INDEX

NOTICE AND GROUNDS OF APPEAL.

Filed January 28, 1928.

Essex County Circuit Court

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as Yeskel Supply Co., *Plaintiffs,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Philip J. Schotland, attorney of plaintiffs.

SIR:

TAKE NOTICE, that the defendants Samuel Gross and Passie Gross appeal to the New Jersey Supreme Court from the whole of the judgment entered in this cause in favor of the plaintiffs and against the defendants on the 12th day of January, 1928, upon the following grounds:

1. The trial court directed a judgment in favor of the plaintiffs and against the defendants for the sum of twenty-nine hundred fifty ($2,950) dollars besides costs when thereunto moved by counsel for the plaintiffs, whereas the said court should have denied said motion and should have directed a judgment in favor of the defendants and against the plaintiffs when thereunto moved by counsel for the defendants.

2. Said judgment in favor of the plaintiffs and against the defendants was erroneous and contrary to law.

Dated, January 25, 1928.

Very truly yours,

GROSMAN & GROSMAN,
Attorneys of Defendants.

Service of the foregoing notice and grounds of appeal is hereby acknowledged this 26th day of January, 1928.

PHILIP J. SCHOTLAND,
Attorneys of Plaintiffs.

SUMMONS.

Filed December 21, 1926.

The State of New Jersey to Sam-
(SEAL) uel Gross and Passie Gross: You are SUMMONED to answer the annexed complaint of William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," in an action at law in the Essex County Circuit Court. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Esq., Judge of the Essex County Circuit Court, at Newark, this 21st day of December, nineteen hundred and twenty-six.

JOHN H. SCOTT,
Clerk.

PHILIP J. SCHOTLAND,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as "Yeskel Supply Co.," *Plaintiffs,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants.*	*Action at Law.* *Complaint.*

William Yeskel and Samuel Yeskel, partners trading as "Yeskel Supply Co.," residing in the City of Newark, County of Essex and State of New Jersey, say that:

1. On or about October 22, 1924, plaintiff and defendants entered into a written agreement, wherein and whereby the defendants agreed to sell, and the plaintiffs agreed to purchase, for the sum of $85,000, all those lots, tracts or parcels of lands and premises, lying and being in the City of Newark, and known and designated as "The Trefz Brewery," having a frontage of approximately 240 feet on Beacon street, and 180 feet on Rankin street, and more fully described in the said agreement, a true copy of which is hereto annexed and hereby made a part hereof; together with the buildings then on said premises, and the contents of all of the buildings except certain enumerated articles. In and by the terms of the said agreement, the defendants undertook to convey the said premises, free and clear of all encumbrances, on or before the 2nd day of January, 1925. At the time of

the delivery and execution of the said agreement, as therein acknowledged, plaintiffs paid the defendants $2,500, on account of the purchase price.

2. After the execution and delivery of the said agreement, plaintiffs caused a search of the title to said lands and premises, to be made, and a survey of the building on said lands, at an expense of $454.35, and found same clear.

3. On or about the 5th day of January, 1925, the defendants tendered a deed to the plaintiffs for said premises, in which deed was inserted a restriction as follows:

"And the said party of the second part, William Yeskel and Samuel Yeskel, partners trading as 'Yeskel Supply Co.,' for themselves, their heirs, executors, administrators and assigns, do jointly and severally covenant with the party of the first part, their heirs, executors and administrators, that neither the said party of the second part, nor their heirs, executors, administrators or assigns, shall or will at any time thereafter, use or permit the said premises, or any part thereof, to be used as a brewery, or for the manufacture of wines, beer or spirituous liquors or malt beverages known as 'near beer.' This covenant to run with the land."

Plaintiffs, not having agreed to purchase said lands and premises subject to any such restriction, refused to accept said deed unless it was made to comply with the terms of the agreement, and upon refusal of the defendants to execute and deliver a deed, in accordance with the terms of the agreement, plaintiffs demanded the return of the said sum of $2,500, paid on the purchase price, together with the sum of $454.35, the amount expended by plaintiffs in having the

search of the title and survey made. Defendants refused to return said money.

4. Defendants thereupon, on or about the 13th day of February, 1925, instituted a suit in the Court of Chancery in this State, against the plaintiffs, to compel the plaintiffs to perform said agreement, and to re-form the agreement by inserting a clause that the premises were to be conveyed subject to said restrictions; trial was had on the issues involved, in the Court of Chancery, and a decree was therein entered dismissing the defendants' bill of complaint, and denying relief. Defendants appealed from said decree to the Court of Errors and Appeals, and said appeal resulted in an affirmance of the Court of Chancery.

5. After the affirmance of the said decree by the Court of Errors and Appeals, plaintiffs again demanded the return of the said deposit, together with the search fees, which the defendants refused to pay to the plaintiffs.

Judgment will be asked for the sum of $2,954.-35, together with lawful interest and the costs of this suit to be taxed.

PHILIP J. SCHOTLAND,
Attorney for Plaintiffs.

Complaint—Agreement.

ARTICLES OF AGREEMENT,

Made the Twenty-second day of October in the year of our Lord One Thousand Nine Hundred and twenty-four

Between SAMUEL GROSS AND PESSIE GROSS, HIS WIFE, of the City of Newark in the Couty of Essex and State of New Jersey party of the first part:

And WILLIAM YESKEL AND SAMUEL YESKEL, PARTNERS TRADING AS "YESKEL SUPPLY CO." of the City of Newark in the County of Essex and State of New Jersey party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of EIGHTY-FIVE THOUSAND DOLLARS to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of warranty free from all encumbrances, except as hereinafter stated, on or before the Second day of January, 1925 * * * all those lots, tracts, or parcels, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of N. J., the said premises being known and designated as The Trefz Brewery, having a frontage of approximately 240 feet on Beacon Street; 180 feet on Rankin Street and consisting of three plots as follows:

Plot 1: Situate on the Easterly side of Beacon Street beginning at a point 171.46 feet southerly from the corner of the southeast corner of Beacon Street and South Orange Avenue, having a frontage of approximately 180 feet on Beacon Street and extending through to Rankin Street, with a frontage of approximately 180 feet on Rankin Street.

Plot 2: Situate on the Easterly side of Beacon Street, beginning 141.46 feet southerly from the said Southeasterly corner of Beacon Street and South Orange Avenue, having a frontage of approximately 30 feet on Beacon Street and a depth of approximately 100 feet.

Plot 3: Situate on the Easterly side of Beacon Street beginning at a point 351 feet southerly from the said Southeasterly corner of Beacon Street and South Orange Avenue, having a frontage of approximately 30 feet on Beacon Street and a depth of 97.60 feet on the southerly side and 97.92 feet on the Northerly side respectively.

Together with the buildings now on the said premises, and the contents of all of the buildings, except the Oak pressure vats, 4 at 440 barrels, and 5 at 555 barrels; vapor pipes of the beer kettles; mash tubs and the cooker; all remaining beer cooler sections in cellars; three cold water tanks on roofs; all office furniture, including safes; all furniture in large hall over office; all loose hardware fittings and tools, which Krueger Brewing Co. have a right to remove.

It is expressly understood that party of the first part has the privilege of also removing one three-section boiler in the new boiler room.

Complaint—Agreement.

This conveyance is made subject to recital in L. 13-409 of Deeds.

And the said WILLIAM YESKEL AND SAMUEL YESKEL, PARTNERS TRADING AS "YESKEL SUPPLY CO.," for themselves, their heirs, executors and administrators doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of EIGHTY-FIVE THOUSAND DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt.....$2,500.00

$45,000, by accepting this conveyance subject to a mortgage which is to be a first lien on the said premises, conditioned for the principal to be paid in five years from its date, with interest at the rate of six per cent. per annum, payable semi-annually, in instalments as follows:

$5,000, at the end of the third year from the date of said mortgage; $5,000, at the end of the fourth year from the date of said mortgage; and the balance at the end of the fifth year from the date of said mortgage, which mortgage contains usual 30 day int. instalment and tax default and provides for $45,000 worth of Insurance.

$22,500, in cash, when title passes and deed is delivered.

The balance by executing and delivering to party of the first part their bond in double said amount, together with a purchase money mort-

gage which shall be a second lien on the said premises, conditioned for the principal to be paid on March 1, 1925, with interest at the rate of six per cent. per annum, payable March 1, 1925. Said bond and mortgage shall also contain the usual thirty day interest instalment default, and tax clauses, and shall provide for insurance in the sum of the purchase money mortgage, with the usual mortgagee provisions relating thereto.

It is expressly understood that party of the first part has agreed to take this conveyance subject to the survey of C. F. Lemassena, made October 23, 1924, a copy of which it attached to this agreement.

In the event party of the first part are unable to convey because the Krueger Brewing Co. refuse to convey to them, through no neglect or fault, on the part of the party of the first part herein, then and in that event, the deposit is to be returned, and this agreement is to be null and void.

* * * *

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the said day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to them and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of Philip J. Schotland, 9 Clinton St., Newark, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said day of settlement next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures and chandeliers, carpets, linoleum, mats, and matting in halls, ash cans and heating apparatus, if any, are included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

* * * *

It is expressly understood that the premises hereby to be conveyed are not derived from adverse possession, nor tax sale, nor is to be what is commonly known as "A Martin Act Title."

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors, and administrators; and they hereby agree to pay, upon failure to perform the same the sum of which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

(L. S.)
(L. S.)
Wm. Yeskel & Saml Yeskel (L. S.)
Partners Trading as Supply Co. (L. S.)

Signed, Sealed and Delivered
in the presence of

Helen Jedell

Complaint—Agreement.

To the within-named defendants:

TAKE NOTICE, that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service.

PHILIP J. SCHOTLAND,
Attorney for Plaintiffs.

AFFIDAVIT OF MERITS.

Filed December 29, 1926.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as Yeskel Supply Co., *Plaintiffs,*	*Action at Law.*
vs.	*Affidavit. of Merits.*
SAMUEL GROSS and PASSIE GROSS, *Defendants.*	

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

Samuel Gross, individually and as agent of the defendant, Passie Gross, being duly sworn according to law, upon his oath deposes and says:

1. He and the said Passie Gross are the defendants in the foregoing suit.

2. Deponent believes that both he and the said Passie Gross have a just and legal defense to the foregoing action on the merits of the case.

SAMUEL GROSS.

Sworn and subscribed to before me
this 24th day of December, 1926.

THEA KREPS,
A Notary Public of New Jersey.

ANSWER.

Filed January 7, 1927.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as "Yeskel Supply Co.," *Plaintiffs,*	*Action at Law.*
vs.	*Answer.*
SAMUEL GROSS and PASSIE GROSS, *Defendants.*	

Samuel Gross and Passie Gross, the defendants in the foregoing case, answering the allegations contained in the complaint, say that:

1. Paragraph 1 is denied.

2. These defendants are without sufficient information or knowledge whereon to form a belief as to the truth of the allegations contained in paragraph 2 and consequently neither affirm nor deny the same, but put the plaintiffs upon their proof.

3. Answering the allegations of paragraph 3, these defendants admit making tender of the deed therein mentioned containing the restriction mentioned and also that the plaintiffs demanded the return of the sum of twenty-five hundred ($2,500) dollars and of the further sum of four hundred fifty-four dollars and thirty-five cents ($454.35) at the time mentioned in said paragraph; and that these defendants refused to return this money at said time.

4. Paragraphs 4 and 5 are admitted.

Answer.

FIRST SEPARATE DEFENSE.

No agreement was ever entered into between these defendants and the plaintiffs as charged in paragraph 1 of the complaint for reason of the fact that the parties to this suit and to said alleged agreement did not agree to the same thing in the same sense, so that there was lacking in the situation the meeting of the minds of the contracting parties, which forms the essential element to the valid consummation of a contract; all of which facts were so adjudicated by the New Jersey Court of Errors and Appeals on the 18th day of October, 1926, as will more at length and in detail appear by the written opinion of said Court reported in 134 Atl. 737.

SECOND SEPARATE DEFENSE.

Plaintiffs are not entitled to recover from these defendants the moneys expended for search fees as charged for reason of the fact that there was never any contract between the parties upon which claim for said fees might be predicated.

THIRD SEPARATE DEFENSE.

The plaintiffs on or about the 5th day of January, 1925, if at all, became and were entitled to receive from these defendants the sum of twenty-five hundred ($2,500) dollars as and for the return of the deposit paid on account of the purchase price of said property and the further sum of four hundred fifty-four dollars and thirty-five cents ($454.35) as and for moneys expended by the plaintiffs for search fees; that the plaintiffs on said date as charged in the third paragraph of the complaint made a demand upon these defendants for the return and payment of

said moneys with which demand these defendants refused to comply.

Thereafter on or about the 13th day of February, 1925, these defendants instituted suit in the Court of Chancery of this State, against the plaintiffs touching the alleged contract mentioned in paragraph 1 of the complaint which suit the plaintiffs answered and defended.

That it was the duty of the plaintiffs to file a counter-claim either by way of set-off or recoupment in said chancery suit and therein set-off, recoup or counter-claim against these defendants for the aforementioned sum of twenty-five hundred ($2,500) dollars and the further sum of four hundred fifty-four dollars and thirty-five cents ($454.35). That plaintiffs herein, who were the defendants in said chancery suit, failed to set-off their debts or demands against these defendants for the aforementioned sums of money in said chancery suit mentioned in paragraph 4 of the complaint, as they were of right entitled to and should have done, and that by reason of their failure to set-off their said debts or demands they are now precluded from bringing this action for such debt or demand, in accordance with the terms and provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Set-off." Rev. 1877, p. 1096, 4 C. S. 4836.

FOURTH SEPARATE DEFENSE.

That heretofore, on or about the 13th day of February, 1925, the defendants herein instituted a suit in our Court of Chancery against the plaintiffs herein touching the subject matter of the alleged agreement mentioned in paragraph 1

of the complaint; that at the time of the institution of said suit, if at all, these defendants were indebted to the plaintiffs for the sums of money sued for herein; that by virtue of an act of the Legislature of the State of New Jersey, entitled "An Act Respecting the Court of Chancery," approved April 3, 1902, and the supplements thereto known as Chapter 116, Laws of 1915, P. L., p. 184, and the rules of the Court of Chancery made in pursuance thereof, the plaintiffs herein, who were the defendants in said chancery action, were privileged to counter-claim or set-off any cause of action which they then had against these defendants; that they failed so to do and in consequence thereof are now precluded, debarred and estopped from maintaining the present action against these defendants.

SILBERMAN & GROSMAN,
Attorneys for Defendants.

NOTICE.

Filed March 5, 1927.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as "Yeskel Supply Co.," *Plaintiffs,*	*Action at Law.*
vs.	*Notice.*
SAMUEL GROSS and PASSIE GROSS, *Defendants.*	

To Messrs. Silberman & Grosman, attorneys for defendants.

Gentlemen:

PLEASE TAKE NOTICE, that on Saturday, the 12th day of March, 1927, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Essex County Circuit Court, at the Court House, in the City of Newark, for an order on behalf of the plaintiffs striking out the answer, and affirmative defenses pleaded, in the above-entitled cause, on the ground that the same do not constitute a defense to the plaintiffs' cause of action.

Please take further notice, that on the argument of said motion, the plaintiffs will waive the claim for search fees, and ask for summary judgment for the amount of the deposit of $2,500, with interest and costs of this suit.

Dated March 1, 1927.

Respectfully yours,

PHILIP J. SCHOTLAND,

Attorney for Plaintiff.

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Notice.

Service of a true copy of the within notice is hereby acknowledged this 3rd day of March, 1927.

SILBERMAN & GROSMAN,
Attorneys for Defendants.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

41976

WILLIAM YESKEL and SAMUEL YESKEL, trading as Yeskel Supply Co.,

vs.

SAMUEL GROSS and PASSIE GROSS,
Defendants.
Plaintiffs,

Action at Law.

After Verdict.

By Order of the Court.

Judgment Entered January 12, 1928.

Damage	$2,950.00
Costs	91.22
Total	$3,041.22

PHILIP SCHOTLAND,
Attorney of Plaintiff.

Judgment after verdict by order of Court in the above entitled action was rendered on the Twelfth day of January, A. D. Nineteen Hundred and Twenty Eight in favor of the plaintiffs William Yeskel and Samuel Yeskel trading as Yeskel Supply Co. and against the defendants Sam Gross and Passie Gross for the sum of Two Thousand Nine Hundred Fifty Dollars ($2,950.00) damage and Ninety-one Dollars and Twenty-two Cents costs of suit.

Clerk's Certificate.

Judgment entered and signed January 12, 1928.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded Circuit Court
Book 104, page 044

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey. Do HEREBY CERTIFY that the foregoing is a true and correct copy of all the pleadings in the case of William Yeskel and Samuel Yeskel, partners trading as Yeskel Supply Co., plaintiffs *v.* Samuel Gross and Passie Gross, defendants, together with a copy of the judgment record entered in Book 104 Circuit Court Judgments, page 044, and the same is taken from and compared with original copies of all pleadings and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 15th day of February, A. D. 1928.

JOHN H. SCOTT,
Clerk.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

January 12, 1928.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as "Yeskel Supply Co.," *Plaintiffs,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants.*	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiffs appears Philip J. Schotland.

For the defendants appear Silberman & Grosman (by Robert D. Grosman).

(A jury is called and sworn.)

Mr. Schotland: The facts are agreed upon between the plaintiffs and defendants as follows:

That on October 22, 1924, the defendants entered into an agreement with the plaintiffs wherein and whereby the defendants agreed to sell to the plaintiffs property at Rankin and Beacon streets, in the City of Newark, known as Trefz Brewery for the sum of $85,000. That at the time the parties entered into the contract the sum of $2,500 was paid by the plaintiffs to the defendants as deposit on account of the purchase price. When the time arrived for consummating the agreement, the defendants presented a deed

to the plaintiffs which contained a restriction as follows:

"And said party of the second part, William Yeskel & Samuel Yeskel partners, trading as Yeskel Supply Company, its heirs, executors, administrators and assigns do jointly and severally covenant with the party of the first part, their heirs, executors and administrators, that neither the said party of the second part nor their heirs, executors, administrators or assigns shall or will at any time thereafter use or permit the said premises or any part thereof to be used as a brewery or for the manufacture of wines, beer, spirituous liquor or malt beverages known as near-beer. This covenant to run with the land."

The plaintiffs rejected such deed on the ground that the agreement did not provide for the sale of the premises subject to any such restriction. The defendants, thereupon, filed a bill in the Court of Chancery of this State seeking to reform the contract by having an agreement inserted in the contract that the conveyance is to be made subject to that restriction and also for specific performance. At the final hearing in the Court of Chancery the prayer for specific performance was abandoned and the case decided on the question as to whether or not the defendants here and the plaintiffs in the Court of Chancery were entitled to have the contract reformed. The Court of Chancery decided against the defendants here and dismissed the bill. The defendants, thereupon, took an appeal to the Court of Errors and Appeals and the Court of Errors and Appeals affirmed the Court of Chancery and in its affirmance decided that there had never been a meeting of the minds between the plaintiffs and defendants and, therefore, that neither was

bound by the contract. This action was then instituted to recover back the purchase money deposit of $2,500 and the amount now due is $2,500 with interest from October 22, 1924, which amounts to $2,990.75.

The Court: Why did you pick that date?

Mr. Schotland: That is the date when the money was paid, the date of the contract when the money was deposited.

Mr. Grosman: Mr. Schotland says that we agree as to the facts. The facts are as Mr. Schotland recites them, but I do not rely on that stipulation in making my motion, I rely on the pleadings. There has been a complaint, answer and no replication, so the facts stand admitted by the pleadings.

Mr. Schotland: I have a copy of the replication.

Mr. Grosman: I have never seen one on the record and I am proceeding on the theory that the facts are admitted by the pleadings.

Mr. Schotland: I have my copy of the reply.

The Court: There is none here, but that does not mean anything, it may be in the county clerk's office.

Mr. Grosman: This is an old record and I find no replication on file. If there is a replication amounting to a denial of the facts set forth, the situation is altogether different. I am relying in this case upon the answer and the complaint, which of course raises an issue, but as far as I know from my examination of the record there is no replication, even though Mr. Schotland has a copy in his file. He may have intended to file it, but failed to do so. The only objection I have to the stipulation of facts is

that it sets forth an agreement. That should be an "alleged agreement," because the Court of Errors said that there was no agreement. The money was paid in pursuance of what we thought was an agreement but what the Court of Errors said was no agreement. And one other fact—

The Court: If the money was so paid why shouldn't they get it back?

Mr. Grosman: For the reason I will state in a minute, your Honor. One other thing Mr. Schotland omitted to mention, that is, the complaint seeks to recover back search and counsel fees. I understand that has been abandoned.

Mr. Schotland: Yes, on account of the decision of the Court of Errors and Appeals that there was no contract; if there was no contract we cannot recover that under the statute.

Mr. Grosman: I would like your Honor to advise how you will consider the record stands with replication or without?

The Court: I have to take a record as it comes to me. If Mr. Schotland filed the reply and he can find it in the clerk's office, which I do not doubt he can, because the case before this had no answer filed when they started out but ultimately they obtained it; papers are mislaid occasionally. I cannot do anything but take the record as I have it.

Mr. Schotland: It does not make any difference, because the only defenses he sets up are the defenses we have considered as a matter of law.

Mr. Grosman: That is true.

Mr. Schotland: And it does not make any difference whether any reply was made to them or not, as a matter of law.

Mr. Grosman: If he replies to them he admits what is set forth in our answer and if he does not he admits it, but I would like to have the record straight so that the facts set up in our answer will stand undenied. If Mr. Schotland is willing to let it go at that well and good, otherwise, we will have to look up the record.

The Court: You make your motion. I will assume that there was no reply, because there isn't any here. If counsel can find one in the clerk's office—

Mr. Schotland: I even have my carbon copy of my letter showing I filed it February 18, 1927, and I mailed a copy to Silberman & Grosman on the very same day.

Mr. Grosman: I haven't got it. Just as you say it doesn't make any difference, but I want the record to stand in such a shape that our answer is admitted.

The Court: I am assuming at this moment that there is no reply. If, as a matter of fact, one is down in the county clerk's office, I may, of course be waiving its effect—

Mr. Grosman: Mr. Schotland is waiving it.

Mr. Schotland: I am not. I am simply saying that I am satisfied to let your Honor assume it is not there, in case one is not found.

The Court: I have my ideas about this case. I do not know why you should under the circumstances have received $2,500 and not return it when the Court has decided there is no contract. If you want to get it on a technicality the upper court will have to reverse me, Mr. Grosman. You make whatever motion you want to make and I will probably direct a verdict for the plaintiff.

Mr. Grosman: Well, your Honor has indicated your position.

Mr. Schotland: On the facts as stipulated, as well as on the pleadings, I move that the Court direct a verdict in favor of the plaintiff for the amount of money paid to the defendants on October 27, 1924, that is $2,500 with interest from that date up to today, which makes a total of $2,950.75.

The Court: Don't you think the interest should be calculated from the time the demand was made for the return of this money?

Mr. Schotland: I do not think so.

The Court: Why should they be charged for interest when there was a voluntary demand?

Mr. Schotland: That would make the interest exactly $454.75, that would make the amount $2,950.75. The date of the demand was on January 5th.

The Court. Is that agreed to?

Mr. Schotland: That is admitted in the pleadings.

Mr. Grosman: Whatever the date is, if Mr. Schotland says so it is agreeable to me.

The Court: January 5, 1925.

Mr. Schotland: Yes, that is three years and seven days. The interest is seventy-five cents a day.

Mr. Grosman: I have a motion to make.

The Court: You may make your motion.

Mr. Grosman: I move for a non-suit on the pleadings consisting of the bill of complaint and the answer and upon the facts as stipulated with the reservation I made about the agreement be-

ing an alleged agreement, on the ground the plaintiff in this case is suing for the return of this money, alleging in his complaint a breach of contract. The contract set forth in the complaint is declared to be non-existent by the Court of Errors in its opinion reported in 134 Atl. 737, wherein the Court sets forth that the parties did not agree to this same thing in the same sense so that there was lacking in the situation a meeting in the minds of the contracting parties which forms the essential element of the parties in consummating the contract. Consequently, if there is to be a recovery of any sort in this case the suit should be for money had and received and not for a breach of this contract, which the Court of Errors said never existed.

Secondly, because this matter was litigated in the Court of Chancery and all the parties to the present suit were parties to the chancery suit and the alleged contract involved in this suit was the subject of litigation in the Court of Chancery. In principle, under the common law and also under the statute of set-offs, the plaintiff here, who is the defendant in the chancery action, should have counter-claimed for their money in the chancery action. The statute of set-offs in this State makes it mandatory for the plaintiff in this case to have counter-claimed in the chancery action. He failed to do so, and by the terms of that action he is now barred from maintaining another suit, not only by statute, but by the terms of the common law which requires all litigation to be terminated in one action.

I, therefore, move for a non-suit on the pleadings.

The Court: Vice-Chancellor Backes wrote an opinion very recently disposing, or indicating the

manner in which the Court of Chancery treated counter-claims of this kind.

Mr. Schotland: Beller *v.* Fenning, 5 Adv. Rep. 1704, which is of the pamphlet date, November 26, 1927.

The Court: As to this complaint being a breach of contract, I am not entirely willing to agree with you as to that. The complaint starts off and alleges a written agreement and then it recites the fact that an effort was made in the Court of Chancery to re-form this agreement and the effort was abortive and an appeal was taken to the Court of Errors and the Court of Chancery was affirmed; that after this had all happened—exactly what happened is a matter of proof—the plaintiff demanded the return of the deposit and that return was refused.

While I am looking at this case I will ask some gentleman on the jury who is mathematically inclined to figure the interest on $2,500 from January 25, 1925, to January 25th, we will say, 1928, three years. The Court asks you to do that because it is a question of fact that cannot be determined by the Court.

The case which Vice-Chancellor Backes decided is the case of Beller *v.* Fenning, in which he says, "A counter-claim of a cause for action, unrelated to the claim made by the bill, and not defensive of the complainant's right of recovery, is not maintainable."

Mr. Grosman: I have one other motion.

The Court: Please make them all.

Mr. Grosman: I wanted to make it in order. I made a motion for a non-suit on the ground I stated. Will your Honor rule on that motion?

The Court: I will deny that motion.

Verdict.

Mr. Grosman: I respectfully move for the direction of a verdict in favor of the defendant on the same grounds alleged by me in support of my motion for a non-suit.

The Court: I will also deny that motion.

Mr. Grosman: May I have an exception to your denial of both of my motions?

The Court: You may.

Exception noted as ground of appeal.

The Court: I direct, gentlemen of the jury, that you bring in a verdict in favor of the plaintiffs and against the defendants in the amount of $2,950.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

OPINION OF SUPREME COURT.

Filed January 16, 1929.

NEW JERSEY SUPREME COURT.

No. 79, May Term, 1928.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as YESKEL SUPPLY CO.,
Plaintiffs-Respondents,

vs.

SAMUEL GROSS and PASSIE GROSS,
Defendants-Appellants.

Submitted May 11, 1928; decided November 15, 1928.

1. Purchasers under an agreement of sale of real estate are entitled to recover from the sellers deposit, search and survey fees, where the contract of purchase is repudiated by sellers upon the ground that it omits to provide for the inclusion in the deed of a covenant to run with the land.

2. Where vendors file a bill in the Court of Chancery for reformation of a contract to sell real estate, the purchasers are not barred from maintaining an action at law to recover a deposit, search and survey fees, by failure to file a counter-claim in the Chancery action.

3. The statute of set-offs applies only to cases of mutual indebtedness.

4. Claims for unliquidated damages are not the subject of set-off.

5. Rules 28 and 70 of the Court of Chancery do not make the filing of a counter-claim compulsory, but only permissive.

On appeal from a judgment of the Essex County Circuit Court.

Before Gummere, *C. J.*, and Parker and Katzenbach, *JJ.*

For the appellants: Grosman & Grosman, Esqs.

For the respondents: Philip J. Schotland, Esq.

The opinion of the Court was delivered by KATZENBACH, *J.*

This is an appeal from a judgment of the Essex County Circuit Court. The judgment is for $3,041.22 and represents the amount of a vendee's deposit and search fees in a real estate transaction. The case was submitted to the trial court on the pleadings and an agreed state of facts. The trial court directed that a judgment be entered in favor of the plaintiffs. From this judgment the defendants below have appealed.

On October 22, 1924, Samuel Gross and Passie Gross entered into an agreement with William Yeskel and Samuel Yeskel, partners trading as Yeskel Supply Co., to sell a property to them located in the City of Newark and known as the "Trefz Brewery" for the sum of $85,000. The purchasers paid down $2,500. When the time came for the delivery of the deed the sellers inserted in the deed a covenant which was to run with the land that the premises were not to be used as a brewery or for the manufacture of wines, beers, spirituous liquor, or malt beverages known as near beer. The purchasers rejected

the deed because the agreement of sale did not provide that such a covenant should be inserted in the deed. The vendors then filed a bill in the Court of Chancery praying for the reformation of the agreement and the specific performance thereof. The Court of Chancery dismissed this bill, 98 N. J. E. 64. The decree of dismissal was affirmed by the Court of Errors and Appeals, 100 N. J. E. 293. The Grosses then refused to pay the Yeskels the deposit money and the expenses incurred by them for searches and a survey. The present action was instituted to recover the deposit, search fees, and cost of survey.

The only ground of appeal specifically stated in the notice of appeal is the direction of a verdict in favor of the plaintiffs and the refusal to direct a verdict in favor of the defendants. Passing the question as to whether under this ground of appeal the defendants-appellants can argue the points advanced in the Circuit Court for the direction of a verdict in their favor, we will consider these points as if they had been stated in the notice of appeal as grounds upon which the appellants rely. The first is that the present action is based on a contract declared non-existent by the Court of Errors and Appeals, and consequently the suit, if maintainable at all, should have been for money had and received. Assuming that the Court of Errors and Appeals declared the contract non-existent, this does not bar the recovery of money paid under the contract. The suit is not one for a breach of the contract but one arising because of the action of the appellants in refusing to return the money paid under the contract and to pay expenses arising from the respondents' efforts to carry out the contract. It is in effect a suit

for money had and received. Such an action has been approved in Kurtz *v.* Busch, 128 Atl. Rep. 552 (not officially reported).

The second contention of the appellants is that the respondents are barred from maintaining the present action at law because they should have filed a counter-claim in the Chancery action for the return of the deposit and the cost of searches and survey. This contention we deem without merit. The statute of set-offs (Vol. IV, C. S., p. 4836) applies only to cases of mutual indebtedness and does not apply to a suit in equity for the reformation of a contract. The respondents' claim was at the time of filing of the bill in Chancery in part (search fees and survey) for unliquidated damages. These are not subjected to set-off. Godkin *v.* Bailey, 74 N. J. L. 655.

The appellants finally argue that under Rule 28 of the Court of Chancery a counter-claim should have been filed by the respondents. This rule provides as follows:

"Subject to the provisions of other rules herein contained, a defendant may counter-claim or set-off any cause of action against the complainant."

Rule 70 of the Court of Chancery provides:

"Any matter being the proper subject of a crossbill under the existing practice may be set up by counter claim."

"The purpose of a crossbill is to enable a defendant to make his defense more complete and effectual than it would be if he stood on an answer alone; but the new facts which he may introduce into pending litigation by means thereof are such, and such only, as it is necessary for the Court to have before it in deciding the question raised in the original suit, so that the

Court may do full and complete justice to all the parties in respect to the cause of action on which the complainant rests his right to relief." McAnarney *v.* Lembeck, 97 N. J. 361.

In the case of Beller, *et al., v.* Fenning, 139 Atl. Rep. 327 (not yet officially reported), Vice-Chancellor Backes construed rules 28 and 70. He held that a counter-claim for partition of lands to a suit by tenants in common against another to recover on an agreement for mutual contribution for upkeep of the premises presents no defense and is improperly joined. He dismissed the counter-claim. With reference to Rule 70 he said:

"The rule invoked as to counter-claims was not intended to allow alien issues, nor other than those that could be tendered by a crossbill to be pleaded and, as to set-offs, only those that may discharge or reduce the complainants' demand. Neither of the rules (28 or 70) has the effect of substantially altering the then existing practice."

But if the respondents could have filed a counter-claim, they would not be barred from maintaining this action. Rules 28 and 70 do not make it compulsory to file a counter-claim. It is only permissive. If filed the Court of Chancery in its discretion may refuse to consider it. There is no provision in the Chancery Act or Rules which makes failure to file a counter-claim a bar to a cross action. As the respondents were not bound to set-off by counter-claim in the Chancery action their claim, the argument that the Chancery decree is *res adjudicata* as to the present suit falls.

The judgment of the Essex County Circuit Court is affirmed.

REMITTITUR.

Filed January 25, 1929.

NEW JERSEY SUPREME COURT.

No. 79, May Term, 1928.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as YESKEL SUPPLY CO., *Plaintiffs-Respondents,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex Circuit. Order.*

This cause having been duly submitted on briefs at the May Term, 1928, by Messrs. Grosman & Grosman, of counsel for the defendants-appellants, and Philip J. Schotland, Esq., of counsel with the plaintiffs-respondents and the Court having inspected the record and judgment below and considered the causes assigned for error and the grounds of appeal therefor, and finding no error in the record or proceedings in the Essex County Circuit Court;

It is thereupon ORDERED and ADJUDGED that the judgment of the Essex County Circuit Court be affirmed with costs; and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

Entered January 25, 1929.

On motion of

PHILIP J. SCHOTLAND,
Attorney for Plaintiffs-Respondents.

NOTICE AND GROUNDS OF APPEAL.

Filed

NEW JERSEY SUPREME COURT.

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as YESKEL SUPPLY CO., *Plaintiffs-Appellees,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants-Appellants.*	*Action at Law.* *Notice and Grounds of Appeal to Court of Errors and Appeals.*

To Philip J. Schotland, Esq., attorney of William Yeskel and Samuel Yeskel, partners trading as Yeskel Supply Co., plaintiffs-appellees, or to whom it may concern.

PLEASE TAKE NOTICE, that Samuel Gross and Passie Gross, the defendants-appellants in the above-entitled cause, hereby appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment of the New Jersey Supreme Court, affirming the judgment of Essex County Circuit Court on the following ground, to wit:

1. Because the Supreme Court erred in giving judgment for the plaintiffs-appellees, affirming the judgment of the Essex County Circuit Court instead of giving judgment for the defendants-appellants reversing the judgment of the Essex County Circuit Court.

Respectfully yours,

GROSMAN & GROSMAN,
Attorneys for Defendants-Appellants.

Notice and Grounds of Appeal.

I conceive there is good cause for appeal in the above-stated case.

ROBERT D. GROSMAN,
Of Counsel with Defendants-Appellants.

Service acknowledged this 1st day of February, 1929.

PHILIP J. SCHOTLAND,
Solicitor of Plaintiffs-Appellees.

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

New Jersey Court of Errors and Appeals

WILLIAM YESKEL and SAMUEL YESKEL, partners trading as Yeskel Supply Co., *Plaintiffs-Appellees,* *vs.* SAMUEL GROSS and PASSIE GROSS, *Defendants-Appellants.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF OF DEFENDANTS-APPELLANTS.

Facts.

This appeal presents for review the action of the New Jersey Supreme Court in affirming the action of the Essex Circuit, Mountain, *J.*, presiding, in directing a verdict upon the pleadings in favor of the respondents and against the appellants (S. C. 27, l. 10 and S. C. 30, l. 11) and its refusal first, to non-suit the respondents upon the pleadings on the appellants' motion (S. C. 27, l. 40) and secondly, to direct a verdict in favor of the appellants and against the appellees when thereunto moved as will appear by the record (S. C. 30, l. 10).

The case was submitted to the trial Court upon complaint and answer. No replication was filed therein so that the facts contained in the answer stand admitted. No testimony was taken in the lower court for reason of the fact that the only question involved was one of law raised by the pleadings to be disposed of upon the motions for a direction of the verdict and of non-suit made by the respective parties as will appear by the record.

The present suit is one on contract to recover the sum of twenty-five hundred ($2,500) dollars paid by the respondents to the appellants as a deposit on the purchase price of certain real estate located in the City of Newark, in this State. The contract, dated October 22, 1924, under which this money was paid is annexed to the complaint filed in this suit (S. C. 7).

The respondents refused to accept a deed from the appellants because a restrictive covenant was included therein, against the use of the premises for brewery purposes. Thereupon the appellants instituted a suit in our Court of Chancery to reform the agreement (S. C. 7) so that it would include a proviso for the insertion in the deed, to be given thereunder, of the restrictive covenant before mentioned.

This suit, of course, was between the parties to this suit and by an opinion rendered in our Court of Chancery (130 A. 546; 98 N. J. E. 64), the relief prayed for by the appellants was denied and the bill of complaint was dismissed. The appellants then prosecuted an appeal from the Chancery decision to the Court of Errors and Appeals and the appellate court by its decision reported in 134 A. 737, affirmed the decree of the Chancery Court but upon somewhat different grounds.

After the termination of the litigation in the Chancery Court and in the Court of Errors and Appeals, the respondents instituted the present action at law to recover from the appellants the deposit paid by them under the contract (S. C. 7) which had been litigated in our Court of Chancery and in our Court of Errors and Appeals as hereinbefore stated.

The appellants contended in the court below and do now contend that the respondents were not entitled to maintain the action at bar for three reasons:

First, the suit is one on a contract declared non-existent by our Court of Errors and Appeals and consequently the suit if maintainable at all, should have been brought for money had and received.

Second, the decree of our Court of Chancery is *res adjudicata* of all matters pertaining to the contract (S. C. 7) which were adjudicated and which might have been adjudicated and consequently the respondents are not entitled to maintain their present action.

Third, the respondents having failed to counter-claim their cause of action in the Chancery action are now barred by the Statute of Set-Off (4 C. S. 4836) from maintaining an independent action therefor.

POINT ONE.

A decree in Chancery is an efficient bar to a subsequent action at law in a case involving the same parties and the same subject matter and the doctrine of res adjudicata may be predicated either upon a decree or a judgment.

In *Sarson* v. *Maccia* (1919) 108 A. 109, 90 N. J. E. 433, Backes, *V.-C.* holds:

> "A decree in Chancery court, in which vendor sought recision on ground that a mortgage and note given as part of purchase price were worthless to knowledge of purchaser, held *res adjudicata,* and a bar to action at law for damages based on alleged deceit, the only difference between the suit in equity and the action at law being the form of the remedy and the nature of the relief."

Ingersoll, *V.-C.*, in *McGarvey* v. *Young*, 134 A. 744, quotes with approval the case of *Sarson* v. *Maccia* (*supra*), and quotes with approval the doctrine laid down in *Beloit* v. *Morgan*, 7 Wall 619, referred to with approval in 51 N. J. E., at page 56, which is to this effect:

> That the judgment of a court having jurisdiction of the parties and the subject matter of the suit is conclusive, not only as to the *res* of that case, but as to all future litigation between the same parties touching the same subject matter though the *res* itself may be different."

The Vice-Chancellor then proceeds to quote with approval the case of *Thompson* v. *Williamson*, 67 N. J. E. 212, 214, 58 A. 602, wherein it is held:

> "It is not necessary that the action in which the judgment is found, and that in which it is relied on as an estoppel, should be of the same kind or for the same cause of action (cases cited). The doctrine is not a mere rule of procedure, but a rule of justice unlimited in its operation which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose of society (cases cited). It is a rule of law based upon two grounds: The first, that there should be an end to litigation; and, the second, that a person should not be twice vexed for the same cause."

In the case at bar the contract (S. C. 7) was involved in the Chancery action. The parties were hopelessly at odds with each other touching their rights thereunder. The respondents refused to accept a deed from the appellants containing a restrictive covenant against the use of the premises for brewing purposes and demanded the return of their deposit together with expenses incidental to the searching of the title (S. C. 5,

l. 30). The entire controversy was submitted to a court of competent jurisdiction as will appear by the allegations of paragraph three of the respondents' complaint (S. C. 5, l. 10). They had demanded the return of their money. Why they did not follow up their demand and present its propriety for the decision of the Chancery Court, is beyond understanding. The fact remains that they failed to do so. They asserted every other right that they had or thought they had under the contract, but deliberately omitted this very important feature of their claim against the appellants. They reserved this claim for future litigation and thus ran counter to the expressed and clear policy of the law that "all litigation between parties be terminated in a single action."

It is respectfully insisted that the respondents were in duty bound to present for adjudication to the Court of Chancery in the original litigation touching this contract, their demand for the return of their deposit; that having failed to do so and having permitted the entry of a decree in a litigation which offered them an opportunity to adjudicate their claim, the decree is *res adjudicata* as to their present action and they should not be permitted to make it the subject of subsequent and independent litigation.

POINT TWO.

The respondents were in duty bound to set off by counter-claim, in the Chancery action, their claim for the return of their deposit and having failed to do so, not only is the Chancery decree res adjudicata as to the present action, but the respondents are barred from maintaining the instant suit by the statute of "set-off" (4 C. S. 4836).

At the inception of the Chancery litigation touching the subject matter of the present suit, the respondents who were the defendants in that action had a liquidated claim for twenty-five hundred ($2,500) dollars against the present appellants. That this was so can be readily gathered from reading sub-paragraph three of paragraph three of the complaint (S. C. 5, l. 30) from which it will appear that the respondents had refused to accept the deed tendered by the appellants and had demanded the return of their twenty-five hundred ($2,500) dollar deposit, which demand the appellants had refused to comply with.

It is respectfully insisted that in this posture of affairs, the respondents were in duty bound to have counter-claimed their demand against the appellants and have secured an adjudication of their claim in that action so bringing all of the issues involved between the parties to a conclusion. The policy of the law in this connection is illustrated not only by the decisions of our courts to which I will refer presently, but also by our statute entitled "An Act concerning set-off" (4 C. S. 4836), which reads as follows:

> "1. Demands subject to set-off; effect of failure to set-off— That if any two or more persons be indebted to each other, such debts or demands not being for unliquidated dam-

> ages, may be set off against each other; and *if one of such debtors,* or his executors or administrators *shall commence an action against the other,* his executors or administrators, *in any court of this State* it shall be lawful for the defendant at the trial, to set off as against the plaintiff, the debts or demands which may be due and owing to him as aforesaid; and any defendant failing to set off such debts or demands, shall thereafter be precluded from bringing any action for such debt or demand which might have been set off by virtue of this act" (Rev. 1877, p. 1096). (Italics mine.)

Reverting once again to the inception of the Chancery litigation, it will be observed that at that time, the parties to this suit were at loggerheads over this contract. The appellants contended that the respondents were obliged to live up to the contract made between them and were thus indebted to them in the sum of eighty-two thousand five hundred ($82,500) dollars. The respondents on the other hand, contended that they were not required to observe the contract as construed by the appellants and demanded from the appellants the return of their twenty-five hundred ($2,500) dollar deposit. Referring now to the statute we find that "*if any action*" be instituted by one debtor against the other *in any court of this State,* it shall be lawful for the defendant at the trial to set-off as against the plaintiff, the debts or demands which may be due and owing to him as aforesaid."

This statute provides not merely for the set-off of *debts,* but also of *demands* and is broad enough to include practically any claim for liquidated damages that a defendant might have against a plaintiff and then the statute proceeds further to declare "that the penalty for failure to assert a debt or demand *is that the defendant*

shall thereafter be precluded from bringing any action for such debt or demand which might have been set-off by virtue of this act."

The respondents' case comes squarely within the purview of the act. The situation which presents itself in this case is exactly the sort of a condition that the statute contemplates and prohibits. Respondents are prosecuting the appellants with needless litigation and it was doubtlessly for this very reason that the statute referred to was enacted.

The decree in the Chancery action was entered on October 27, 1925. Had the respondents presented their present claim in the Chancery action, the issue would have been determined at that time without further embarrassment or expense either to the appellants or to our courts. The viciousness of the respondents' conduct is plainly evident from these facts. Given the broad and ample opportunity by the statute and the rules of court to present their demand against the appellants in the previous litigation they failed to do so and now, two and one-half years later they are still burdening the courts and prosecuting the appellants with needless litigation.

Rule 28 of our Court of Chancery provides among other things as follows:

> "Subject to the provisions of other rules herein contained, a defendant may counterclaim or set-off any cause of action against the complainant."

It follows that under the statute of "set-off" the law casts upon the respondents, the duty of presenting their claim against the appellants in the Chancery action upon penalty of being forever barred from prosecuting their demand if they failed to do so. Under Rule 28 of the

Chancery Court, the respondents were permitted to present their claim against the appellants as provided for by the statute. They failed to do so. Whether from a desire to vex the appellants with additional litigation or whether from a desire to abandon their claim, I cannot say. The fact remains that they failed to avail themselves of the opportunity to have their claim determined and now seek to make their claim the subject of an independent suit. This they cannot and should not be permitted to do not only in fairness to the appellants who are thus vexed with needless litigation, but also because of public policy which dictates that a litigant having had one opportunity to adjudicate all his claims against another, should do so and not burden the courts and delay other litigants with needless litigation.

Beasley, *C. J.*, speaking for the Court in the case of *Day* v. *Jackson,* 39 N. J. L. 535 (syl. 1) holds that:

> "A claim arising from a bonus paid on a usurious loan, is the subject of a set-off and will be barred, if not presented as a *set-off in a suit that offers an opportunity.*" (Italics mine.)

It cannot be gainsaid that the Chancery action *offered an opportunity* to the respondent to present their claim against the appellants. They failed to do so and under the statute as well as our decisions are barred from asserting it at this late date.

The respondents of course, were not required to set-off their demand against the appellants by counter-claim in the Chancery action. It was their privilege to abandon or waive it as they saw fit.

To this effect is the case of *Carey* v. *Brown*, 92 E. 497; 113 A. 499, wherein the courts hold at page 501, paragraph 6, that:

> "The defendant may counter-claim or set-off any cause of action against the complainant or plaintiff, as the case may be, or against any third party necessary to be brought in," and at paragraph 7, states: "The defendant if he sees fit, could counter-claim against the complainant and the assignors, *he, however, may have elected to simply resist the complainant's claim to the extent of defeating her right to the relief she seeks by the bill.* That is *his privilege, if he so elects.* But in any event, I think that the proper procedure requires a counter-claim by Brown to the extent of the damages sustained by him" * * * (Italics mine.)

It may be contended that the rule barring the respondents' claim, is a harsh one, but this argument is not convincing. The respondents had every conceivable opportunity to present their claim and deliberately failed to do so. Having thus neglected to avail themselves of the opportunity afforded by the statute and the rules of court and dictated by public policy, they should not be permitted to further embarrass the respondents, subject them to additional costs and to further burden the Court with litigation which could and should have been determined in October, 1925.

Considering the statute of "Set-Off" by analogy to the "Justices Act" which has been repeatedly passed upon by this court, the conclusion is inescapable that the respondents cannot maintain their present cause of action.

In *Righter* v. *Van Riper* (1810) 3 N. J. L. 715,

> "It was contended by the defendant, that in a prior action brought by him in a Justices

Court, the plaintiff failed to plead in set-off the claim which was made the basis of the suit at bar, and therefore he was estopped from recovering upon his claim. The Court upheld the defendant's contention, holding that the plaintiff was barred by sections 16 and 17 of the 'Justices Act' from maintaining an independent action on a claim which he had failed to plead in set-off as required."

And in *Johnson* v. *Pennington* (1835) 15 N. J. L. 188, it was held:

"That under a statute the plaintiff could not maintain an action on a claim which was the proper subject of a set-off, and which he failed to plead as such in a prior action before a justice, the Court said: 'Our statute is peremptory.' When a party is sued, he is not at liberty to bring a cross action, for a demand which, as in this case, is, the subject matter of a set-off. The set-off must be claimed as such, or the right to recover it is barred. Nor does it make any difference which process was first returnable; or which suit first progressed to judgment. A different rule would encourage a party defendant to evade the wholesome provision of the act to prevent the multiplaction of actions and to excite a disgraceful scramble for jurisdiction."

In *Henry* v. *Milham* (1832) 13 N. J. L. 266, the Court held that:

"By the terms of the statute (Rev. Laws 633, sec. 15), a party who had failed to assert a claim in his favor which was the proper subject of a set-off in a former action against him, could not recover on the same in a subsequent independent action."

In *Links* v. *Mariowe* (1912) 83 N. J. L. 389; 84 A. 1056, the Court held:

"That the plaintiff's omission to file a liquidated claim for damages as a set-off in a prior action against him in a District Court precluded him from maintaining a

subsequent action thereon, under the terms of the statute" (C. S., p. 1971, sec. 61).

So, in *Dey* v. *Jackson* ( ) 39 N. J. L. 535, wherein it appeared that the plaintiff, as defendant in a former action, had omitted to plead his claim as a set-off therein, the Court held that:

> "Under the statute relating to set-offs, his claim became forever barred by reason of the failure to assert it in the original action as required."

To the same effect is *Schenck* v. *Schenck,* 10 N. J. L. 276, the Court held:

> "That under the statute the plaintiff could not maintain an action on a claim which was the proper subject of a set-off in a former action, but which he failed to plead.

Of course, these cases involved action purely at law. The statute, however makes no distinction between equity and law actions. It speaks of "*any action*" in "*any court.*" The crux of the question is whether or not the respondents in a court of competent jurisdiction were parties to an action involving the contract *sub judice;* whether they had an opportunity, in that action, to present and have determined their present liquidated claim for damages. If these queries are answered in the affirmative and of course they must be so answered, because they can only be so answered, then the respondents are barred from maintaining their present independent action on this claim which was the proper subject of counter-claim in the original action.

The viciousness of the respondents' conduct is too evident to require any extended discussion. Considering the monumental amount of litigation under which our courts are now staggering; the public hew and cry set up by litigants who claim that they cannot secure timely disposition of

their controversies, it is respectfully insisted that the requirement of the statute and of the general law that litigants present every claim they may have against one another for determination when afforded an opportunity to do so, should be strictly enforced for reasons that are obvious. Litigants should not be permitted to reserve for future litigation in other tribunals, questions which they are required and given ample opportunity to present for adjudication.

I think that it has been clearly demonstrated that the Chancery action offered full opportunity to the respondents as well as to the appellants for the determination of all claims they may have had against each other. I now desire to call the Court's attention to several cases treating of this specific issue.

In the case of *Decker* v. *Caskey,* 1 N. J. E. 427, it was held:

> "It is the duty of this court never to do justice by halves, to beget business for another court, or, when a cause is fairly within its jurisdiction, to leave open the door for further litigaiton here or elsewhere."

To the same effect are the cases of *Symms* v. *Strong,* 28 N. J. E. 131, and *Mosser* v. *Pequest Mining Co.,* 26 N. J. E. 200.

In *Melick* v. *Cross,* 62 N. J. E. 545, 546, it was held:

> "The Court having obtained jurisdiction of the cause will settle the whole controversy."

Particularly applicable to the case at bar, is *Goldstein* v. *Ehrlich,* 96 N. J. E. 52; 124 A. 761, wherein counsel for the present respondents was counsel for the defendants. This case was decided on May 28, 1924, so that the learned counsel for the present respondents must have been

thoroughly familiar with the pronouncement in the Goldstein case.

In this case the complainant rescinded a contract for the purchase of land because there was a cloud on the title. By his bill he sought the return of the deposit which he had paid to the defendants and also prayed that the amount so found due him be decreed a lien upon the property involved in the suit.

The relief prayed for by him was decreed and this case is cited to demonstrate the proposition that equity could not only have afforded the present respondents the relief which they seek in this suit, but could have done more for them than the law court could, that is, impress upon the lands involved, a specific lien for the amount so found due.

POINT THREE.

The proofs must meet the allegations of the pleadings and if they fail to do so the action cannot be maintained even though such proofs might be sufficient to support a different type of suit.

The complaint in this cause (S. C. 4) is founded on contract. It charges that the respondents are entitled to recover from the appellants the sum of twenty-five hundred ($2,500) dollars because of their breach of the contract referred to in the complaint and annexed thereto (S. C. 7). This contract has been declared non-existent by the Court of Errors and Appeals of this State and its opinion is reported in 134 A. 437. It consequently follows as a natural conclusion that no action can be predicated upon a non-existent contract. This is precisely what the respondents insist upon doing. This objection was made the

basis of a motion for a non-suit by the appellants in the court below, which motion was denied (S. C. 27, l. 40). It is not contended that under the admitted facts in this case, all other factors being eliminated, an action could not be maintained by the respondents against the appellants, but it is respectfully submitted that their remedy is not by a suit on contract any more than they could maintain an action against the appellants upon the facts, for trover and conversion. The suit should have been brought for money had and received by the appellants to the use of respondents and not upon contract as was done and for this, among other reasons urged, the judgment of the court below should be reversed.

POINT FOUR.

The New Jersey Supreme Court erred in affirming the action of the Essex Circuit.

The Supreme Court in its opinion (S. C. 31) apparently erred in holding that the respondents' claim was an *unliquidated* one and as such could not be set off under the statute of set-offs and the rules of the Chancery Court, in the Chancery action. There can be and there is no dispute on the part of the appellants that if the respondents' claim was one for unliquidated damages, it does not come within the purview of the *statute of set-offs* and the respondents were not barred from maintaining their suit in the trial Court. The insistment of the respondents is that this was a liquidated claim. The Supreme Court in its opinion holds that the respondents' claim was not liquidated because the present action was instituted to recover not only the deposit but "search fees and costs of

survey." These items were never properly included in the respondents' claim. The Court of Errors and Appeals in its opinion affirming the decree of our Court of Chancery, 100 N. J. E. 293, at page 294, holds:

> "It is manifest that the parties to this agreement have not agreed to the same thing in the same sense, so that there was lacking in the situation the meeting of the minds of the contracting parties, which forms the essential element to the valid consummation of a contract."

It therefore follows that under the decision of this Court there never was a contract between these parties because their minds never met upon the same thing in the same sense. This being so the respondents were never entitled to recover search fees and costs of survey. This they themselves recognized because they abandoned their claim thereto in the lower court and sued only for the recovery of their deposit. It certainly cannot be said that a claim liquidated can be made into an unliquidated one merely by the improper inclusion of a demand for unliquidated items to which the claimant was never entitled. It may be contended that the respondents honestly thought at the time of the Chancery action that they were entitled to search fees and costs of survey. This of course can have no bearing upon the issues. When this Court in its opinion in the Chancery appeal held "that the minds of the parties never met upon the same thing and in the same sense" that determination referred back to the making of the original contract. This was so not only at the time that this Court made this pronouncement, but insofar as the Court is concerned it was always so from the very inception of the dealings between the parties. The conclusion is inescap-

able that the only valid claim that the respondents ever had was for the return of their naked deposit and for nothing more. This, of course, was a liquidated sum, namely, twenty-five hundred ($2500) dollars, and it is respectfully insisted that the Supreme Court erred when it permitted itself to include into its consideration the demand of the respondents for search fees and costs of survey which they do not seek to recover in this action and to which they were never entitled under the pronouncement of this Court in the Chancery appeal.

The claim of the respondents being one for liquidated damages, they should have counter-claimed it in the Chancery action. It is true as stated by the Supreme Court that the Chancery rules do not make it mandatory for a defendant to counter-claim even a liquidated debt. The appellants do not contend that these rules are mandatory. Their insistment is that these rules are permissive, that they merely furnished an opportunity for the respondents to have presented their claim for determination. The appellants do insist, however, that the Statute of Set-offs (4 C. S., p. 4836) does make it absolutely and unconditionally mandatory for the respondents to have set off their liquidated claim in the Chancery action; that by having failed to do so they have incurred the penalty provided by the statute and are now barred from asserting their claim at this time.

CONCLUSION.

In conclusion it is respectfully submitted that the respondents have had an ample opportunity to present their claim against the appellants in the original Chancery action and having de-

liberately failed to do so, are now barred from making their claim the subject of an independent action and consequently burdening the Court and harrassing the appellants with more and needless expense and litigation. This not only because the decree in Chancery is *res adjudicata* as to the issues actually raised and those which might have been raised, but also because of the statute of this State, entitled, "An Act concerning Set-off" hereinbefore referred to. It is respectfully insisted that the verdict in the court below is not maintainable for the further reason that the action sounds on contract when in fact there is no contract. For all of these reasons, it is respectfully submitted that the trial Court erred in directing a verdict on the pleadings in favor of respondents and against the appellants; that the circumstances of the case required the trial Court to direct either a judgment of non-suit or a verdict in favor of the defendants-appellants when thereunto moved; that the Supreme Court erred in holding that respondents' claim was unliquidated and affirming the action of the trial Court. The affirmance of the Supreme Court should be reversed.

Respectfully submitted,

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New Jersey
Court of Errors and Appeals

WILLIAM YESKEL AND SAMUEL YESKEL, partners trading as Yeskel Supply Company, *Plaintiffs-Appellees.* vs SAMUEL GROSS AND PASSIE GROSS, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex Circuit.*

BRIEF OF PLAINTIFFS-APPELLEES.

Facts.

The facts in this action are undisputed and were stipulated on the record at the trial of the cause appearing on pages 22 to 24 of the State of the Case substantially as follows:

The plaintiffs brought this action to recover a deposit of $2,500 paid by them to the defendants on account of the purchase price of $85,000 for property on Rankin and Beacon streets, in the City of Newark, known as the Trefz Brewery, which the defendants by agreement dated October 22, 1924, had agreed to convey on or before January 2, 1925. The action also is to recover the reasonable search fees and cost of survey made by the plaintiffs in preparation for taking title in accordance with the terms of the contract.

When the time for consummation of the agreement arrived, the defendants tendered a deed containing a covenant against using the premises to be conveyed as a brewery, or for the manufacture of wines, beer or spirituous liquors or malt bever-

ages known as near beer. The agreement provided for no such restrictive covenant and the plaintiffs thereupon demanded the return of the deposit, together with search fees and cost of survey. The defendants did not comply with said demand but brought suit in the Court of Chancery to reform the contract by inserting a provision that the conveyance to be made by the defendants to the plaintiffs is to be subject to said restrictive covenant. The matter was fully tried in the Court of Chancery and on final hearing a decree was made dismissing defendant's bill and denying their right to reform the contract. Vice-Chancellor Backes before whom the cause was tried filed an opinion which is reported in 98 N. J. E. 64. The defendants thereupon appealed to the Court of Errors and Appeals, which court affirmed the decree dismissing the defendants' bill and denying the defendants the right to reform the contract, and held "It is manifest that the parties to this agreement have not agreed to the same thing in the same sense, so that there was lacking in the situation, the meeting of the minds of the contracting parties, which forms the essential element to the valid consummation of a contract." This decision is reported in 100 N. J. Eq. 293. It is on account of the fact that the Court of Errors and Appeals held that there was no meeting of the minds that the plaintiffs admit they are not entitled to recover the search fees and cost of survey sued for in this action.

The amount, if the plaintiffs are entitled to recover, is not in dispute and is the sum with interest from the date of the verdict of $2,950, for which the Circuit Court directed a verdict in favor of the plaintiffs and against the defendants on motion of the plaintiffs. The defendants contended that they were entitled to a non-suit and to a direction of a verdict on two grounds, which appear at the bottom

of page 27 and on the whole of page 28 of the State of the Case as grounds for non-suit and are referred to without being repeated as grounds for a direction of a verdict in favor of the defendants on the top of page 30. The learned Circuit Court Judge denied these motions and the defendants duly excepted to the ruling of the Court and also to the direction of a verdict in favor of the plaintiffs. The Supreme Court affirmed the judgment of the Circuit Court (State of Case P. 31-35).

In the Supreme Court, the only ground specifically stated in the grounds of appeal is the direction of the verdict in favor of the plaintiffs and the refusal to direct a verdict in favor of the defendants.

The grounds upon which the defendants relied in the court below, are as follows:

1. That the plaintiffs are suing for the return of the deposit, alleging a breach of contract and the Court of Errors and Appeals having held that the parties did not agree to the same thing in the same sense, the recovery in this case should be for money had and received and not for breach of contract.

2. Because the defendants in this action had as complainants in Chancery, filed a bill to reform the contract by inserting a clause which was not in it, that therefore, the plaintiffs here, who were the defendants in the Chancery suit should have filed a counter-claim in Chancery against the suit for reformation of the contract and demanded on the counter-claim, the return of the amount paid on account of the purchase price, together with the search fees and cost of survey and that the Statute of Set-offs bars the plaintiffs from now maintaining

their action at law to recover the deposit money.

The above grounds having been the only grounds raised and argued before the Circuit Court, plaintiffs assume that they are the only grounds which the defendants can raise in this court, and will therefore, in this brief deal only with these two points in the order in which they were raised in the court below.

ARGUMENT.

I.

The present action is not an action for breach of contract as the defendants-appellants claim and as they argue in their brief and this appeal, but is as said by the Supreme Court in its opinion (State of Case P. 31-35) at P. 33 line 6

> "The suit is not one for a breach of contract but one arising because of the action of the appellants in refusing to return the money paid under the contract and to pay expenses arising from the respondents' efforts to carry out the contract. It is in effect a suit for money had and received. Such an action has been approved in Kurtz v. Busch, 128 Atl. Rep. 552 (not officially reported)."

II.

The Statute of Set-offs, Volume 4, Compiled Statutes, page 4836, does not apply to the case at bar.

(a) The Statute only applies to cases of mutual indebtedness and does not apply to a suit in equity to determine the contractual rights of the parties or what the contract should be. A case which throws a great deal of light on the purpose of the statute and its proper construction is *Godkin v.*

Bailey, 74 N. J. L. 655; 65 Atlantic 1032, wherein Justice Swayze, speaking for the Court of Errors and Appeals goes very carefully into the history, the purpose and the construction to be placed upon the Statute of Set-offs.

(b) The statute does not apply because the plaintiffs' claim at the time the bill was filed by the present defendants was for unliquidated damages and could not be made the subject of a set-off or counter-claim. *Godkin v. Bailey, supra.* The fact that the Court of Errors and Appeals in its decision rendered more than a year after the Chancery action was started decided that the contract was not a contract because there had been no meeting of the minds and therefore now bars the plaintiffs from recovering the damages consisting of the search fees and the survey expense which are unliquidated, for the breach of the contract does not change the situation, that at the time of the Chancery suit the claim of the plaintiffs contained a substantial element for unliquidated damages.

(c) The fact that the Statute of Set-offs cannot bear the construction attempted to be placed upon it by counsel for the defendants is demonstrated by the fact that in 1900, the Legislature found it necessary to enact section 5, adding it to the Statute of Set-offs, giving the right of set-off in suits for foreclosure of mortgages. If the construction defendants contend for is correct, then a suit to foreclose a mortgage is certainly a suit to collect an indebtedness from the defendant, which indebtedness is secured by a lien on the property and if the defendant claimed any indebtedness from the complainant he would be not only permitted, but required to set-off his claim, but the Statute of Set-offs applying only as it does to actions at law and not to suits in Chancery, it was necessary for the

Legislature to add section 5 in order to enable a defendant in a foreclosure suit to interpose a set-off, and *the Legislature recognizing that the Statute to which it added Section 5 applies only to actions at law*, uses the following language after giving the right of set-off:

> *"In the same manner and to the same extent as like set-offs are allowable in actions at law."*

To simply state that the bill in Chancery was filed for the reformation of the contract itself demonstrates the fact that it was not a case of mutual indebtedness.

In the case of *Naylor v. Smith, et al.*, 63 N. J. L. 596, the Court of Errors and Appeals held that a builder sued under the Mechanics' Lien Act may not set-off claims due to him from the plaintiff in a different right.

(d) A counter-claim is permitted to be filed in the Court of Chancery by Rule 70 of the Chancery Court Rules, which provides, "Any matter being the proper subject of a *crossbill* under the existing practice *may* be set up by counter claim."

The defendants' suit in the Court of Chancery was brought against the plaintiffs in this action to reform the contract of purchase and sale which the parties had entered into. How could a cross-bill under the old practice have been filed against such an action to recover the deposit paid together with search fees and cost of survey? If the defendants in the Chancery proceeding had filed a counter-claim to enforce a lien on the premises which were the subject matter of the contract, the Court of Chancery would probably have struck it out on the

ground that it would not have been the subject matter of a crossbill in a suit for reformation and that the evidence regarding the amount of the deposit, the cost of the search, the reasonableness of the charge for the search and the reasonableness of the charge for the survey was not necessary for the Court to have before it on the question as to whether or not the agreement should or should not be reformed. In the case of McAnarney v. Lembeck, 97 N. J. E. 361, the Court of Errors and Appeals held:

> "The purpose of a crossbill is to enable a defendant to make his defense more complete and effectual than it would be if he stood on an answer alone; but the new facts which he may introduce into pending litigation by means thereof are such, and such only, as it is necessary for the Court to have before it in deciding the question raised in the original suit, so that the Court may do full and complete justice to all of the parties in respect to the cause of action on which the complainant rests his right to relief."

In the case of *Beller, et al. v. Fenning*, 139 Atl. 327 (not yet officially reported), Vice Chancellor Backes construing Rules 28 and 70 of the Chancery Rules, quotes from *McAnarney v. Lembeck, supra*, and holds that a counter-claim for partition of lands to a suit by tenants in common against another to recover on an agreement for mutual contribution for upkeep of the premises presents no defense and is improperly joined and he thereupon dismissed the counter-claim. Speaking of Rule 70, Vice-Chancellor Backes says:

> "The rule invoked as to counter-claims was not intended to allow alien issues, nor other than those that could be tendered by a crossbill to be pleaded and, as to set-offs, only those that may discharge or reduce the compla'n-

ants' demand. Neither of the rules (28 or 70) has the effect of substantially altering the then existing practice."

(e) Even if the plaintiffs could have, as defendants in the Chancery action, filed a counter-claim by virtue of Rules 28 and 70 of the Court of Chancery, they nevertheless would not be barred from maintaining this action:

Firstly, because a counter-claim is not required to be filed by these rules, but is only permissive;

Secondly, because even when filed the Court of Chancery in its discretion is authorized by its said rules to refuse to consider it, and

Thirdly, because there is no provision in the Chancery Act or Chancery Rules that failure to file a counter-claim is a bar to maintain the cross action such as is found in the Statute on Set-offs.

Plaintiffs therefore respectfully submit that there is no error in the judgment of the Supreme Court affirming the judgment of the Essex County Circuit Court, and that the same should be affirmed with costs.

Respectfully submitted,

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Plaintiffs-Appellees.