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NOTICE OF APPEAL.

Filed October 28, 1929.

**EAST ORANGE DISTRICT COURT OF
THE CITY OF EAST ORANGE.**

WALTER DOYLE, trading as
Pompton Avenue Service
Station,

Plaintiff,

vs.

JOSEPH J. CORN,

Defendant.

On Contract.

*Notice of
Appeal.*

10

*To plaintiff Walter Doyle, trading as Pompton
Avenue Service Station or Griffinger & Grif-
finger, his attorneys:*

20

SIR:

TAKE NOTICE, that defendant Joseph J. Corn
hereby appeals to the New Jersey Supreme
Court from the judgment of the East Orange
District Court rendered in the above-stated ac-
tion on the 9th day of October, Nineteen Hun-
dred and Twenty-nine.

CORN & SILVERMAN,
Attorneys of Defendant.

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SPECIFICATION OF DETERMINATIONS.

New Jersey Supreme Court

- | | | | |
|----|--|---|---|
| 10 | WALTER DOYLE, trading as
Pompton Avenue Service
Station,
<i>Plaintiff-Appellee,</i>
<i>vs.</i>
JOSEPH J. CORN,
<i>Defendant-Appellant.</i> | } | <i>On Contract.</i>

<i>On Appeal</i>
<i>from the</i>
<i>East Orange</i>
<i>District</i>
<i>Court.</i>

<i>Specification</i>
<i>of</i>
<i>Determina-</i>
<i>tions.</i> |
|----|--|---|---|

- 20 The following is a specification of determinations of the District Court with which appellant is dissatisfied in point of law:

1. The Court dismissed defendant's counter-claim on the ground that a counter-claim in tort cannot be set off against a contract action in a District Court.

CORN & SILVERMAN,
Attorneys of Defendant-Appellant.

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STATE OF DEMAND.

Filed June 26, 1929.

EAST ORANGE DISTRICT COURT OF
THE CITY OF EAST ORANGE.

WALTER DOYLE, trading as Pompton Avenue Service Station, vs. JOSEPH J. CORN,	}	<i>Plaintiff,</i> <i>Defendant.</i>	<i>On Contract.</i> <i>State of</i> <i>Demand.</i>
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The plaintiff demands of the defendant the sum of five hundred dollars (\$500.00) on a certain book account, a true copy of which is as follows:

20

"July 1, 1929.

J. J. CORN,

to

POMPTON AVENUE SERVICE
STATION—DR.

July	7th—1 tire repair.....	\$.75	
	" —Oil	2.65	
	" —Gasoline	1.00	
	15th—1 House fuse.....	.15	
Aug.	1st—Oil	1.80	
	" —1 tire repair	1.00	
	" —Alemite car	1.50	
	" —Urcase—6 lbs. in rear.....	1.00	
Nov.	1—Oil	1.80	
	4—Wrecking service	40.00	
	26—1 battery charge and rental....	1.25	

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State of Demand.

Nov.	30—3 qts. alcohol.....	.75
	“ —Labor	14.25
	“ —2 clevis pins.....	.20
	“ —1 exhaust pipe.....	5.40
	“ —Glass	10.00
	“ —1 <i>accelerator</i> spring.....	.15
10	Dec. 17th—1½ gal Prestone.....	7.50
	“ —Packing water pump.....	.75
	“ —Water pump fitting.....	.28
	“ —Starting car	.50
	“ —Putting car in garage.....	.50
	CREDITS—\$.75	
	3.00	
	10.00	

BALANCE DUE—\$79.93

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Judgment will be claimed in the sum of seventy-nine dollars and ninety-three cents (\$79.93) together with all lawful interest and costs of suit.

GRIFFINGER & GRIFFINGER,
Attorneys for Plaintiff.

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SPECIFICATION OF DEFENSES AND COUNTER-CLAIM.

EAST ORANGE DISTRICT COURT.

WALTER DOYLE, trading as Pompton Avenue Service Station,	}	<i>On Contract.</i> 10
<i>Plaintiff,</i>	{	<i>Specification of Defenses and Counter- claim.</i>
<i>vs.</i>		
JOSEPH J. CORN,	}	
<i>Defendant.</i>	{	

The following are the defenses on which de-
fendant will rely:

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1. Defendant is not indebted to plaintiff in
any sum.

2. The items set forth in the state of demand
are not proper book account items.

3. On or about November 26, 1928, plaintiff
agreed to put defendant's automobile in good and
safe running order for the sum of thirty dollars
(\$30). Plaintiff did not put defendant's auto-
mobile in good and safe running order in that
the brakes were greasy and would not hold, and
the piston rings were not properly fitted. Never-
theless plaintiff has charged defendant with said
sum of thirty dollars (\$30) on said book account.

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By way of counter-claim against plaintiff, de-
fendant says that:

FIRST COUNT.

1. On or about November 1, 1927, plaintiff
took and carried away winter front belonging to

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Specification of Defenses and Counter-claim.

defendant of the value of thirty-two dollars (\$32).

2. Plaintiff has failed and refused to return said winter front although defendant has frequently demanded return thereof from plaintiff.

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SECOND COUNT.

1. On or about August 17, 1928, plaintiff placed a quantity of grease in the rear end of defendant's automobile.

3. Plaintiff placed said grease in a negligent and careless manner and without the use of proper care, whereby said grease flowed into the brakes of said automobile.

20

3. On or about November 4, 1928, while defendant's car was being driven by defendant's wife on a public highway, by reason of said grease on said brakes, defendant's car could not be properly controlled and fell down a high embankment.

4. By reason thereof defendant's automobile was greatly damaged and greatly depreciated in value.

30

Defendant demands as damages against plaintiff on the counter-claim:

(a) On the first count, thirty-two dollars (\$32).

(b) On the second count, four hundred dollars (\$400).

CORN & SILVERMAN,
Attorneys of Defendant.

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ORDER DISMISSING COUNTER-CLAIM.

Filed October 9, 1929.

EAST ORANGE DISTRICT COURT.

WALTER DOYLE, trading as Pompton Avenue Service Station,	}	10 <i>On Contract.</i> <i>Order.</i>
<i>vs.</i>		
JOSEPH J. CORN,	}	<i>Defendant.</i>

On motion of Simon Griffinger of Griffinger & Griffinger, attorneys of plaintiff, that the counter-claim filed herein by the defendant Joseph J. Corn is based on an action in tort and the Court being of the opinion that a counter-claim in tort action cannot be set off against a contract action in a district court;

It is therefore, on this twenty-sixth day of September, 1929, ORDERED that the said counter-claim be and the same is hereby dismissed.

William V. Rafferty
 Judge of the East Orange District Court.

TRANSCRIPT OF CLERK'S DOCKET.

DISTRICT COURT.

EAST ORANGE, N. J.

No. 59577.

10

WALTER DOYLE, trading as
Pompton Avenue Service
Station,

*Plaintiff,**vs.*

JOSEPH J. CORN,

*Defendant.**On Contract.**Demand \$500.*

20

Griffinger & Griffinger, plaintiff's attorneys.

Summons\$2.10

Mileage40

Listing Fee 1.50

Attorney's Fee 3.14

Total Cost\$7.14

Summons issued June 26, 1929.

Returnable July 2, 1929.

30

Demand filed June 26, 1929.

I served this summons June 26, 1929, by read-
ing the same to the defendant, and delivering to
him a copy thereof.

Sergeant-at-Arms M. E. L.

Transcript of Clerk's Docket.

1929

- September 26. The plaintiff appeared and the defendant appearing.
 Walter Doyle for plaintiff.
 Bills P. 1-2-3-4.
 Joseph J. Corn for defendant.
 Morris Weiner for defendant. 10
 Wm. Gearty for plaintiff.
 Ima Doyle for plaintiff.
 The plaintiff and the defendant appearing, the cause was tried and the evidence being closed, the Court reserved decision.
- October 9. The evidence being closed, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of sixty-two and 83/100 dollars damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of \$62.83 damages with costs. 20
 Counter-claim dismissed.
- " 28. Notice of appeal filed.
 " 29. Bond filed.

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STATE OF CASE SETTLED BY COURT.

EAST ORANGE DISTRICT COURT.

10	WALTER DOYLE, trading as Pompton Avenue Service Station, <i>Plaintiff-Respondent,</i> <i>vs.</i> JOSEPH J. CORN, <i>Defendant-Appellant.</i>	<i>On Contract.</i> <i>On Appeal.</i> <i>State of</i> <i>the Case</i> <i>Settled</i> <i>by Court.</i>
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Griffinger & Griffinger, attorneys of plaintiff-respondent.

20 Corn & Silverman, attorneys of defendant-appellant.

The parties hereto or their attorneys having been unable to agree upon the state of the case for appeal and having applied to me, Judge of said Court, within the time limited by law (and as extended by order made herein), I do hereby settle the state of the case as follows:

30 The action was on contract on a book account. Defendant filed a counter-claim in tort. At the beginning of the case attorney of plaintiff made a motion to dismiss the counter-claim. Motion granted and exception to Court's ruling allowed. The action then proceeded on the contract action on book account. The action was to recover seventy-nine dollars and ninety-three cents (\$79.93). Defendant denied being indebted for some of the items. After hearing the testimony of the witnesses produced in behalf of both plaintiff and defendant, Court gave judgment for

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State of Case Settled by Court.

the plaintiff and against the defendant for sixty-two dollars and eighty-three cents (\$62.83).

IN WITNESS WHEREOF I have hereunto set my hand and seal this first day of February, nineteen hundred and thirty.

WILLIAM V. RAFFERTY, 10
Judge District Court of the
City of East Orange.

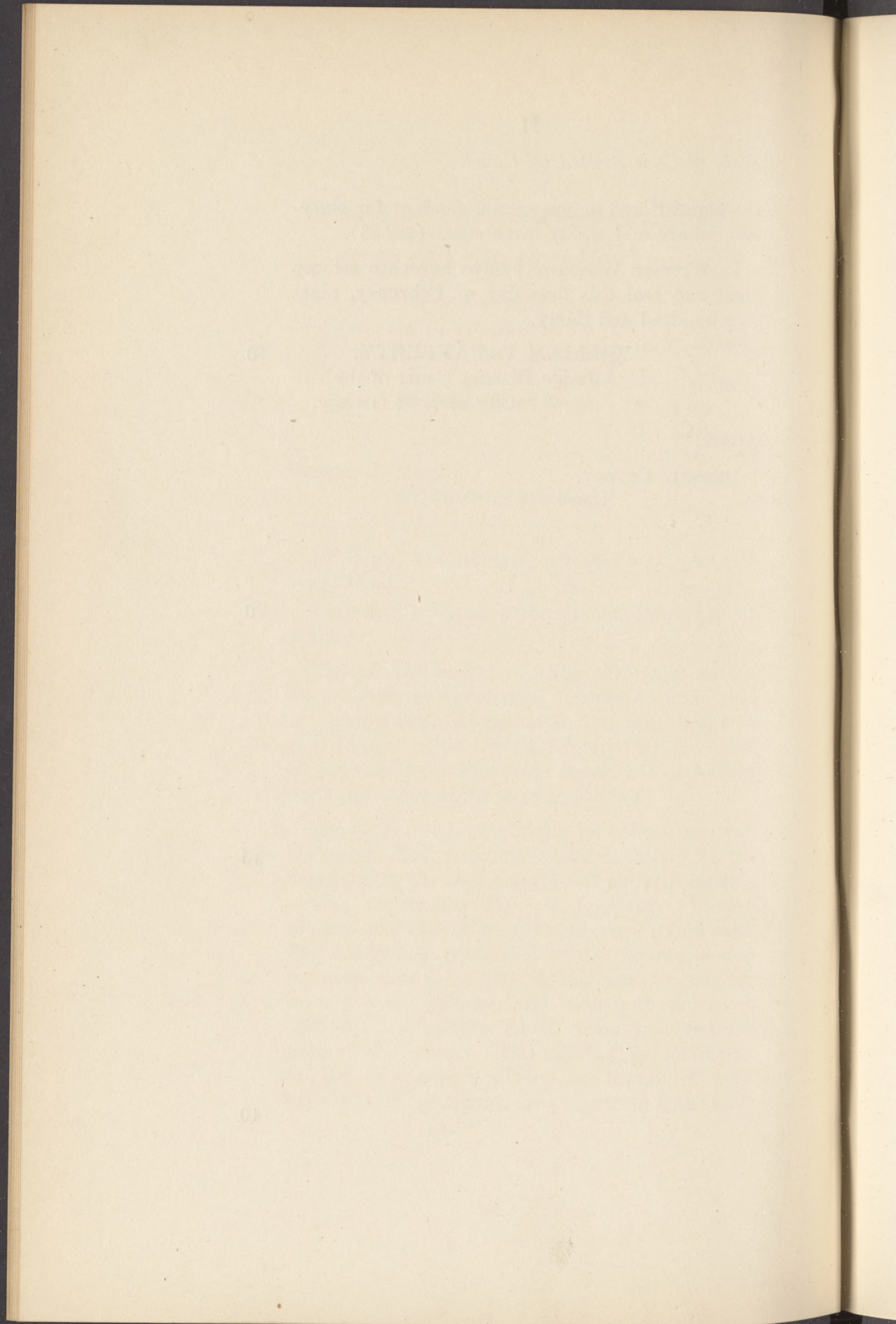
Attest:

DENIS L. CONROY,
Clerk.

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OPINION OF SUPREME COURT.

Filed November 19, 1930.

No. 419. May Term, 1930.

NEW JERSEY SUPREME COURT.

10

WALTER DOYLE, trading as, etc.,
Plaintiff-Respondent,

v.

JOSEPH J. CORN,
Defendant-Appellant.

Submitted May 16, 1930; decided November
 , 1930.

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On appeal from a judgment of the East Orange
 District Court.

Before Justices Case, Daly and Donges.

For the appellant: Corn & Silverman, Esqs.

For the respondent: Griffinger & Griffinger,
 Esqs.

Per curiam.

Plaintiff-respondent brought suit in the East
 Orange District Court to recover on a book ac-
 count. Defendant-appellant counter-claimed *in*
tort for the taking of a winter-front device and
 for negligence in the manner in which some work
 was done by plaintiff-respondent on the defend-
 ant-appellant's car.

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At the trial the plaintiff-respondent proved his
 book account and thereupon a motion was made
 to dismiss the counter-claim on the ground that
 it could not be interposed in the suit in question

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Opinion of Supreme Court.

because it was for unliquidated damages. The motion was granted and this appeal raises the propriety of such ruling.

10 The provision of the District Court Act in question is the amendment of 1927, P. L. 1927, page 499, to Section 60, the language of which as respects this case is the same as the amendment of 1922, P. L. 1922, page 230, which reads: "If the defendant have any account, demand or cause of action against the plaintiff he shall be permitted to discount, set off, or counter-claim the same against the account, debt or demand of such plaintiff."

Defendant-appellant alleges that this language permits him to counter-claim *in tort* to plaintiff's action in contract.

20 Section 61 of the District Court Act provides that if any defendant "neglect or refuse to deliver a copy of his account, demand or cause of action against such plaintiff, he shall forever thereafter be precluded from having or maintaining any action for such account, demand or cause of action" in any future action, excepting in cases where the balance due to the defendant exceeds three hundred dollars, in which case defendant shall not be so precluded from a recovery in a subsequent suit.

30 These sections, as amended in 1922, were directly passed upon in this court in *Ehret v. Hering* (1923), 99 Law 73, and it was held that defendant was not required to counter-claim for unliquidated damages, and that, on failure so to do, he would not be precluded from a recovery in a subsequent suit. In that case the Court said: "The proper construction of the amended sections is to hold that they apply only to a cause of action
40 in which the damages are liquidated."

Opinion of Supreme Court.

In *Rebenfeld v. Friedberg* (1925), 127 Atlantic Reporter 187, affirmed by the Court of Errors and Appeals, 102 Law 222 on the opinion of the Supreme Court, the same question was presented, and it was held that a claim for unliquidated damages was not the subject of counter-claim under the District Court Act. There is no direct reference in the opinion in this case to the amendment of 1922, but inasmuch as the decision was made several years after the legislation was passed, the court was dealing with the sections as amended. That decision is controlling in this case.

The judgment is affirmed with costs.

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RULE OF AFFIRMANCE.

Filed December 3, 1930.

NEW JERSEY SUPREME COURT.

10	WALTER DOYLE, trading as Pompton Avenue Service Station, <i>Plaintiff-Respondent,</i> <i>vs.</i> JOSEPH J. CORN, <i>Defendant-Appellant.</i>	}	<i>Rule of Affirmance.</i>
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20 This appeal having been heard by the Court in the presence of Griffinger and Griffinger, attorneys of plaintiff-respondent, and Corn and Silverman, attorneys for defendant-appellant, and the Court being of the opinion that the judgment below be affirmed, it is

ORDERED that the judgment of the East Orange District Court hereby is affirmed and costs to be taxed, and it is further

30 ORDERED that the record be remitted to the East Orange District Court for further proceedings thereon.

On motion of
 GRIFFINGER & GRIFFINGER,
 Attorneys for Plaintiff-Respondent.

SAMUEL J. GRIFFINGER,
 Of Counsel.

Dated December 3, 1930.

NOTICE AND GROUNDS OF APPEAL.

Filed July 29, 1931.

NEW JERSEY SUPREME COURT.

WALTER DOYLE, trading as Pompton Avenue Service Station, Plaintiff-Respondent,	}	<i>On Appeal from East Orange District Court.</i>	10
v.			
JOSEPH J. CORN, Defendant-Appellant.	}	<i>Notice and Grounds of Appeal.</i>	

To: Plaintiff-Respondent, or Griffinger & Griffinger, his attorneys. 20

TAKE NOTICE that defendant-appellant hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered herein on the ground that the New Jersey Supreme Court erred in affirming the judgment of the East Orange District Court.

CORN & SILVERMAN,
Attorneys of Defendant-Appellant. 30

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

New Jersey Court of Errors and Appeals

WALTER DOYLE, trading as Pompton Avenue Service Station, <i>Plaintiff-Respondent,</i> <i>vs.</i> JOSEPH J. CORN, <i>Defendant-Appellant.</i>	}	<i>On Appeal from New Jersey Supreme Court.</i>
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BRIEF OF APPELLANT.

Facts.

Plaintiff-respondent brought suit in the East Orange District Court to recover on a book-account. Defendant-appellant counter-claimed for conversion of a winterfront device and for damages in negligently permitting grease to flow into the brakes of defendant's automobile. The District Court Judge dismissed the counter-claim on the ground that a counter-claim in tort cannot be set up in a contract action. Appellant contends such dismissal constitutes error. The New Jersey Supreme Court affirmed the District Court judgment.

LAW.

A defendant may counter-claim in tort to plaintiff's contract action in the District Court.

Prior to 1922, by Statute, a defendant in a District Court action could set-off or recoup, but no provision for counter-claim was made. Section 60 of the District Court Act (P. L. 1898, p. 574) provided in part:

"If the defendant have any account or demand against the plaintiff, he shall be

permitted to discount or set off the same against the account, debt or demand of such plaintiff."

This section was amended by P. L. 1916, page 540, but without change as to the part above quoted.

By P. L. 1922, page 230, this part of Section 60 was amended to read:

"If the defendant have any account, demand or cause of action against the plaintiff, he shall be permitted to discount, set-off, or counter-claim the same against the account, debt or demand of such plaintiff."

The last amendment of this section (P. L. 1927, p. 499) does not affect the portion in question.

The wording of the Statute is plain and unambiguous. The Legislature grants a defendant in a district court action permission to counter-claim any cause of action. There is no proviso that if the counter-claim be in tort it may not be interposed to a suit on contract. "Any account, demand or cause of action" includes every set-off, recoupment or counter-claim which a defendant may have. "Shall be permitted to discount, set-off or counter-claim the same" gives defendant the right to do so. "Against the account, debt or demand of such plaintiff" embraces contract as well as tort actions. This section cannot but intend that the defendant may counter-claim any cause of action against any cause of action brought by the plaintiff: tort against tort, contract against contract, contract against tort, or tort against contract.

A counter-claim is a cross action. It may be a cause of action arising from the same transaction or act on which plaintiff's suit is brought,

or a cause of action arising from a different or foreign transaction or act.

“A counter-claim is a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. It embraces recoupment and set-off, although more comprehensive than either. It secures to a defendant the full relief which a separate action at law gives. 34 Cyc. 629. A counter-claim may be for a liquidated sum or it may be for an unliquidated amount.” *Ehret v. Hering* (Sup. Ct. 1923), 99 N. J. Law 73.

When our Legislature, in 1922, changed the section to include “any cause of action against the plaintiff,” it must have had in mind tort actions, for contract matters were already embraced in “any account or demand.” If the Legislature intended that a tort action could not be counter-claimed in a contract action, it would not have amended the section by expressly permitting the defendant to “counter-claim the same (any cause of action) against the account, debt or demand of such plaintiff.”

This section of the District Court Act gives a defendant a definite right of counter-claim. That “he shall be permitted to discount, set-off or counter-claim,” makes it obligatory on the District Courts to hear such counter-claim as defendant may interpose, subject only to the jurisdictional limit as to amount and to the propriety of the pleading as setting forth a proper cause of action. A defendant has as much statutory privilege to counter-claim any good cause of action as a plaintiff to bring any good cause of action.

While Section 68 of the District Court Act makes the practice of the Circuit Courts, in so far as applicable, apply to District Courts, the

proviso is also made excepting "in cases where there may be some express provision of law providing otherwise." Section 60 of the District Court Act sets out an express provision of law, so that the practice in the Circuit Courts, which provides otherwise, cannot prevail.

Assuming, however, that the Circuit Court practice is controlling, the action of the trial judgment in dismissing the counter-claim is still erroneous.

Section 12 of the 1912 Practice Act provides:

"Subject to rules, the defendant may counter-claim or set off any cause of action. In the discretion of the court, separate trials may be ordered, or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out."

Here the Statute gives the Court the power to order separate trials, or to dismiss the counter-claim if it cannot be conveniently tried with the plaintiff's cause of action. No such discretion is given a District Court Judge by Statute. In the upper courts the right to counter-claim is made expressly subject to rules and to the exercise of the Court's discretion in ordering separate trials or striking it out for convenience. In the District Court the right to counter-claim is not made subject to any such conditions.

The trial court dismissed the counter-claim because it was in tort, whereas plaintiff's action was sounded in contract (State of Case, p. 7). There was no ruling or finding by the Court that the counter-claim could not be conveniently disposed of in the then-pending action; the Court ruled, as a matter of law, that the counter-claim could not lie because it was in tort and plaintiff's action was on contract. In the absence, as in the

instant case, of an exercise of the Court's discretion as to the convenience of disposing of the counter-claim, the dismissal of the counter-claim was erroneous, even if it be held that the practice of the Circuit Court is applicable here.

Section 59 of the District Court Act (P. L. 1898, p. 573) permits the joinder of contract counts and of tort counts. While that act does not expressly permit the joinder by plaintiff of a tort and a contract count, such joinder is not expressly prohibited. Since the adoption of the 1912 Practice Act, the distinction between tort and contract actions in the District Courts (as well as in the upper courts) has vanished.

"The action is styled in tort * * * But the first lessee (the defendant) is liable in contract. Under Section 68 of the District Court Act (2 Comp. St. 1910, p. 1977) the practice of the Circuit Courts is to apply to the District Courts. Under this section the action can be changed to one in contract."

Hemmindinger v. Gitter (Supt. Ct. 1929), 7 N. J. Misc. 1115, 148 Atl. 15—not officially reported.

In the upper courts a defendant who has a cross action may either counter-claim or bring an independent action; if the Court strike out the counter-claim the defendant is not estopped from asserting the same cause of action in another suit.

But in the District Court the defendant must counter-claim or he is debarred.

"If any defendant neglect or refuse to deliver a copy of his account, demand or cause of action against such plaintiff, he shall forever thereafter be precluded from having or maintaining any action for such account, demand or cause of action, or from

setting off or counter-claiming the same in any future suit."

District Court Act, Sec. 61 (as amended, P. L. 1922, p. 231).

This section of the act formerly read:

"If any defendant neglect or refuse to deliver a copy of his or her account or state of demand against such plaintiff, he or she shall forever thereafter be precluded from having or maintaining an action for such account or demand, or from setting off the same in any future suit." *District Court Act*, Sec. 61 (P. L. 1898, p. 574).

Thus Section 61 originally embraced only accounts and demands, and precluded "setting off"; this could have reference only to claims in contract of defendant against plaintiff. The amendment, by adding "cause of action" and forbidding later "counter-claiming," takes in claims in tort of defendant against plaintiff.

The Court erred in dismissing the counter-claim.

"The language of the District Court Act (C. S., p. 1970, par. 60) seems sufficiently generic and liberal in the use of the words 'account, debt or demand' of the defendant, as the basis of a counter-claim against the plaintiff's demand, to warrant the admission of the defendant's claim in evidence, in support of his defense of abandonment, and as the logical result of the plaintiff's alleged act.

In the absence of such a construction, it is difficult to perceive how the defendant can thereafter in another action, assert his claim or prove his demand, since the sixty-first section of the act forecloses him from such action, by providing that unless the demand be interposed he 'shall forever thereafter be precluded from having or maintaining any action for such account or demand, or

from setting off the same in any future suit.' This construction of the act seems to be supported by the twelfth section of the Practice Act, which concedes to the defendant the right to 'counter-claim or set-off any cause of action' (P. L. 1912, p. 379) and which further provides that the act 'shall be liberally construed to the end that legal controversies may be speedily and finally determined, according to the substantive rights of the parties' (Section 1, P. L. 1912, p. 377). This mandate of procedure, read in conjunction with the sixty-eighth section of the District Court Act, making the practice of the Circuit Court applicable to the procedure of the District Court, would seem to be dispositive of the defendant's right to interpose his demand.

These considerations require the reversal of the judgment below, and the trial of the cause *de novo*."

MacPherson v. MacKay (Sup. Ct. 1918), 91 N. J. Law 473.

When, in 1922, our Legislature amended Section 60 of the District Court Act it undoubtedly intended that all disputes between the parties, triable at law and within the \$500 jurisdictional limit, should be disposed of in one action, according to "the manifest trend of legislation to prevent multiplication of legal controversies" (quoting from *Ehret v. Hering*, *supra*). If, then, the amendment be construed as limiting the cross-action to one for liquidated damages, the interpretation affords no different effect to the amended than to the original Section 60 of the District Court Act.

Defendant D is summoned to answer in the District Court by plaintiff P. If P be not a resident of New Jersey, D would be compelled to file action in P's domicile to recover on an unliquidated cause of action (unless permitted to

counter-claim in the District Court) and would thereby be caused the additional expense of engaging a local and a foreign attorney and the additional trouble of appearing with his witnesses in the courts of two States at different times, and, should P not be financially responsible, D would be in the position of paying P's judgment without being able to collect on the judgment he might obtain against P. And if P be a resident of another county, D would, under such ruling, have no choice but to bring action in P's county while P sues D in D's county, with the consequent double expense and inconvenience to all concerned including the Court. And even if P and D be of the same county, there would still be two trials (*P v. D* and *D v. P*), perhaps in different courts and at different times, and the resulting application to offset the judgments against each other, thus causing more than double the trouble to the litigants and courts than if one complete trial had been had.

There does not appear to be any logical reason why the action and cross-action of the parties should not be disposed of in one proceeding. If, as very rarely happens, the matters are so involved as to require a separate trial of the cause of action raised by the complaint and that raised by the counter-claim, the Court surely has the power to try plaintiff's claim, render judgment, then try defendant's claim, render judgment, and then combine the two judgments into one.

The Supreme Court, in its decision affirming the District Court, in the instant case, cites the cases of *Ehret v. Hering*, and *Rebenfeld v. Friedberg*.

In *Ehret v. Hering* (Sup. Ct. 1923) 99 N. J. Law 73, it was held that Section 61 of the District

Court Act, barring a person from bringing an action against another if the former neglected or refused to counter-claim or set-off in any prior action brought against him by the latter (except where the balance found exceeds \$300), applies only where the cause of action which may be counter-claimed or set-off is for liquidated damages, since a litigant cannot "divine the exact amount which he would recover in a suit in which the damages were unliquidated." The Supreme Court, however, did not hold in that case that a counter-claim for unliquidated damages could not be interposed in a contract action, as this point was not at all involved.

In *Rebenfeld v. Friedberg* (Sup. Ct. 1925) 3 N. J. Misc. 93, 127 Atl. 187—not officially reported, affirmed (E. & A. Ct. 1925) 102 N. J. Law 222, the Court held that a claim for unliquidated damages was not the subject of counter-claim in a District Court contract action. But there is no mention in the opinion of the 1922 amendment to Section 60 of the District Court Act. It is quite evident that the Court did not pass on this section as amended, for in its opinion on this point it quotes the cases of *Slaytor-Jennings Co. v. Specialty Paper Box Co.* (69 N. J. Law 214) and *Reveruzzi v. Caruso* (86 N. J. Law 556), both of which were decided prior to 1922, as authority for its decision.

The meaning of the Statute in question (District Court Act, Section 60) is clear. A defendant having *any cause of action* is permitted to counter-claim the same against the account, debt, or demand of the plaintiff. The terms used are general and comprehensive and are not limited. There is no room for a strained construction, or a restriction, depending on

whether the counter-claim is in contract or in tort, upon the consideration of the counter-claim desired to be interposed by defendant.

The judgment appealed from should be reversed.

Respectfully submitted,

JOSEPH J. CORN,
Attorney and Counsel of Appellant.

New Jersey Court of Errors and Appeals

WALTER DOYLE, trading as POMP-
TON AVENUE SERVICE STATION,
Plaintiff-Respondent,

v.

JOSEPH J. CORN,
Defendant-Appellant.

On Appeal from
New Jersey
Supreme Court

BRIEF

BRIEF OF PLAINTIFF-RESPONDENT

SUMMARY OF FACTS

This is an appeal from an order of the Supreme Court affirming a judgment of the East Orange District Court on October 8, 1929, in favor of the plaintiff-respondent, and against the defendant-appellant.

On the 26th day of June, 1929, the plaintiff-respondent instituted suit against the defendant-appellant in the East Orange District Court on a book account for goods sold and delivered by the plaintiff-respondent to the defendant-appellant. In that suit the defendant-appellant filed a counterclaim in tort for unliquidated damages. At

the trial of the action plaintiff-respondent moved for a dismissal of the counterclaim on the ground that a counterclaim for unliquidated damages in a tort action cannot be interposed in a contract action, and the Judge of the Court after considering the matter, dismissed the counterclaim. The plaintiff-respondent thereupon proved his book account, and whereupon judgment was entered in favor of the plaintiff-respondent, and against the defendant-appellant in the sum of \$62.83, besides costs.

An appeal to the Supreme Court was taken by the defendant-appellant, and the Supreme Court affirmed the judgment of the District Court. This appeal now seeks to review the action of the Supreme Court in affirming the said judgment.

The only point involved in this appeal is whether a counterclaim for unliquidated damages in tort may be interposed in a contract action. Plaintiff-respondent insists that this cannot be done.

LAW

A counterclaim for unliquidated damages in a tort action cannot be interposed in a contract action.

That this has been the established law in this state is amply substantiated by the authorities.

Chapter 271, laws of 1927, provides:

“The plaintiff shall, on or before the time specified for appearance in the process or summons, or on the return of the warrant, or at the time of appearance specified in the recognizance, file with the clerk a copy of his

account or state of demand against the defendant, and in default thereof, the plaintiff may be non-suited with costs; and if the defendant have any account, demand or cause of action against the plaintiff, he shall be permitted to discount, set-off, or counterclaim the same against the account, debt or demand of such plaintiff; but a copy of his account, demand or cause of action, so intended to be set-off, or counterclaim, shall be filed with the Clerk on or before the time specified for appearance in the process or summons, or on or before the final hearing, or, if on a warrant * * *

“64. In actions on contract, whether under seal or not, the defendant may set up as a defense in abatement of the damages to be recovered by the plaintiff, a defect in or partial failure of the consideration of the contract to them; the defendant may also recoup all damages which he may have sustained by reason of any cause of action arising out of the contract or transaction set forth in the plaintiff's demand or connected with the subject of the action.”

The laws of 1927, Chapter 271, Sections 60 and 64, do not permit the defendant-appellant to counterclaim in tort to plaintiff-respondent's action in contract.

The act of 1927, Chapter 271, Section 60, is amendatory to Chapter 132 of the laws of 1922. Section 64 of the laws of 1927, Chapter 271, page 500 is law of this State as to the filing of a counterclaim for unliquidated damages as against contract action.

By the Pamphlet Laws of 1922, page 230, defendant-appellant was permitted to file an account, demand or cause of action against plaintiff-

respondent, where the counterclaim was for liquidated damages and Section 64 of the laws of Pamphlet Laws 1927, page 500, permits the defendant-appellant to recoup damages which he may have sustained by reason of a cause of action arising out of the *contract* or *transaction* set forth in plaintiff-respondent's demand.

Against the account, debt or demand of the plaintiff-respondent, the defendant-appellant cannot counterclaim for a tort or an unliquidated cause of action. Section 64 of laws of 1927, page 500, was not intended to permit the defendant-appellant to counterclaim any cause of action against the contract action brought by the plaintiff-respondent.

These sections were directly passed upon in *Ehret v. Hering*, 122 Atl. 598, in which the Court said:

"A Counterclaim is a claim presented in opposition to, or deduction from the claim of plaintiff,"

and on page 600, the Court said that the proper construction of Pamphlet Laws 1922, page 230, is to hold that they apply only to a cause of action in which the damages are liquidated.

Prior to 1922, in the case of *Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. Law 214, 54 Atl. 247, it was decided that Section 60 of the District Court Act did not permit a defendant to set up a set-off or counterclaim for unliquidated damages against the plaintiff. This case was decided in 1903.

The practice act of 1912 on this subject reads:

"Subject to rules, the defendant may counterclaim or set off any cause of action.

He may, and when required by the court shall, issue summons against any third party necessary to be brought in; but, in the discretion of the Court, separate trials may be ordered, or if the counterclaim cannot be conveniently disposed of in the pending action, the court *may strike it out.*" (My italics.)

In *Rebenfeld v. Friedberg*, 127 Atl. 187, affirmed by the Court of Errors and Appeals, 102 N. J. L. 222, on the opinion of the Supreme Court; it was found that a counterclaim filed by defendant to an action in contract, instituted by the plaintiff, was not proper and that the trial court did not err in striking out the counterclaim. The court stated that the counterclaim filed in the case, herein cited, was for damage to an automobile and the cause of action instituted by the plaintiff was on contract. The court finding that the counterclaim was in tort and not the subject of counterclaim under the District Court Act to an action on contract. This decision was made several years after legislation of 1922 was passed, the Court of Errors and Appeals affirming the Supreme Court in September, 1925. The court was dealing with the sections as amended. *The decision is controlling in the case at bar.*

It was the intention of the Legislature by Section 60 of Pamphlet Laws 1922, Chapter 132, and as amended 1927, Chapter 271, that unliquidated damages cannot be set off in suit in the District Court, where the cause of action is founded upon contract.

In the case of *Kassel Poultry Co., Inc. v. Sheldon Produce Co.*, 129 Atl., page 425, Justice ACKERSON of the Circuit Court elaborated on the counterclaim filed in an attachment suit instituted

by the plaintiff, Justice ACKERSON stating as follows:

“For the reasons last mentioned, I should feel disposed to strike out the counterclaim in the case *sub judice*, regardless of whether or not the allegation of prior termination of the attachment proceedings was a necessary element therein, under the authority given to the court by the Practice Act, wherein it is Provided that in case of a counterclaim, in the discretion of the court, separate trials may be ordered, or, if the counterclaim cannot be conveniently disposed of in the pending action, the court may strike it out (P. L. 1912, p. 379, C. 231, Sec. 12).

“The counterclaim will therefore be stricken out, first, upon the ground that it does not set forth a legal cause of action in failing to allege the prior termination of the attachment proceedings in favor of the defendant (*Veysey v. Bernard*, 49 Wash. 571, 95 p. 1096; *Sonsee v. Jones & Green*, 157 Ark. 131, 248 S. W. 289; *Gunnis v. Cluff*, 111 Pa. 512, 4 A. 920; 2 O. C. D. 244; *Kramer v. Thomson-Houston Electric Light Co. of Boston*, 95 N. C. 277; *Jeffreys v. Hancock*, 57 Cal. 646; *Carver v. Shelly*, 17 Kan. 472) and also for the reason that the issue attempted to be raised by the counterclaim is one which cannot conveniently be disposed of in the main action: and an order may be presented accordingly:

“Rule #21 of the Supreme Court, Section ‘F’ sets forth that:

“ ‘The court may strike out causes of action which cannot be conveniently tried with other causes of action joined in the same suit.’

“Rule #66, of the Supreme Court further says that:

“ ‘A counterclaim is deemed to be a cross

action, and the rules respecting the form and manner of pleading the complaint apply to the counterclaim.' ”

The defendant-appellant sets forth in the brief submitted that the Court was in error in the dismissal of the counterclaim, and cites *MacPherson v. Mackay*, 91 N. J. Law 473. The facts in that case are not similar to the facts in the case at bar, except in regard to the discussion by Justice MINTURN as to the test of liquidated and unliquidated damages.

In the case of *MacPherson v. Mackay*, 91 N. J. L. 473, Justice MINTURN stated that unless the demand be liquidated, this court, based upon the theory that in fact the plaintiff abandoned his contract, held prior to the enactment of the Practice Act of 1912, that it was not the subject of set-off (*Slaytor, etc., Co. v. Specialty Company*, 69 N. J. L. 214).

Justice MINTURN stated further that the demand of the defendant in this instance is based upon consequent letting out the work by defendant to another party at a higher figure, whereby the defendant was subjected to a loss, based upon the difference between the contract prices of the two contracts.

Justice MINTURN found that it has been held that the test of a liquidated demand is the ability to reduce it to certainty, by calculation doubtless upon the strength of the maxim *Id est certum quod certum reddi potest* (*Parker v. Hartt*, 32 N. J. Eq. 225).

Justice MINTURN cites Judge BRONSON in the case of *Batterman v. Pierce*, 3 Hill 171, 174:

“When the demand of both parties spring out of the same contract or transaction, the

defendant may recoup, although the damages on both sides are unliquidated; but he can only set off where the demands of both parties are liquidated, or are capable of being ascertained by calculation."

In this case the suit was instituted to recover damages for a breach of contract and the jury found for the plaintiff. The contract alleged is the agreement of the defendant to pay plaintiff \$425 for painting and the sum of \$135 for painting the said home "instead of kalsomining," making the total contract price \$500. The breach consisted in defendant's refusal to allow plaintiff to complete work after he commenced performance.

The demand of the defendant was based upon consequent letting out the work by defendant to another at a higher figure, whereby defendant was subjected to a loss, based upon the difference between the contract prices of the two contracts.

The learned justice discussed the test of liquidated damages and although this case is not similar to the case at bar, because the counterclaim was not in tort, Justice MINTURN construes a counterclaim as being admitted to the action of the plaintiff, where the demand of the defendant is liquidated or capable of being ascertained by calculation.

This case was tried in 1918, prior to Pamphlet Laws 1922, Chapter 132, and prior to laws of 1927, Chapter 271.

In the case of *Kelly v. Faitoute Iron & Steel Co.*, 87 N. J. L. 567, Justice TRENCHARD stated for the Court of Errors and Appeals, in respect to a counterclaim sounded in tort as against an action in contract, that the defendant could not

recover against a plaintiff on a counterclaim for unliquidated damages.

Page 5 of the brief of defendant-appellant sets forth that the defendant must counterclaim or he is debarred.

In the case of *Ehret v. Hering*, 122 Atl. 598, the court passed upon this section of the District Court Act and stated that the defendant would not be precluded from recovery in a subsequent suit on failure to file a counterclaim. In this case the court passed upon Chapter 132 of Pamphlet Law 1922, pages 230-231.

In the laws of 1928, Chapter 152, page 308, the Legislature passed an amendment which sets forth the procedure of transfer of an action to the Circuit Court when set-off exceeds jurisdiction of court, and the part of the act applicable to the case at bar is set forth as follows:

“Whenever in any answer to any action brought in any District Court now or hereafter created under the provisions of the act to which this is a supplement, the defendant shall file any set off, counterclaim, discount or recoupment for *liquidated damages*, wherein it shall be made to appear that the amount claimed in such set off, counterclaim, discount or recoupment shall exceed the sum or value limited for the jurisdiction of said court, such action shall, upon application * * *.” (My italics.)

Although the issue at bar is not the removal of a cause of action instituted in the District Court, by a counterclaim in excess of the jurisdiction, it was clearly the intention of the Legislature by this amendment to the act concerning District Courts, that counterclaims filed in actions brought in the District Court, be for *liquidated damages*.

The Legislature has at all times intended that counterclaims for unliquidated damages be barred in actions where the demand is on contract.

The statutes of this State require a reasonable degree of certainty respecting the amount of the defendant's damages, whether those damages be alleged by set-off, counterclaim or recoupment.

In the case at bar, the damages of the defendant-appellant are unliquidated. As the general rule adopted by all the courts is consistent and uniform, that where the cause of action arises from a debt or money demand, or where it sounds in damages, but the damages are capable of being ascertained with certainty, by mere arithmetical computation, the damages are liquidated, but where the cause of action consists merely in a right to recover some damages, but those damages are general, *indefinite* and *undetermined*, or *incapable of being reduced by calculation* to a proper degree of certainty, the *damages are unliquidated*.

It is the contention of the plaintiff-respondent that the counterclaim of the defendant-appellant and the damages sought to be recovered by the defendant-appellant falls within the latter class, and it is the contention of the plaintiff-respondent that the counterclaim must be for liquidated damages to entitle the defendant-appellant to a cross action to the action of contract brought by the plaintiff-respondent.

It is the contention of the plaintiff-respondent that the court did not err in striking out the counterclaim filed by the defendant-appellant, as the counterclaim could not be conveniently tried in the pending cause of action, plaintiff-respondent's action be instituted on a book account, and in contract, arising out of the sale of gas and oil and miscellaneous appurtenances connected with the

gasoline station conducted by the plaintiff-respondent.

The statutes have clearly defined the intent of the Legislature as to when cross actions will lie, and the nature of unliquidated and liquidated damages, have been established by the authorities in the courts of this State.

There is no dispute in the case at bar that the counterclaim of the defendant-appellant is sounded clearly in tort as against any action of the plaintiff-respondent founded upon contract.

It is the contention of the plaintiff-respondent that the cause set forth in plaintiff-respondent's demand and defendant-appellant's counterclaim are separate and distinct; that the claim of plaintiff-respondent is solely a contract action, and that the counterclaim of the defendant-appellant is *indefinite, undetermined and cannot be ascertained by calculation to any degree of certainty* and further in no way arises out of the contract or transaction set forth in the plaintiff-respondent's demand or connected with the subject of the action, which by Section 64, Laws of 1927, Chapter 271, is required of the defendant-appellant, before a counterclaim can be filed.

In *Yeskel v. Gross*, 144 Atl. 312, *affirmed by the Court of Errors and Appeals*, 148 Atl. 920, for reasons expressed in opinion delivered by Mr. Justice KATZENBACK in the Supreme Court, the court held that claims for unliquidated damages were not the subject of set-off. The court stated that the statute of set-off applies only to cases of mutual indebtedness.

CONCLUSION

It is respectfully urged that the foregoing authorities amply sustained the dismissal of the counterclaim, and that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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