coal and Lumber Co., Inc. and Meyer Lobsenz, plaintiffs herein, received same subject to existing set-offs, discounts and defenses. 30

WHEREFORE defendants demand judgment on the counter-claim against the plaintiffs and Ida Miller the sum of \$10,000 with cost of suit.

FOURTH COUNT.

1. On or about the 26th day of June, 1926, Ida Miller third party and assignor of plaintiffs, entered into a certain contract in writing, wherein said Ida Miller agreed to sell, grant, convey and exchange to defendants certain lands owned 40

Answer and Counter-claim.

by said Ida Miller and situated in the Township of North Plainfield, Somerset County, New Jersey, and more particularly described in the complaint filed herein.

10 2. Said contract also contained an agreement by defendants to sell, grant and convey to said Ida Miller in exchange for the above-mentioned property, certain lands and premises owned by the said defendants and situated in Essex County, New Jersey, being two six-family dwellings known and designated as Nos. 58-62 Ridgewood avenue, Newark, New Jersey.

20 3. On July 8, 1926, said contract was consummated and in all things performed by the parties therein except that the deed executed by said Ida Miller conveying lands in North Plainfield, Somerset County, New Jersey, to the defendants was not delivered to said defendants until June 20, 1928.

30 4. Some time prior to said 26th day of June, 1926, Isaac Miller, third party herein, acting as agent, servant or employee of said Ida Miller and on his own behalf, and in the course of his employment, wilfully misrepresented and falsely pointed out and fraudulently designated the location of the lands described in the first paragraph herein and situated in North Plainfield, Somerset County, New Jersey, with intent to deceive and defraud said defendants.

40 5. Said Isaac Miller knew the essential falsity of his fraudulent representations, made with the intent that it be acted upon, and that said lands falsely exhibited to the defendants was entirely different land and not the land proposed in the negotiations of sell and exchange.

Answer and Counter-claim.

6. Said lands falsely and fraudulently exhibited to defendants as aforesaid were of enhanced value by virtue of its location, topography and proximity to a public school.

7. Defendants were strangers to and unacquainted with said locality which was peculiarly within the knowledge of said Isaac Miller and believed and relied upon the said representations made with malice and wanton and reckless disregard of the rights of defendants and were induced thereby to execute certain bond and mortgage contemporaneously with said contract as aforesaid, and transfer and convey said property owned by the said defendants and situated in Newark, Essex County, New Jersey, to said Ida Miller on to their damage. 10

WHEREFORE defendants demand judgment on the counter-claim against Isaac Miller, third party compensatory and punitive, the sum of \$25,000 with costs and disbursements. 20

ERNEST P. BIRO,
Attorney for Defendants.

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NOTICE OF MOTION.

Filed September 9, 1929.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

10

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

*Action
at Law.*

vs.

EMIL O. BELZ and LOUISE BELZ
his wife,

*Notice of
Motion.*

Defendants.

20

To Ernest P. Biro, Esq., attorney of defendants.

SIR:

30

TAKE NOTICE, that on Saturday, the 28th day of September, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, at the Court House in the Town of Morristown, Morris County, New Jersey, I shall apply to his Honor, Charles W. Parker, Justice of the Supreme Court of New Jersey, for an order in the above-entitled cause, striking out the counter-claim filed by said defendant against Ida Miller and Isaac Miller in the above-entitled cause, on the following grounds:

1. That same is *res adjudicata* for the following reasons:

40

(a) That the matters and things set forth in the four counts of said counter-claim are the same matters and things set forth in a certain counter-claim filed by said defendants on May

Notice of Motion to Strike Out Counter-claim.

25, 1928, in a certain action in the Court of Chancery of the State of New Jersey, for the foreclosure of a mortgage mentioned in said counter-claim, wherein the above-named plaintiffs were complainants and the said defendants, Emil O. Belz and Louise Belz, his wife, were defendants.

10

(b) That the counter-claim filed by said defendants, as aforesaid, in the Chancery action, was adjudicated by an order made and entered on October 9, 1928, striking out said counter-claim.

2. That the said defendants are debarred from maintaining said counter-claim for the reason that by the filing of said counter-claim in the Court of Chancery, they have elected to have the entire transaction between the third party, Ida Miller and themselves, the defendants, rescinded in equity and having made their election, cannot maintain this suit for damages.

20

3. That said defendants have confirmed the entire transaction, including the exchange of property between said Ida Miller and themselves, mentioned in said counter-claim.

4. That said counter-claim and all the allegations contained therein are untrue in fact, and that the same are frivolous and sham.

30

Attached hereto and made part hereof is an affidavit by Isaac D. Miller; a certified copy of the bill of complaint filed in the New Jersey Court of Chancery on May 25, 1928, in the foreclosure suit above referred to; a certified copy of the answer and counter-claim filed in said foreclosure suit on June 30, 1928; a certified copy of an affidavit of Isaac D. Miller on motion to strike out answer and counter-claim filed in

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Notice of Motion to Strike Out Counter-claim.

said foreclosure suit on September 18, 1928; a certified copy of the order of the Court of Chancery bearing date October 9, 1928; which affidavit and documents will be used on said motions.

10 Dated September 9, 1929.

Yours respectfully,

DAVID LESNIK,
Attorney of Third Parties,
Ida Miller and Isaac D. Miller.

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Affidavit of Isaac D. Miller.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,
Defendants.

*Action
at Law.*

Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

ISAAC D. MILLER, of full age, being duly sworn according to law, on his oath deposes and says: I am one of the third parties brought into this suit by the above-named defendants and was the agent of Ida Miller, the other third party and acted for her during the entire transaction mentioned in the counter-claim filed in this course.

I have reread the affidavit made by me in a certain foreclosure suit between the parties hereto and reiterate each and every word thereof.

A certified copy of said affidavit is attached hereto and made a part hereof.

ISAAC D. MILLER.

Subscribed and sworn to before
me this 9th day of September,
1929.

HENRY SEVRIN,

An Attorney at Law of New Jersey.

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Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey.

10 The complainants, Simon and Diamond Coal and Lumber Company, Inc., a corporation having its office and principal place of business in the City of Clifton, County of Passaic and State of New Jersey, and Meyer Lobsenz of the City of Paterson, County of Passaic, and State of New Jersey, respectfully show that:

20 1. On July 8, 1926, Emil O. Belz and Louise Belz, his wife, being indebted to Ida Miller in the sum of Six thousand (\$6,000) dollars, executed a bond of that date to secure that sum payable on July 1, 1930, with interest thereon to be computed from July 1, 1926, payable semi-annually from the date of the bond.

30 2. To secure the payment of the said bond, the said Emil O. Belz and Louise Belz, his wife, executed to the said Ida Miller a purchase money mortgage of even date of the said bond and thereby conveyed to her in fee the lands hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the said bond, which said mortgage having been duly acknowledged was, on July 10, 1926, recorded in the Register's Office of the County of Somerset in Book E-11 of Mortgages on page 175, etc.

3. The said mortgaged premises are described as follows:

40 All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of North

Bill of Complaint.

Plainfield in the County of Somerset and State of New Jersey.

BEGINNING at a stake and stone heap in or near the southerly side line of the old road leading from Washington Rock to Warrentville and at the corner of property belonging to one Davis; thence running along land of said Davis in a magnetic course North thirteen degrees and eleven minutes West a distance of seven hundred and twenty nine and fifty three one hundredths feet to a stake and stone heap being another corner of said Davis's land; thence still along land of said Davis North twelve degrees and three minutes West a distance of twelve hundred and eighty-six and fifteen one hundredths feet to a stake and stone heap for a corner in line of property belonging to S. H. Schlieff; thence running along land of said Schlieff South sixty one degrees and fifty minutes West a distance of four hundred and forty three and fifty two one-hundredths feet to a stake heap in a corner of land formerly owned by Stephen O. Staats; thence running along land of said Staats South fourteen degrees twenty two minutes East a distance of two thousand and twenty and twenty-one hundredths feet to a stone for a corner in or near the southerly side of said road leading from Washington Rock to Warrentville; thence running along or near the southerly side line of said road and along land belonging to Joseph Tetlow and also along land belonging to W. S. McCauley North fifty nine degrees and four minutes East a distance of three hundred and eighty four and fifteen one hundredths feet to the place of BEGINNING. Containing 18 and 191/1000 acres of land more or less.

4. On September 17, 1927, the said Ida Miller assigned said bond and mortgage to the Simon

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Bill of Complaint.

and Diamond Coal and Lumber Company, one of the complainants herein, which said assignment was duly acknowledged and recorded in the Register's Office in the County of Somerset in Book 44 of Assignments of Mortgages for said County on page 364.

10 5. On November 1, 1927, the said Simon and Diamond Coal and Lumber Company assigned the said bond and mortgage to Meyer Lobsenz, one of the complainants herein, as collateral for a loan in the sum of three thousand five hundred dollars (\$3,500) and interest, which said Assignment was duly acknowledged and recorded in the Register's Office in the County of Somerset in Book 44 of Assignments of Mortgages for said County on page 461.

20 6. Both bond and mortgage contained an agreement that should any interest become due and remain unpaid for a space of thirty days, then the principal sum of six thousand dollars (\$6,000) should become immediately due with all arrearages and interest at the option of the mortgagee or her assigns.

30 7. On January 1, 1928, interest for six months became due and payable and the said interest has not been paid and still remains unpaid.

Complainants have elected that the whole principal sum with all the unpaid interest shall now become immediately due.

Complainants are without adequate remedy in the courts of law and therefore pray:

40 1. That Emil O. Belz and Louise Belz, his wife, who are defendants to this suit may answer this bill of complaint and each statement therein made.

Bill of Complaint.

2. That an account be taken of the amount due on the complainants mortgage.

3. That the defendants, or one of them, may be debarred to pay to the complainants the amount so found due with interest and costs by a short day to be appointed by this Court and in default of such payment, that they, and each of them, be debarred and foreclosed of all equity of redemption in the said lands. 10

4. That a decree be made for the sale of the mortgaged premises to raise and pay to the complainants the amount so found due on this mortgage together with interest and costs.

5. That a writ of subpoena may be issued commanding the said defendants to answer this bill of complaint and abide by such decree as this Court may make in the premises. 20

SYDNEY LOBSENZ,
Solicitor for Complainants.

ROBERT H. DAVIDSON,
Of Counsel.

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Answer and Counter-claim.

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	SIMON AND DIAMOND COAL AND LUMBER COMPANY, INC., and MEYER LOBSENZ, <i>Complainants,</i>	} <i>On Bill, &c.</i> <i>Answer and</i> <i>Counter-</i> <i>claim.</i>
	<i>and</i>	
	EMIL O. BELZ and LOUISE BELZ, his wife, <i>Defendants.</i>	

20 The defendants answering the bill of complaint herein say that,

1. They admit the execution of bond as alleged in paragraph 1, but deny any indebtedness and deny the remaining allegations thereof.
2. They admit paragraph 2.
3. They admit paragraph 3.
4. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 4, and therefore deny the same.
- 30 5. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 5, and therefore deny the same.
6. They admit paragraph 6.
7. They deny paragraph 7.

Answer and Counter-claim.

COUNTER-CLAIM.

By way of counter-claim against the complainants and a third party, Ida Miller, the defendants say that,

1. The mortgage involved in this proceeding was executed and delivered by the defendants to vendor, the third party, Ida Miller, in part payment of the purchase price of lands and premises sold to them by her by deed dated July 8, 1926. 10

2. Prior to the execution and delivery of such deed and of the bond and mortgage referred to in the bill, the said Ida Miller personally, and by her agents, pointed out to these defendants premises in North Plainfield, Somerset County, New Jersey, which she proposed to sell to them and which the said defendants, after examination, agreed to buy. 20

3. The agreement between the said parties was in writing and the property was therein described as being a plot of land, containing 18.191 acres more or less; being the same premises described in a certain deed dated March 8, 1922, from Sarah Search, trustee, to Louis Kohn, recorded in the office of the Clerk of Somerset County, on March 28, 1922, in Book Q 18 of Deeds for said County, on pages 384, etc. 30

4. The said defendants agreed, as part of the consideration, to convey to the said Ida Miller, lands and premises in the City of Newark, County of Essex and State of New Jersey, more fully described in said agreement and being two plots of land on Ridgewood avenue, each 331½ feet x 100 feet more or less and containing two six-family dwellings, generally known and designated as Nos. 58-60-62 Ridgewood avenue; reference 40

Answer and Counter-claim.

to which agreement is hereby made for full particulars.

10 5. In accordance with such agreement, the said Ida Miller executed deed to the defendants and the defendants executed deed to her, and likewise executed bond and mortgage as provided in said agreement, and all of the said instruments were duly delivered, but the property conveyed by the said Ida Miller was other than, and different from, that which had been shown to the defendants and which she had agreed to convey and they to purchase.

20 6. The defendants were induced to accept such conveyance and to consummate the transaction through the fraud of the said Ida Miller and her agents, in that they did wilfully, fraudulently and knowingly represent to the defendants, prior to the contract of purchase, that the said defendants were to have conveyed to them the premises which had been exhibited to them as alleged in paragraph 2.

30 7. Such representations were false and made to induce the defendants to make such purchase and to execute the bond and mortgage described, and likewise to convey to the said Ida Miller the property which they had owned on Ridgewood avenue, Newark. The said defendants, in accepting the conveyance and in executing bond and mortgage, and also the deed for such property, relied upon the representations which had been made.

40 8. Upon learning that such representations were fraudulent and that the property which had been conveyed to them was not the property which they had agreed to purchase, the defendants notified the said Ida Miller, and have at

Answer and Counter-claim.

all since refused to honor the bond and mortgage, or to pay the interest provided for.

9. Any assignments made by the said Ida Miller to the complainants of the bond and mortgages involved herein, were not made in good faith and for value.

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These defendants therefore pray,

1. That the complainants, Simon & Diamond Coal & Lumber Co., Inc., and Meyer Lobsenz, and the third party Ida Miller, may answer this counter-claim and each statement therein made.

2. That the complainants may be ordered and directed to surrender the said bond and mortgage properly endorsed for cancellation, or that the said mortgage may be decreed to be cancelled.

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3. That the contract entered into for the exchange of property between the said Ida Miller and the defendants, may be in all respects rescinded, and the said Ida Miller compelled to reconvey to the defendants the property which they had conveyed to her.

4. That an account be taken of the amount due to the defendants from the said Ida Miller, and to the said Ida Miller from the defendants.

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5. That a writ of subpoena may issue, commanding said third party, Ida Miller, to answer this counter-claim and to abide by such decree as such court may make in the premises.

WALTER D. VAN RIPER,
Solicitor for Defendants.

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Affidavit of Isaac D. Miller.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>SIMON AND DIAMOND COAL AND LUMBER COMPANY, INC., and MEYER LOBSENZ, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>EMIL O. BELZ and LOUISE BELZ, his wife, <i>Defendants.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>On Motion to Strike Answer and Counter- claim.</i></p> <p><i>Affidavit of Isaac D. Miller.</i></p>
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20 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

ISAAC D. MILLER, being duly sworn according to law, upon his oath deposes and says:

1. I am the agent of Ida Miller who has been brought into this suit by the defendants, Emil O. Belz and Louise Belz, and am familiar with the real estate transaction and mortgage that is being foreclosed in the above-entitled cause.

30 2. Prior to the execution of the deed and the bond and mortgage referred to in the bill of complaint, the said Ida Miller was the owner of a tract of vacant land containing about eighteen acres in the Town of North Plainfield, County of Somerset and State of New Jersey, and the defendants were the owners in fee of two six-family houses on Ridgewood avenue, in the City of Newark, County of Essex and State of New Jersey.

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Affidavit of Isaac D. Miller.

3. At the request of the defendants who desired to make an exchange of properties with my principal, the said Ida Miller, I took them to the land in North Plainfield, exhibited the said acreage to them and after numerous conferences and negotiations between the said defendants and myself as the representative of Ida Miller, a contract was executed for the sale and exchange of the defendants' properties in Newark and the vacant land in North Plainfield. 10

4. By the terms of said contract of exchange the difference in equities was in favor of Ida Miller, and the said defendants agreed to execute a purchase money bond and mortgage for six thousand (\$6,000) dollars on the land in North Plainfield to the said Ida Miller on the date of closing of title. 20

5. On the date of closing of title and delivery of deed the said defendants executed to the said Ida Miller a purchase money bond and mortgage for six thousand (\$6,000) dollars, and all apportionments were made on the date of closing by the said defendants executing to the said Ida Miller their personal promissory notes, which notes were about six or seven in number, each for the sum of one hundred (\$100) dollars payable in intervals of thirty days at the Springfield Avenue Trust Company, Newark, N. J. 30

6. The contract for the sale and exchange of properties was consummated about July 15, 1926, and deeds were delivered at the office of Samuel Cohen, an attorney whose office is at 207 Market street, Newark, N. J. The said Samuel Cohen represented the defendants in the said transaction. 40

Affidavit of Isaac D. Miller.

7. The said defendants have paid and honored the several promissory notes that were executed on the date of closing of title and exchange of deeds.

10 8. Sometime in the year 1927, I, as agent for Ida Miller, entered into an agreement for the purchase of a certain property in the City of Passaic, New Jersey, with Simon & Diamond Coal & Lumber Co., Inc., one of the complainants in this cause, and by the terms of said agreement of purchase the consideration for their equity in the Passaic property was to be evidenced by an assignment of the six thousand (\$6,000) dollar mortgage on the North Plainfield land to be executed by my principal, the said Ida Miller.

20 9. On the date of closing of title and delivery of deed by the complainant, Simon & Diamond Coal & Lumber Co., Inc., to the said Ida Miller, an assignment of the \$6,000 mortgage executed by the said defendants on the land in North Plainfield, was delivered by the said Ida Miller to the complainant.

30 10. I deny that the lands in North Plainfield described in the deed of Ida Miller to the said defendants are other lands than were pointed out to them prior to the sale. I, personally, representing my principal, Ida Miller, took the said defendants to the land and designated the acreage which they were purchasing and to which title was given them.

11. About six months after the defendants, Emil O. Belz and Louise Belz, conveyed the properties on Ridgewood avenue, Newark, N. J. to the said Ida Miller, the said Ida Miller sold and con-

Affidavit of Isaac D. Miller.

veyed the said Ridgewood avenue houses to purchasers for value.

ISAAC D. MILLER.

Sworn to and subscribed before
me this 10h day of August,
1928.

10

SAMUEL AVIDAN,

An Attorney at Law of New Jersey.

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Order Dismissing Counter-claim.

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	SIMON AND DIAMOND COAL AND LUMBER COMPANY, INC., and MEYER LOBSENZ, <i>Complainants,</i>	}
	<i>and</i>	
	EMIL O. BELZ and LOUISE BELZ, his wife, <i>Defendants.</i>	
		<i>On Bill, &c. Order Dis- missing Defendant's Counter- claim or Cross Bill.</i>

20 This matter coming on to be heard in the presence of Morris Schechter, Esq., solicitor of Ida Miller, a third party who has been brought into this suit by the defendants, Emil O. Belz and Louise Belz, his wife, and the Court having heard the arguments of the said solicitor and having read the affidavit filed in this cause on behalf of the said Ida Miller, and being of the opinion that the counter-claim or cross bill filed by the

30 said defendants, Emil O. Belz and Louise Belz, his wife, against the complainants and the said Ida Miller, a third party, should be dismissed on the ground that the said counter-claim does not represent a meritorious or equitable cause of action against the said complainants and Ida Miller; and also on the ground that the said defendants are not entitled to the equitable relief of rescission and the cancellation of the mortgage which they are seeking in said counter-claim, by reason of their laches; and on the

40 further ground that they have confirmed and

Order Dismissing Counter-claim.

ratified the real estate transaction and exchange of properties of which the mortgage being foreclosed and described in the bill of complaint was part of the consideration for the conveyance made by the said Ida Miller to the said defendants;

And it further appearing that due notice of the said Ida Miller's motion to dismiss the said defendants' counter-claim or cross bill for the cause aforesaid has been given to the said defendants;

It is thereupon on this 18th day of September, one thousand nine hundred and twenty-eight, ORDERED, ADJUDGED and DECREED that the said counter-claim or cross bill filed by the said defendants against the complainants and a third party, Ida Miller, be and the same is hereby dismissed with costs.

And it is further ORDERED, ADJUDGED and DECREED that the said defendants, Emil O. Belz and Louise Belz, pay to the said Ida Miller, a third party, or to Morris Schechter, Esq., her solicitor, a counsel fee of \$25.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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Defendants' Affidavits—Emil O. Belz.

DEFENDANTS' AFFIDAVITS.

Filed October 7, 1929.

NEW JERSEY SUPREME COURT.

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SOMERSET COUNTY.

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,

20

Defendants.

*Action
at Law.*

Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

EMIL O. BELZ, being duly sworn on his oath according to law, deposes and says: I am one of the defendants in a cause wherein Simon and Diamond Coal and Lumber Co., Inc., *et als.*, is plaintiff.

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1. On the 26th day of June, 1926, my wife and I entered into an agreement to purchase from Ida Miller, one of the defendants to the counter-claim herein, a certain piece of property the location of which was described to me as being in a certain part of the Township of North Plainfield, Somerset County, New Jersey, and at the same time we agreed to convey to the said Ida Miller two parcels of land having thereon two six-family dwellings located on Ridgewood

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avenue in the City of Newark, New Jersey.

Defendants' Affidavits—Emil O. Belz.

2. In this transaction both myself and my wife were represented by Samuel George Cohen, attorney-at-law in the City of Newark, who also represented the said Ida Miller. After the closing of title and on or about the 25th day of July, 1926, at my request Mr. Cohen forwarded me a description of the property which I was supposed to have purchased in a certain part of the Township of Plainfield, and shortly thereafter I went to North Plainfield for the purpose of looking at the property. Up to this time the deed to the property which we were supposed to have purchased in North Plainfield had not yet been delivered to me, said deed having been delivered to me on June 20, 1928, by Mr. Cohen. 10

3. Prior to June 26, 1926, and before the agreement above referred to was signed, I went to the Township of Plainfield with Isaac Miller, the agent of Ida Miller, and he pointed out to me the land which was supposed to have been conveyed in accordance with our agreement. 20

4. Shortly after the receipt of the description of this property from Mr. Cohen and during the early part of August, 1926, I again went to the Township of North Plainfield to look at the property which was supposed to have been conveyed to me and then on that occasion one of the residents of the neighborhood inquired from me the purpose of my visit, and after I told him I had purchased this property, this person informed me that this property was owned by the Board of Education at that time. This was the first time that I had any intimation that the land conveyed to me by Ida Miller was not the land designated by her agent, Isaac Miller; and after having taken the matter up with others they in- 30 40

Defendants' Affidavits—Emil O. Belz.

formed me that the description contained in the deed given to me pertained to other lands in the Township of North Plainfield, and not the particular piece of land in the Township of Plainfield, as had been pointed out to me.

10 5. I have never been a resident in Somerset County and was entirely unfamiliar either with the Township of North Plainfield and had to be taken around to the different places by someone familiar with the vicinity, as I was a stranger thereof.

20 6. Immediately on ascertaining the fraud that had been perpetrated on me as heretofore stated, I consulted counsel. On information and belief, my attorney communicated and informed Miller that I repudiated and disaffirmed the contract on the ground of the alleged fraud. Isaac D. Miller, as agent of Ida Miller, acknowledged receipt of the notice by attending a conference at the office of my attorney.

30 7. It is not true that I ever honored the obligations which arose out of the contract entered into on June 26, 1926. The several promissory notes that I executed on the day of closing title were dishonored by me as they became due. Ida Miller negotiated said notes to Morris Scharf, who instituted legal proceedings against me for the collection of same and recovered judgment thereon. I was therefore compelled to pay the aforesaid notes, as I could present no valid defense against the holder of said notes, the said Morris Scharf.

40 8. I have also refused to pay the installments of interest due on the mortgage, which was executed on the aforesaid day, viz., June 26, 1926,

Defendants' Affidavits—Louise Belz.

and have made no payments to either Ida Miller or her assigns.

9. I believe that I have a just and substantial legal defense to this action on the merits of the case.

EMIL O. BELZ.

10

Sworn to and subscribed before me
this 19th day of September, 1929.

ERNEST P. BIRO,

Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

LOUISE BELZ, being duly sworn on her oath according to law deposes and says:

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I am one of the defendants in a cause wherein Simon and Diamond Coal & Lumber Company, Inc., *et als.*, is plaintiff.

1. On June 26, 1926, my husband, Emil Belz, and I entered into a certain contract in writing with Ida Miller for the purchase of lands owned by her in Plainfield, Somerset County, New Jersey.

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2. After the transfer and exchange of property on July 8, 1926, George Samuel Cohen who represented both Ida Miller and my husband and I in the transaction retained the deed to the property which the said Ida Miller conveyed to us.

3. Approximately two weeks after the transfer of title my husband accompanied by a few of his acquaintances drove out to Plainfield to inspect the property which was conveyed to us by the

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Defendants' Affidavits—Louise Belz.

10 said Ida Miller. On his return he informed me that he had obtained a description of said property situated in Plainfield, Somerset County, and that the said description was entirely different than and at variance with the lands which had been pointed out to him by Isaac Miller prior to the transfer of title in July.

4. A few days thereafter we consulted counsel and endeavored to ascertain our legal rights and retained Judge Walter D. Van Riper.

20 5. As my husband had executed several promissory notes in adjusting our equities with Ida Miller at the sale and exchange of property, said notes were presented to us for payment. We dishonored said notes and refused to pay any of them. Subsequently, suit was instituted against us on said several promissory notes and as we had no defense, judgment by default was taken against us and execution was made thereon. We were compelled therefore to pay said obligation by process of law.

30 6. I refused to pay the interest due on the mortgage executed on July 8, 1926 and defaulted in payment on the ground that I had been defrauded. I have never paid any installment of principal or interest of said mortgage having refused to recognize any obligation thereon.

7. I believe that I have a just and substantial legal defense to this action on the merits of the case.

LOUISE BELZ.

Sworn to and subscribed before me,
this 18th day of September, 1929.

40 ERNEST P. BIRO,
Master in Chancery of New Jersey.

Defendants' Affidavits—Walter D. Van Riper.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

WALTER D. VAN RIPER, being duly sworn on his oath according to law, deposes and says:

During the months of August, September and October, 1926, I represented Mr. and Mrs. Belz, the defendants in this action. Some time during the month of August, Mr. Belz came to me and informed me that the property which I was supposed to have received in exchange for the sale of his own property on Ridgewood avenue, Newark, New Jersey, was not the property which should have been conveyed under the original contract between the parties. 10

As the result of information received from our client I had a conference with Mr. Isaac Miller, the defendant to the counter-claim in this action, informed him that the error was discovered by Mr. Belz and Mr. Miller promised me that he would do everything possible and would cooperate with us in working the problem out to a satisfactory conclusion. 20

WALTER D. VAN RIPER.

Sworn to and subscribed before me
 this 18th day of September, 1929. 30

ERNEST P. BIRO,
 Master in Chancery of New Jersey.

ORDER TO STRIKE OUT COUNTER-CLAIM.

Filed September 30, 1929.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

10

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs,

vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,
Defendants.

*Action
at Law.**Order to
Strike Out
Counter-
claim.*

20

The defendants in the counter-claim, Ida Miller and Isaac D. Miller, having moved to strike out the counter-claim filed by the defendants in the above-entitled cause on the ground that the same is *res adjudicata* and that the defendants have elected their remedy against the said Ida Miller and Isaac D. Miller in equity, and that the said counter-claim is frivolous and sham; and it appearing to the Court that said counter-claim filed in this cause sets forth the same allegations as is set forth in a counter-claim filed by the same defendants in the Court of Chancery of the State of New Jersey in an action in which the parties to this suit were the parties and the issues were the same, and that said counter-claim was stricken out and adjudicated by an order made by the Chancellor of the State of New Jersey and entered on October 9, 1928, and that the filing of the counter-claim by the above defendants in the said action in the Court

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Order to Strike Out Counter-claim.

of Chancery constitutes an election of remedies by the said defendants to have their claim against the said Ida Miller and Isaac D. Miller adjudicated in a Court of Equity and not in a court of law; and it further appearing that said defendants have confirmed the transaction mentioned in both of said actions and that said counter-claim is frivolous and sham. 10

IT IS on this 28th day of September, 1929, ORDERED that the counter-claim filed in the above-entitled cause against the third parties, Ida Miller and Isaac D. Miller, be and the same is stricken out and for nothing holden, with costs against the said defendants, Emil O. Belz and Louise Belz, his wife.

Enter,

C. W. PARKER, 20
J. S. C.

On motion of

DAVID LESNIK,
Attorney for third parties,
Ida Miller and Isaac D. Miller.

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ORDER FOR SUMMARY JUDGMENT.

Filed October 1, 1929.

NEW JERSEY SUPREME COURT,

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SOMERSET COUNTY.

SIMON AND DIAMOND COAL AND LUMBER COMPANY, INC., a cor- poration, and MEYER LOBSENZ, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
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vs.

EMIL O. BELZ and LOUISE BELZ, his wife, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Order for Summary Judgment.</i>
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30 Plaintiffs having moved to strike out the first, second, third and fourth counts of the counter-claim as against the plaintiffs, and having also moved to strike out the answer filed by the defendants, and due notice having been given to the defendants, and the Court having heard and considered the argument of counsel for all parties, and it appearing by an inspection of the pleadings in this cause and by affidavits filed in the cause and by certified copies of pleadings, affidavit, orders and final decree filed and entered in the New Jersey Court of Chancery which have been filed in this cause, that such motions should be granted;

40 IT IS ORDERED that the first, second, third and fourth counts of the counter-claim be struck out as against the plaintiffs, and that the answer be struck out and that final judgment be entered for the plaintiffs against the defendants, Emil O.

Order for Summary Judgment.

Belz and Louise Belz, his wife, for the sum of
\$6,893.31 and costs.

Let this rule be entered.

C. W. PARKER,
J. S. C.

On motion of 10

WHITING & MOORE,
Attorneys for Plaintiffs.

Rule entered this 30th day of September, 1929.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOBSENZ,
Plaintiffs-Respondents,
vs.

EMIL O. BELZ and LOUISE BELZ,
his wife,
Defendants-Appellants,

IDA MILLER and ISAAC MILLER,
third parties,
Defendants-Respondents.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF FOR APPELLANTS.

Statement of Case.

The case is brought before the Court on an appeal from an order of the Supreme Court striking out the answer and counter-claim against the plaintiffs and third parties defendants upon the ground that all of the matters alleged in the answer and counter-claim are res judicata and that defendants have elected their remedy in equity and on the further ground that their pleading is frivolous and sham, and that defendants-appellants are thereby debarred from defending the plaintiffs' cause of action and maintaining their counter-claim against third parties (S. C. pp. 44-47).

Grounds of Appeal.

The grounds of appeal are as follows (S. C. p. 2):

1. The Supreme Court erroneously struck out the counter-claim of the appellants against Ida Miller and Isaac D. Miller, third parties.

2. The Supreme Court found in favor of Ida Miller and Isaac D. Miller, third parties, instead of the appellants.

Statement of Facts.

This action was brought on a bond to recover a deficiency arising after sale on foreclosure. The plaintiffs are the assignees of a bond and mortgage executed by the defendants to Ida Miller, third party. The appeal from the judgment in favor of the plaintiffs is abandoned and reference to plaintiffs will be excluded except in so far as may be essential to a succinct presentation of the case. The bond and mortgage was executed by the defendants, Belz, in adjusting the equities with Ida Miller, the third party, on an exchange of property. Belz owned two six-family dwellings in Newark, Essex County, and Ida Miller owned 18 acres of vacant land in Plainfield, Somerset County. The contract for the exchange of property was entered into on June 26, 1926 and in July of the same year Belz delivered the deed to their property, executed the said bond and mortgage and six promissory notes payable to Ida Miller. On September 17, 1927 Ida Miller assigned the said bond and mortgage to plaintiff, Simon and Diamond Coal and Lumber Co., who in turn assigned a part interest to the other plaintiff, Meyer Lobsenz. The defendants, Belz, continually refused to honor

their obligation on the bond and mortgage and on May 25, 1928, plaintiffs instituted foreclosure proceedings. Belz filed an answer and counter-claim alleging fraud and misrepresentation by Ida Miller and her agent or employee and prayed for the cancellation of the mortgage and brought in Ida Miller as a defendant to the counter-claim. Ida Miller served notice of motion to dismiss the counter-claim and submitted in support thereof an affidavit made by Isaac Miller (S. C. p. 32). Defendants, Belz, were not represented and the counter-claim was dismissed (S. C. p. 36). The plaintiffs Simon and Diamond Coal and Lumber Co. and Meyer Lobsenz were granted an order striking out the answer and the final decree in foreclosure was entered in the usual course.

At the foreclosure sale the property was sold for \$150 and plaintiffs commenced present action at law on the bond for the deficiency. Defendants filed an answer admitting the amount of the mortgage debt as adjudged in the foreclosure proceedings, but set up four separate defenses to the cause of action (S. C. p. 9) and a counter-claim that embraces several distinct counts, including an independent cause of action against Ida Miller, third party, and an independent action against Isaac Miller, third party (S. C. pp. 10-19).

The plaintiffs and the third parties defendants, respectively, moved to strike out the answer and counter-claim and the motions were granted, and order for summary judgment was entered against the defendants. This appeal, however, is directed solely to the action of the Supreme Court in striking out the counter-claim against Ida Miller and Isaac D. Miller.

BRIEF OF ARGUMENT.

POINT ONE.

The counter-claim cannot be stricken out unless defective on its face.

A counter-claim is an independent cause of action and is governed by the rules respecting the form and manner of pleading the complaint (Rule 64 of the Supreme Court). The defendants in the counter-claim hereinafter designated as the Millers had not challenged the legal sufficiency of the appellants' counter-claim nor filed an answer pleading separate defenses thereto. Nevertheless, the record of the prior suit (pp. 24-37) was introduced to support the motion to strike out the counter-claim. As the counter-claim contains no averment of the prior suit (S. C. pp. 10-19) a different state of facts from that pleaded in the counter-claim was disclosed for the first time on the hearing of the motion. The prior record in the suit was therefore an introduction of extrinsic facts, improper, and beyond the scope of the allegations contained in the counter-claim. *Smith v. Hopping*, 88 L. 195; *Gross v. N. Y. Cent. R. Co.*, 99 L. 414; *Brookes v. Metropolitan Life Ins. Co.*, 70 L. 36; *Mechanics Mutual Loan Ass'n v. Freeholders of Mercer County*, 56 L. 6. The motion to strike out admitted the truth of the allegations and any inferences of fact which could be drawn therefrom. *Crawford v. Winterbottom*, 88 L. 580 (reversed on other grounds in *Freeman v. Conway*, 95 L. 89).

The memorandum of Justice Bergen in the case of *Peter Breidt City Brewing Co. v. Tomaine* (not officially reported) in 40 N. J. Law Journal 20, seems to be pertinent. In that case

the plaintiff, who filed a complaint at law for damages, had previously filed his bill of complaint in Chancery praying that defendant be restrained from selling any malt except that manufactured by plaintiff. Defendant then moved to strike out the complaint at law because of the Chancery bill previously filed by plaintiff. Justice Bergen held that the Court must take the complaint as it finds it and there is nothing in the complaint which shows a pendency of any other suit nor was it incumbent upon the Court to determine whether the action at law and the bill in equity were for the same cause and denied the motion.

The contention of the appellants in the first point is equally applicable to a plea of *res judicata*. In *Corpus Juris*, Volume 34, title "Judgment" on page 1058, Sec. 1494, the rule is stated to be that the defense of *res judicata* may be raised by demurrer were the facts and the nature of the prior adjudicata appear *on the face of the pleadings*; but otherwise this is not a proper mode of taking advantage of the estoppel. Nor can the question of a former recovery be raised by a motion to dismiss. Where the defense of *res judicata* is raised by demurrer, the Court is limited to the facts disclosed by complaint, although it may have other sources of information.

POINT TWO.

Appellants are not concluded by the dismissal of their counter-claim in the Chancery suit.

The contention of the appellants under this Point Two does not challenge the validity of the order dismissing their counter-claim in the Chancery suit.

The order was entered on motion to strike out the counter-claim before final hearing. There is no statute, rule of practice or decision of this Court to support the dismissal of a bill in equity before final hearing unless the bill fails to show on its face a situation calling for equitable relief. *Penrose v. Absecon Land Co., et als.*, 94 Eq. 436; *Metropolitan Lumber Co. v. Fordham Nat. Bank, et als.*, Feb., 1929 (not officially reported) in 144 Atl. 879; *Mansfield v. Kraus*, 101 L. 287. A counter-claim in equity is deemed to be a cross-action, and the rules respecting the form and manner of pleading the bill of complaint apply to the counter-claim. Rule 71 of the Court of Chancery (ed. 1928). The ground for the order of dismissal in Chancery (S. C. p. 36) is that the said counter-claim or cross-bill does not represent a meritorious or equitable cause of action against Ida Miller. The motion to strike out was directed solely to the allegations in the counter-claim or cross-bill and the determination of the motion in equity is regarded as merely an inquiry whether an issue of fact is to be tried. *South Camden Trust Co. v. Stiffel*, 101 Eq. 41, and no question of fact arising to defeat foreclosure, the action of the Court amounted to a summary award of a final decree for the complainants in the Chancery suit, Simon and Diamond Coal and Lumber Co. and Meyer Lobsenz. The effect of the order of dismissal was to enable the complainants to enter final decree in foreclosure and proceed to sale. There was not and could not be a final determination of the ultimate rights of the appellants against Miller for the matter was presented to the Court on a motion before final hearing and not for a determination of the ultimate rights of the parties to this appeal.

POINT THREE.

To sustain a plea of *res judicata*, an identity of parties must be shown.

This is one of the essential elements of the plea. *Hoffmeier v. Trost*, 83 L. 358. Assuming (*pro argumeto* only) that the former record was properly introduced on the motion to strike out the counter-claim against Isaac Miller (pp. 20-37), a perusal of the counter-claim in the former suit (p. 29) will disclose that Isaac Miller was not a party to the former record. There was no pleading filed on behalf of Isaac Miller nor was a final judgment on the merits entered in favor of or against Isaac Miller. On the other hand, the fourth count of the appellants' counter-claim in this action alleges a separate and distinct cause of action against Isaac Miller as the actual perpetrator of a positive and obvious wrong (pp. 17-19). The absence of Isaac Miller as a party to the prior suit is fatal to his plea of *res judicata*.

Nor can Isaac Miller claim to be in privity with the parties in the prior suit, for privity connotes a succession in interest arising after the event. In *Masten v. Olcott*, 101 N. Y. at p. 161, the opinion of the Court is that the rule that estoppel binds parties and privies is no exception to the principle that a person not a party to an action should not be bound by the result of litigation. This applies only to a privity arising after the event out of which the estoppel arises and the person in privity is bound by or entitled to the benefit of the estoppel because he comes in after the fact creating the estoppel by succession or representation.

POINT FOUR.

There is no *res judicata* pre-existing the counter-claim to extinguish appellant's rights against the Millers.

The judgment or decree in the former suit can only operate as a bar to subsequent litigation when it was rendered upon the merits and adjudicated the question directly involved in the subsequent suit. Kingston's case, 2 Smith Lead. Cases (8th edition), p. 784, and innumerable pronouncements of appellant tribunals.

The pleadings in the prior suit were framed to determine the right of the complainants therein to foreclosure. That right was the primary object of the suit while the counter-claim against Miller was collateral and incidental thereto. Ida Miller as third party thereto filed no pleadings to raise any issue but resorted to a motion to strike out the cause of action as pleaded by appellants in former suit. Such actions was hers by right, but what were the issues raised in the alleged former suit upon which to "bottom" a final judgment? There were no issues nor final judgment on the merits arising on that motion to dismiss. In *Corpus Juris*, Volume 34, title "Judgments," on page 763, section 1177, that notable authority states that the determination of a motion or summary application is not *res judicata* so as to prevent the parties from litigating the same matters again in the more regular form of an action, especially if the matter affected by the motion was only incidental or collateral to the determination of the main controversy.

The motion to dismiss came on to be heard before a Vice-Chancellor and Belz was not represented. On behalf of Ida Miller, an affidavit

of Isaac D. Miller was presented to support the motion (S. C. p. 32). No testimony or other deposition was taken before the Vice-Chancellor; there was no opportunity to weigh the evidence, judge the witnesses or obtain a composite picture of all the details of the transaction between the parties to enable the Court to weigh and deliberate the equities before rendering its decision on the merits.

The appellants come squarely within the justice of the opinion of Vice-Chancellor Stevens in the case of *Wiebke v. De Wyngaert*, 88 Eq. 41, wherein the defendants were not concluded by the former decree in foreclosure. The former decree was *res judicata* only on the question of the amount of the mortgaged debt, and that is the breath of the prior adjudication in this action. The appellants have admitted the amount due on the mortgaged deed as determined in the Chancery proceedings in their answer (S. C. p. 8, l. 34), and have abandoned this appeal against and settled their claim with Simon and Diamond Coal and Lumber Co. and Meyer Lobsenz. The prior decree was not a final judgment on the merits and did not determine whether a gross fraud was committed against the appellants.

POINT FIVE.

The doctrine of election of remedies does not apply where the remedy pursued is unavailable.

Another ground for striking out the appellants' counter-claim in the present action is that they have elected their remedy in equity (S. C. p. 44). The appellants had no remedy in equity at the time they filed their counter-claim wherein they prayed for a reconveyance of their prop-

erty from Ida Miller (S. C. p. 31, l. 21); for Ida Miller had previously conveyed the property to purchaser for value, as appears in the affidavit of Isaac D. Miller on page 34 of State of Case, line 36. The Court therefore could not have exercised its jurisdiction to compel a reconveyance as against the higher equities of an innocent purchaser and appellants attempted to pursue the wrong remedy. *Titus v. Phillip*, 18 Eq. 581.

Will appellants be charged with having elected their remedy in equity when the order in Chancery dismissing their counter-claim recites that the Belz' are not entitled to equitable relief *by reason of their laches*. The appellants had no efficient remedy to pursue in equity, for a remedy barred by laches is a futile one. *Corpus Juris*, Volume 20, title "Election of Remedies," page 25. The same volume on page 21 is authority for the statement that an election of remedies can exist only where there is a choice between two inconsistent remedies actually existing at the time the election is made. At the time of filing the counter-claim in Chancery, Belz had but one effective remedy and that remedy is the one sought in the present action.

POINT SIX.

Appellants' counter-claim cannot be stricken out as frivolous AND sham.

A common law pleading may be either frivolous or sham; it cannot be possessed of both legal infirmities at the same time. *Fidelity Mutual Life Ins. Co. v. Wilkes-Barre & H. R. Co.*, 98 L. 507; *Witteman v. Giele*, 99 L. 479; *Milberge v. Keuthe*, 98 L. 779. By virtue of Chapter 151 of the Laws of 1928, a counter-claim that is sham

or frivolous may be stricken out on motion; but this enactment does not alter the common law rule that a pleading may be stricken out on one or another ground, and the same tests should be applied as far as applicable to a counter-claim.

A frivolous plea is defined as so palpably insufficient as not to require any argument to prove its inadequacy and the facts therein stated are presumed to be true. *Boynten Lumber Co. v. Evans*, 101 L. 120. It is respectfully submitted that appellants' counter-claim avers facts sufficient to constitute a cause of action.

A sham pleading connotes unfounded allegations of fact and implies bad faith on the part of the pleader. *Penrose v. Absecon Land Co., et als.*, 94 Eq. 436. The appellants have verified their cause of action by affidavits showing facts entitling them to maintain the action (S. C. pp. 38-43).

Conclusion.

It is respectfully submitted that appellants, Emil O. Belz and Louise Belz, are entitled to a reversal by this Court of the order striking out their counter-claim against Ida Miller and Isaac D. Miller.

Respectfully submitted,

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Attorney for Defendants-Appellants.

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New Jersey Court of Errors and Appeals

SIMON AND DIAMOND COAL AND
LUMBER COMPANY, INC., a cor-
poration, and MEYER LOB-
SENZ,

Plaintiffs-Respondents,

vs.

EMIL O. BELZ and LOUISE
BELZ, his wife,
Defendants-Appellants,

IDA MILLER and ISAAC MILLER,
third parties,
Defendants-Respondents.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF FOR DEFENDANTS-RESPONDENTS.

Statement of Facts.

This appeal is brought by the defendants ~~and~~
~~respondents~~ ^{appellants} and only concerns Ida Miller and
Isaac Miller, third parties, defendants-respond-
ents. In order to understand the case properly
it is necessary to include in this statement the
history of the transactions and various litigations
between the parties to this suit.

1. On June 26, 1926, the appellants and Ida
Miller, one of the respondents entered into a
contract whereby the appellants agreed to con-
vey to said Ida Miller, premises in the City of
Newark, New Jersey, in exchange for a convey-
ance by said Ida Miller to the appellants of cer-
tain acreage in Somerset County, New Jersey.
This contract was consummated and the deeds
exchanged on July 8, 1926. As part of the
transaction the appellants executed and deliv-

ered to said Ida Miller a bond and also a mortgage in the sum of \$6,000.00, payable July 1, 1930, together with interest payable semi-annually from July 1, 1926.

2. Said bond and mortgage was assigned by the said Ida Miller to the plaintiffs in this action who were the complainants in a bill of foreclosure herein. The appellants were the only defendants. The appellants filed an answer to said bill of foreclosure and also filed a counter-claim against Ida Miller and thus making her a party to the foreclosure action (State of the Case, p. 29). Paragraphs 5, 6 and 7 of said counter-claim allege fraud and misrepresentation on the part of Ida Miller and her agents (not naming them). The counter-claim concludes with various prayers, the third of which (State of the Case, p. 31), prays "that the contract entered into for the exchange of property between the said Ida Miller and the defendants may be in all respects rescinded and the said Ida Miller compelled to reconvey to the defendants the property which they had conveyed to her."

3. The defendant Ida Miller moved to strike out the counter-claim filed against her and in support of said motion filed an affidavit by Isaac Miller who was her agent in this transaction.

4. On September 18, 1928, the Chancellor made an Order striking out the counter-claim filed by the appellants in this cause, on the ground, amongst others, that said counter-claim does not represent a meritorious cause of action; and on the further ground that they, the appellants, have confirmed and ratified the real estate transaction and exchange of properties of which the mortgage being foreclosed was part of the consideration (State of the Case, pp. 36 and 37).

5. The premises were sold under a decree of foreclosure and apparently there was a deficiency due from the appellants to the complainants, who are the plaintiffs in this cause.

6. The latter thereupon brought suit on May 29, 1929, in the New Jersey Supreme Court, against the appellants in this case, Emil O. Belz and Louise Belz.

7. The latter filed an answer to said suit for damages and also filed a counter-claim against the plaintiffs and against the said Ida Miller and Isaac Miller. The counter-claim contained four counts which are all in the same wording with the exception that a paragraph is left out here and there.

8. The gist of the counter-claim and demand against Ida Miller and Isaac Miller is fraud and misrepresentation as to the identity of the property in Somerset County. This is exactly the same basis for filing the counter-claim in the preceding action in Chancery, (State of the Case, p. 11).

9. The defendants in the counter-claim, who are respondents in this appeal, Ida Miller and Isaac Miller, gave notice of motion for an order to strike out the counter-claim filed in this suit on the grounds of (a) *res adjudicata*, (b) election of remedies, (c) ratification of transaction and (d) that the same is frivolous and sham, (State of the Case, pp. 20 and 21).

10. Upon the hearing of this motion, Justice Parker after argument by counsel, struck out the counter-claim filed in the Supreme Court action, upon the ground that the same is *res adjudicata* and that the bringing of the suit in the Court of Chancery by counter-claim against Ida Miller constituted an election of remedies against

said Ida Miller and Isaac Miller, and upon the further ground that the appellants have confirmed the transaction between the said last mentioned parties (State of the Case, pp. 44 and 45).

11. This Order was entered on September 28, 1929, and is the subject of this appeal by the defendants-appellants.

ARGUMENT.

The questions presented on this appeal are the following:

1. Are the appellants precluded from bringing suit for damages by reason of having the counter-claim filed in the Chancery action stricken out for the reasons given by the Chancellor?

2. Does the filing of the counter-claim in the Chancery action constitute an election of remedies by these appellants, and are they bound by the decree in that case, even as against Isaac Miller who was not an actual party to the Chancery action?

POINT ONE.

The decision of the Supreme Court should be affirmed because the issues in the Chancery Case and in the Civil Case are the same and were adjudicated by Chancellor Walker's Order of October 9, 1928.

1. The contention of the respondents, Ida Miller and Isaac Miller, (the plaintiffs in this suit, Simon and Diamond Coal and Lumber Company, Inc. and Meyer Lobsenz, not being party to this appeal and being no longer respondents) is that the issues contained in the counter-claim filed by

the appellants, Belz, in the Chancery action and the issues contained in the counter-claim filed by the same appellants in this action, are one and the same and the grounds for striking out the counter-claim in the Chancery action (State of the Case, p. 36), are identical with the grounds stated in Justice Parker's Order, (State of the Case, p. 44). This leads to the conclusion that the rule of *res adjudicata* was properly applied by the Supreme Court Justice.

2. The doctrine of *res adjudicata* is based on two main rules. First: the judgment or decree of a court of competent jurisdiction upon the merits, concludes the parties and privies to the litigation and constitutes a bar to a new action; second: any right, fact or matter in issue and directly adjudicated upon or necessarily involved in the determination of an action before a competent court in which a judgment is rendered, is conclusively settled between the parties and can not be litigated again, whether the claim or demand, purpose or subject matter of the two suits is the same or not. 34 Corpus Juris, Section 1154, page 742. The leading case on this subject is Kingston's case and the above principles are applied in that case. This case says "the judgment of a court of exclusive jurisdiction directly upon the point is conclusive upon the same matter between the same parties, coming incidentally in another court for a different purpose."

3. This is exactly the situation in this case. The appellants, Belz, filed a counter-claim against the respondents, Miller, praying for a rescission of the contract entered into between them for the exchange of real estate (State of the Case, par. 3, p. 31). Thus they became the moving parties and the Millers became defend-

ants. This counter-claim was stricken out on the ground that it was not meritorious and upon the ground that they, Mr. and Mrs. Belz, confirmed and ratified the entire transaction. Now they come, after having been defeated in the Chancery action and do identically the same thing, namely, when they are sued in a court of law, they file a counter-claim alleging the same grounds for damages as they did for rescission, although the civil suit is for a different purpose, the subject matter is the same, namely, fraud and misrepresentation on the part of the respondents. The questions involved and brought into each case by the appellants are the same. It is therefore self evident that the bringing of the action for damages comes within the bar of the principle above quoted from *Corpus Juris* and from *Kingston's case*.

4. The contention of the respondents is that the appellants by filing a counter-claim in the Supreme Court and becoming plaintiffs against the respondents, violated the cardinal principle of public policy and they renewed litigation upon the same matter. *Whitehouse v. Rodgers*, 38 Md. 503.

5. The Chancery Order contains all the elements of a valid and subsisting judgment and is not a mere immaterial cause. It was decided upon the merits of the case which were the question of rescission prayed for by the appellants Belz. The Chancery Court decided that the latter were not entitled to a rescission upon the ground that they ratified the agreement.

6. It is well established that it is not necessary that there should have been a trial in the Chancery action. The parties had full opportunity to be heard on their respective matters

when the motion came up for hearing. This Order was not based on a technical defect in the pleadings. It is not in the nature of a non-suit. The pleadings of the appellants Belz were stricken out upon the merits of the issues. *Corpus Juris*, Section 1206, page 788. Precisely the same situation arose in the case of *Seeley v. Adams*, 76 Atlantic Reporter, 462. The rule is the same on demurrer as on evidence. *Smith v. Furling*, 3 N. J. Law 558. *Roarke v. Roarke*, 77 N. J. E. 181.

7. The case cited by counsel for appellants, *Peter Breidt City Brewing Co. v. Tomaine*, in Point One of his argument clearly is far from the point and does not apply, for the reason that a bill in Chancery for an injunction is concurrent with a suit for damages arising out of the acts complained in the bill of Chancery for an injunction and the remedies are concurrent and both actions can be maintained at the same time, but it is elementary and self-evident that an action for rescission of a contract and a suit for damages is not in the same category. The commencement of one of the latter actions is a conclusive bar towards the bringing of the other.

8. It is also well established that the doctrine of *res adjudicata* applies to points of law as well as by judgment or verdict. *Hancock v. Singer Manufacturing Co.* 92 L. 289

9. Finally, the contention of the respondents on this point is universally recognized and are innumerable and a lengthy line of decisions can be quoted from every state in the Union and from England and every other English-speaking country. Among the New Jersey cases can be cited

In *Re Walsh*, 80 Equity 565.

- Pittell v. Pittel*, 90 Equity 366.
West New York Improvement Company v. West New York, 88 Equity 571.
Condit v. Bigalow, 64 Equity 594.
Seeley v. Adams, *supra*.
Gyafer v. Karpf, 83 Law 387.
Eligot v. Nutley, 92 Law 120.

10. The best expression on the doctrine of *res adjudicata* was made by Justice Harlan of the United States Supreme Court. He put the rule in plain language and is as follows: "Even if the second suit is for a different cause of action, the right, question or fact once determined as between the parties or privies is taken as conclusively established so long as the judgment in the first suit remains unmodified. The very objects for which courts are established are to secure peace and repose in society by a single settlement of matters capable of judicial determination." *So. Pac. R. Co. v. U. S.*, 168 U. S. 1.

POINT TWO.

The appeal should be dismissed because the decision of the Supreme Court was based on the merits of the case.

1 The Order striking out the counter-claim in the Chancery action was made after due consideration of the facts as alleged in the counter-claim of the appellants who became complainants insofar as the respondents in this appeal, the Millers, are concerned. While in the same action a decree of foreclosure was entered and the foreclosure suit was pursued to the end so that the action for damages by the complainants (who became plaintiffs) was instituted. The question of foreclosure, or what happened between the complainants and the appellants has

nothing to do with this appeal, so far as the respondents, Ida Miller and Isaac Miller are concerned. That was and is a matter between the other parties.

2. The Millers were brought into this suit to have the contract between the appellants and the Millers rescinded. Any other matters between the appellants and any other litigants is collateral and we are not concerned with the question raised between the appellants and the other parties. The effect of the Order striking out the counter-claim as against the complainants determined the rights between the appellants and the complainants. It had nothing to do and did not deal with the rights of the respondents in this case, the Millers.

3. The rights of the Millers were determined by a separate and distinct Order and had nothing to do with the foreclosure. It was a determination of the question whether or not the appellants Belz were entitled to a rescission of the contract in question. The Court decided that they were not.

4. This was not a determination based upon an incidental issue. It affected a substantial right of the appellants and also of the respondents to this appeal and thus constituted a complete bar to the bringing of this action by counter-claim by the appellants against the respondents.

5. Point Two of the brief for appellants endeavors to tell this court that the motion to strike out made in the Chancery action was directed solely to the question of foreclosure and that the action of the Court amounted to a summary award of a final decree for the complainants in the Chancery suit and further that there

could not be a final determination of the rights of the appellants against the Millers (Brief for appellants, p. 6). This is clearly not in accordance with the terms of the Order in Chancery striking out the counter-claim filed in the Chancery suit by the appellants. This latter Order distinctly strikes out the counter-claim against the complainants and against Ida Miller and the grounds for said action by the Court are given in the body of the Order and distinctly state that the defendants (who are the appellants in this appeal), are not entitled to the equitable relief of rescission. How can it then be said that said Order did not determine the ultimate rights of the parties to this appeal?

6. That being the case, the appellants are in a position of bringing a new suit (by filing counter-claim in the Supreme Court action), in a different form, when judgment has already been rendered in the prior action which is the Chancery action. In the case of *Prewitt v. Wilborn*, 184 Ky. 638, the rule is laid down as follows:

“The accepted rule in determining whether two suits are on the same state of facts is whether the same evidence will sustain or defeat the action in both cases.”

7. This is exactly our case. The Millers were brought in as defendants to a counter-claim in both actions upon the grounds of fraud and misrepresentation. The same allegations, almost verbatim, are contained in each counter-claim. The same evidence would have been necessary to sustain the allegations in each case and the same evidence on the part of the respondents to this appeal would have been necessary to defeat the contention of the appellants. It is therefore apparent that the Supreme Court's decision should be sustained on the ground of *res*

adjudicata and that the counter-claim can not be sustained in view of the prior decision of the Court of Chancery.

See *Scott v. Hall*, 60 Equity 451.

Attorney General v. N. J. Central R. R. Co., 68 Equity 198.

Phillip v Pullin, 45 Equity 18.

Hendrickson v. Norcross, 19 Equity 417.

POINT THREE.

The decision of the Supreme Court should be affirmed on the ground that the plea of *res adjudicata* resulting in the striking out of the counter-claim was properly entered on a motion to strike out.

1. The Practice Act of 1912 was enacted by the Legislature of the State of New Jersey, for the purpose of speeding litigation and for liberal construction of pleadings. The result was that a pleading could be stricken out on motion instead of compelling the party to file a demurrer. The intention of the legislature must be adhered to and that, as stated in Justice Harlan's definition of *res adjudicata*, to end litigation and to avoid hardship upon parties, so that they will not have to defend two suits upon the same subject matter. This principle is upheld in the case of *Putnam v. Clark*, 34 Equity 532, where it is said "The doctrine of *res adjudicata* rests on strong reasons of public policy and also of private right. If, after decree in equity, a party shall proceed at law for the same matter, equity will restrain him by injunction," and cases there cited. This doctrine is also upheld in the case of, *In Re Walsh*, 80 Equity 565. This is exactly the respondents' position. A decree in equity has been entered and the appellants attempt to

bring a suit at law because they were defeated in equity.

2. It is our contention that appellants' rights were entirely extinguished by the Chancery Order.

3. Point Four of the appellants' brief, pages 8 and 9, distinctly states that the pleadings in the Chancery suit were framed to determine the right of the complainants as to foreclosure. THIS IS NOT SO, insofar as the Millers were concerned. That may be so as between the complainants and the appellants Belz. Surely the counter-claim filed in the Chancery suit praying for a rescission of the contract certainly was not filed to determine the rights of the complainants to foreclosure. On the contrary, the appellants raised a new issue in the case and brought in new parties, namely, the Millers. The Order speaks for itself and clearly determines the rights of the appellants to sustain the counter-claim as final.

4. It was an entirely new action in which the appellants became complainants and the Millers made a motion to strike out, in their own behalf, and that motion was determined on the merits, in favor of the Millers, and had nothing to do with the collateral issue for foreclosure as between the complainants and the Belz'.

5. There was every opportunity to present the appellants' case on the hearing of this motion; there was every opportunity to combat the allegations in the affidavit of Mr. Miller. The learned Vice-Chancellor did not merely read the pleadings and decide it off-hand. He surely weighed the matter before him and knew the point and issue involved, which was "rescission" and not foreclosure. Our contention is that the

arguments of the appellants in Point One and Point Four do not contain the entire contents of the Chancery Order in question and necessitated additional points on the part of the respondents for the purpose of having the entire facts in the case set properly in the minds of the members of the Court of Errors and Appeals.

POINT FOUR.

The appeal should be dismissed because the plea of *res adjudicata* has been sustained and the identity of the parties clearly shown.

1. The respondent, Ida Miller, was the only defendant in the Chancery suit. The allegations of fraud and misrepresentation against Ida Miller also involved her agents, although they are not named in the counter-claim filed in the Chancery suit. Ida Miller took no active part in the litigation. She left all this to Isaac Miller and made him her agent. He took the aggressive part in the entire transactions and litigation between appellants and Ida Miller. He did this openly and Mr. and Mrs. Belz knew this and dealt with him. As a matter of fact, to support the motion to strike out the counter-claim in the Chancery action only the affidavit of Isaac Miller is filed and the same procedure took place on the motion to strike out the counter-claim in the Supreme Court action.

2. The contention of the appellants is that Isaac Miller stands privy to Ida Miller, although no pleadings were filed on behalf of Isaac Miller in the Chancery case, still the appellants are bound by the judgment entered in the Chancery Court. If the appellants had succeeded in the Chancery action there surely could not be an ac-

tion for damages brought against Isaac Miller in the civil courts. The mere fact that Ida Miller prevailed in the Chancery action does not change the principle of law. Mr. Miller was the agent of Ida Miller and as such, by a reading of all the pleadings and papers in this case, his interest was so combined with that of Ida Miller that the action against him for damages can not be sustained for the same reasons that it can not be sustained against Ida Miller as if Isaac Miller was a party to the Chancery action.

3. In the case of *Souffront v. La Compagnie*, 217 U. S. 475 the following principle of law is enunciated: "A person who assists in prosecuting or defending an action and does so openly to the knowledge of the adverse party is fully entitled to avail himself of the judgment as an estoppel as he would be if he had been a party to the record."

Van Kamel v. Winter Hotel, 263 Fed. Reporter 988.

Goodno v. Hotchkiss, 237 Fed. Report. 688.

The following cases are also in point:

Buchingham v. Ludlum, 37 E. 137.

Penrose v. Absecon Lamp Co., 120 Atlantic 207.

4. Our case is exactly on all fours with the above principle. The allegations in the counter-claim in the Chancery action wherein Ida Miller is the only defendant is exactly the same as the allegations in the counter-claim in the civil suit wherein both Millers are defendants. The fraud and misrepresentations are alleged to have been made by Isaac Miller and same are alleged to have been ratified by Ida Miller. Thus their interests and rights are one and the same as principal and agent. They are surely one in law in this case and thus Mr. Miller can avail himself

as the agent of Ida Miller of the plea of *res adjudicata*. *Happin v. Avery*, 87 Mich. 551. *Molin v. Langan*, 77 Mo. 481. It is therefore our contention that the element of identity of parties is fully established by the respondents.

POINT FIVE.

The decision of Justice Parker should be affirmed on the ground that the appellants have elected to have their rights established in a Court of Equity rather than in a Court of Law.

1. As stated above, the Chancery action as disclosed in the counter-claim and prayer is for rescission. This is repugnant to a suit for damages and therefore the appellants are precluded and barred from the suit for damages, and Justice Parker surely was correct in striking out the counter-claim in this case on this ground.

2. Rescission is disaffirmance of a contract. A suit for damages is an affirmance. They are two inconsistent positions for any litigant to take. They are not concurrent actions. The plaintiff has the choice. No court or defendant can tell him what to do. He must stand or fall by his decision. For instance, one can not sue in equity for specific performance and also for breach of contract. The appellants endeavor to do this in this case. Whether a party is successful or not in the action that he takes he can not subsequently resort to the other form of action.

3. The respondents' contention is that the filing of the counter-claim in the Chancery action by Mr. and Mrs. Belz, the appellants to this appeal, constitute an election of remedies, and it was so found by Justice Parker in striking out

the counter-claim in this case (State of Case, p. 44).

4. This is not a case where the appellants misconceived their rights and took the wrong step. The appellants claimed that they were defrauded. They had one of two remedies, each of which is inconsistent to the other. They either could file a bill for rescission or sue for damages.

5. The appellants took a decisive step. They consulted counsel (State of the Case, p. 40, par. 6). They knew the facts and their rights. They did not act until a bill for foreclosure was filed against them. They showed distinctly that they would rather pursue the equitable remedy than the legal remedy. If ever a litigant elected a remedy, the appellants in this case did.

6. There are three essentials to the election of a remedy. First, there must be two remedies. Second, they must be inconsistent. Third, there must be no mistake or misconception. The appellants' case falls within this rule. The counter-claim prayed rescission in the Chancery action which can only be had in equity and is a clear election of remedies and the appellants are bound thereby.

7. The case in Chancery having been decided on its merits and the Court being a court of competent jurisdiction, the controversy between the appellants and the respondents terminated upon the making of the Chancery Order striking out the counter-claim in Chancery. Insofar as the rights between the parties to this appeal are concerned, Chancery and law have concurrent jurisdiction and either may determine the controversy. That being the case, the suit for damages can not be maintained and the appeal should be dismissed for this reason.

8. The defendants were also bound by the Chancery Order in their suit as against Isaac Miller. The appellants maintained that they started a separate, distinct and independent action against Isaac Miller and that this action is maintainable for the reason that he was not a party to the Chancery action.

9. However, the rule is well established in every jurisdiction that where a party has made an election of remedies as the appellants have, a separate action can not be maintained against a different party for the reason that the remedy is inconsistent even as against third parties, as stated above. If the Court of Chancery had decided that the contract should be rescinded, as prayed for by the appellants, no action could be maintained against Isaac Miller. How can this be revived when the appellants failed in their Chancery action? The action for rescission against Ida Miller precluded a damage suit against every other person, irrespective of the fact whether or not that other person was a party to the Chancery suit. This principle is universal, as can be gleaned from an inspection of the following cases:

In *Re Weissner*, 116 Fed. 68.

Davenport v. Walker, 116 N. Y. Supplement 411.

Darragh v. Rowe, 96 N. Y. Supplement 666.

Foster v. Los Angeles, 36 Cal. Appeal 460.

American Process Co. v. Fla. Brick Co., 56 Fla. 116.

Smoot v. Judd, 184 Mo. 508.

Pawlet v. Kelly, 69 Vt. 398.

Hecksher v. Blanton, 11 Va. 648, and many other cases cited in Note 15, page 17 of Vol. 34, Corpus Juris.

CONCLUSION.

It is respectfully submitted by respondents Ida Miller and Isaac Miller that the judgment of the Supreme Court in striking out the counter-claim of the appellants in this cause be affirmed in every respect and that the reasons for the action of the Supreme Court, namely *res adjudicata* ratification by appellants and especially the plea of election of remedies are sound and that the decision should be affirmed with costs.

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