INDEX

NOTICE OF APPEAL.

Filed December 2, 1927.

SECOND DISTRICT COURT OF THE CITY OF NEWARK

P. Gerome Diffley, *Plaintiff,* *vs.* Jacobson Manufacturing Co., Inc., a corporation, *Defendant.*	*On Contract.* *Notice of Appeal.*

To Fleming & Handford, Esqs., attorneys for plaintiff.

Sirs:

Take Notice that the defendant, Jacobson Manufacturing Co., Inc., a corporation, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of the City of Newark, rendered in the above-stated action on the 30th day of November, 1927.

COHEN & KLEIN,
Attorneys for Defendant.

Dated, December 1, 1927.

Due service of a copy of the within notice of appeal is hereby acknowledged this 1st day of December, 1927.

FLEMING & HANDFORD,
Attorneys of Plaintiff.

SUMMONS.

ESSEX COUNTY, *ss.*

THE STATE OF NEW JERSEY.

To any Constable in said County or to the Sergeant-at-Arms of the Second District Court:

(SEAL)

SUMMON Jacobson Manufacturing Co., Inc., a corporation, to appear before the Second District Court of the City of Newark, to be held in the City Hall, Broad street, between Green and Franklin streets, in the said city, on the tenth (10th) day of October, nineteen hundred and twenty-seven, at ten o'clock in the forenoon, to answer unto P. Gerome Diffley in an action on contract of each to the damage of the plaintiff five hundred dollars. Hereof fail not.

WITNESS, LOUIS R. FREUND, Esq., Judge of said Court at Newark, aforesaid, the 4th day of October, in the year one thousand nine hundred and twenty-seven.

JAMES E. GARRIGAN,
Clerk.

Summons.

SECOND DISTRICT COURT
OF NEWARK, N. J.

Summons on Contract

P. Gerome Diffley,

Plaintiff,

vs.

Jacobson Manufacturing Co., Inc., a corporation,

Defendant.

Demand	$500.00
Costs	3.60
Mileage	.08
Attorney Fee	25.00

Returnable October 10, 1927.

Fleming & Handford,
Attorneys for Plaintiff,
790 Broad St., Newark, N. J.

STATE OF DEMAND.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

P. GEROME DIFFLEY, *Plaintiff,* *vs.* JACOBSON MANUFACTURING CO., INC., a corporation, *Defendant.*	*On Contract.* *State of Demand.*

Plaintiff demands of the defendant the sum of five hundred ($500) dollars for that on or about June 13, 1927, the defendant engaged the plaintiff to work for it as a retail sales manager for one year at a salary of $6,500 per year, payable in equal weekly installments of $125.00. The plaintiff agreed to the terms of the said hiring and entered upon his duties, but on June 18, 1927, defendant failed and refused to pay the plaintiff his salary in accordance with the terms of said contract and thereupon dismissed the plaintiff from its employ. Plaintiff was obliged to accept other employment at a much lesser salary.

Judgment will be claimed for the sum of five hundred ($500) dollars and costs of suit to be taxed.

FLEMING & HANDFORD,
Attorneys for Plaintiff,
790 Broad street, Newark, New Jersey.

State of Demand.

To the Defendant:

TAKE NOTICE that the plaintiff demands that the defendant shall file a written specification of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

FLEMING & HANDFORD,
Attorneys of Plaintiff.

SPECIFICATION OF DEFENSES.

Filed October 21, 1927.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

P. GEROME DIFFLEY, *Plaintiff,* *vs.* JACOBSON MANUFACTURING CO., INC., a corporation, *Defendant.*	*On Contract.* *Specification of Defenses.*

The following is a specification of the defenses intended to be made by the defendant in the trial of the above cause:

1. Defendant denies the allegations contained in the state of demand.

2. The state of demand does not set forth good cause of action.

3. The contract of employment was not authorized by the defendant.

4. Plaintiff voluntarily left the employment of the defendant.

5. Plaintiff misrepresented his capabilities and experience to the defendant.

COHEN & KLEIN,
Attorneys of Defendant.

Dated, October 18, 1927.

STATE OF CASE SETTLED BY COURT.

Filed February 9, 1928.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

P. GEROME DIFFLEY, *Plaintiff,* vs. JACOBSON MANUFACTURING CO., INC., the corporation, *Defendant.*	*On Appeal.* *State of Case Settled by Court.*

Fleming & Handford, attorneys of plaintiff-appellee.

Cohen & Klein, attorneys of defendant-appellants.

The parties hereto, or their attorneys, having been unable to agree upon a 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 case as follows:

The action was one brought to recover the sum of $500.00, as damages resulting from a breach of contract of hire whereby the defendant engaged the plaintiff as retail sales manager for one year, commencing June 13, 1927, at a salary of $6,500.00 per year, payable in equal weekly installments of $125.00.

On June 18, 1927, Mr. Jacobson, president of the defendant corporation, who had on behalf of the defendant entered into contract of hire with the plaintiff, advised plaintiff that defendant did

not continue to employ him upon a salary basis, but offered to engage plaintiff upon a commission basis. Such offer plaintiff refused.

Defendant then offered to pay plaintiff first installment due at that time, providing plaintiff would execute a general release to the defendant, terminating all relationship between them. That plaintiff declined to do. On the Monday following the day when first installment of salary was due, plaintiff returned and agreed to execute such release upon payment of installment then due. At that time Mr. Jacobson refused to pay such installment stating to the plaintiff that he would take the matter up with counsel.

One week thereafter plaintiff entered the employ of another corporation at a reduced salary of $5,200.00 per year and continued in that position for a period of eight weeks, after which time his employer, due to lack of business, terminated contract. During period of employment with new employer, plaintiff received eight weekly installments of $100.00.

Plaintiff remained out of employment until September 19, 1927, at which time he again obtained a position at a weekly salary of $125.00 per week.

All excess of damages over and above jurisdiction of $500.00 was waived.

Mr. Jacobson, president of the defendant corporation, denied the hiring of plaintiff upon a salary basis, but alleged that the contract of hiring was one based upon commission.

I entered judgment for plaintiff against the defendant for $500.00.

Exception to Court's ruling was prayed and granted.

State of Case Settled by Court.

In witness whereof, I have hereunto set my hand this 7th day of February, 1928.

LOUIS R. FREUND,
Judge of the Second District Court
of the City of Newark.

Attest:

JAMES E. GARRIGAN,
Clerk.

EXHIBIT D. 1.

THE REGINA CORPORATION
Electric Homecleaning Machines
General Offices and Factory
Rahway, N. J.

June 6th, 1927.

J. Jacobson, President,
The Jacobson Manufacturing Co.,
76 Commerce St.,
Newark, New Jersey.

Dear Mr. Jacobson:—

I enclose herewith a complete resume of my past business experience with business and personal references attached.

You will also observe that my personal card is enclosed, showing my present position which I have today resigned to take effect on Saturday next.

I will appreciate it if you will acknowledge receipt of same, so that I will be ready to start for you on next Monday.

Thanking you for your courtesies, I remain,

Very truly yours,

THE REGINA CORPORATION

P. Gerome Diffley,
Manager.

PGD-CB
Encls.

EXHIBIT D. 1.

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Very truly yours,

THE REGINA CORPORATION

P. Gerome Diffley,
Manager.

PGD-CB
Encls.

June 6th, 1927.

r. P. Gerome Diffley,
/c Regina Corp.
89 Broad St.
oom 209
ewark N.J.

ear Sir:-

have yours of June 6th and appreciate what you say.
e are looking for you to start with us on June 13th, and
rust that your coming with us will be of mutual benefit.

Very truly yours,
JACOBSON MANUFACTURING CO.

J:C

SPECIFICATION OF DETERMINATIONS.

Filed February 19, 1928.

NEW JERSEY SUPREME COURT.

P. GEROME DIFFLEY, *Plaintiff-Appellee,* *vs.* JACOBSON MANUFACTURING CO., INC., a corporation, *Defendant-Appellant.*	*On Appeal from the Second District Court of the City of Newark.* *Specification of Determinations.*

The following is a specification of determinations of the Second District Court of the City of Newark, with respect to which the defendant-appellant is dissatisfied in point of law:

1. The District Court erred in entering judgment for the plaintiff and against the defendant.

2. The District Court erred in entering judgment for the plaintiff and against the defendant in the sum of $500.

3. The District Court erred in entering judgment for the plaintiff against the defendant upon the facts.

4. The District Court erred in entering judgment for the plaintiff and against the defendant in that the plaintiff failed to prove the allegations set forth in his state of demand.

5. The District Court erred in entering judgment for the plaintiff and against the defendant upon the law.

Specification of Determinations.

6. The District Court erred in entering judgment for the plaintiff and against the defendant on the ground that there was no evidence to support the averment in the plaintiff's state of demand that the plaintiff had been discharged.

7. The District Court erred in entering judgment for the plaintiff against the defendant in that the plaintiff failed to prove that he returned to his position with the defendant or attempted to return to his position.

Dated, February 16, 1928.

COHEN & KLEIN,
Attorneys for Defendant-Appellant.

Service of a copy of the within specification of determinations is hereby acknowledged this 16th day of February, 1928.

FLEMING & HANDFORD,
Attorneys for Plaintiff-Appellee.

TRANSCRIPT OF CLERK'S DOCKET.

P. Gerome Diffley,
Plaintiff,
vs.
Jacobson Manufacturing Co., Inc., a corporation,
Defendant.
972 Broad St.

On Contract.
Demand $500.

Fleming & Handford, plaintiff's attorneys.
Cohen & Klein, defendant's attorneys.

Plaintiff's Costs.

Page No.		
43	Summons	2.10
—	Mileage	.08
215	Listing Fee	1.50
43	Witness Fee	
—	Order	
215	Attorney's Fee	25.00
43	Total Cost	28.68
—	Execution	1.43
	Statement	
268	Order	1.00

Summons issued October 4, 1927.

Returnable October 10, 1927.

I served the within summons October 5th, 1927, on David Bobker, he being the Agent of said Corporation, by reading the same to him, and delivering to him a copy thereof.

Sergeant-at-Arms.

Constable.

1927.

Oct. 21. Specification of Defenses filed.

Oct. 10. This cause adjourned to October 17, 1927, and from time to time thereafter until November 21, 1927, when the plaintiff and defendant appeared and the cause was tried and determined at this time, the following witnesses being sworn in behalf of the plaintiff: P. Gerome Diffley and Paul R. Alley.

The plaintiff offered letter in evidence.

The Court continued the trial to November 28, 1927.

Nov. 28. The Court resumed the trial and the following witnesses were sworn in behalf of the defendant: Jacob Jacobson, Ernest Phillburn and Irving Menkes.

P. Gerome Diffley was sworn in rebuttal.

The Court continued the trial to November 30, 1927.

Nov. 30. The Court resumed the trial and the evidence being closed, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of Five Hundred Dollars damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of Five Hundred Dollars damages with costs.

I return this Execution 12/19, 1927, unsatisfied; I have made diligent search and inquiry and could not find any goods or chattels of the defendant

whereon to levy to make the debt and costs, or any part thereof.

I. J. Marks, Constable.

Dec. 2. Defendant filed Notice of Appeal.
Defendant filed Appeal Bond.

1928.

Jan. 28. Defendant filed Order.

Feb. 9. State of Case settled by Court filed.

This is a true copy of the proceeding now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,
Clerk.

(SEAL)

CLERK'S CERTIFICATE.

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

I, JAMES E. GARRIGAN, Clerk of the Second District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify the foregoing to be a true copy of the record and proceedings in the case of P. Gerome Diffley *v.* Jacobson Manufacturing Co., Inc., a corporation, held in the Second District Court of the City of Newark, in the City Hall, Broad street, in the County of Essex and State of New Jersey, as taken from the Second District Court Docket No. 200, page No. 78701, as the same appears on file or of record in this Court.

JAMES E. GARRIGAN,
Clerk.

(SEAL)

Dated, March 5, 1928.

OPINION OF SUPREME COURT.

Filed November 23, 1928.

NEW JERSEY SUPREME COURT.

#414, May Term, 1928.

P. Gerome Diffley,
Plaintiff-Respondent,

vs.

Jacobson Manufacturing Co.,
Defendant-Appellant.

Submitted May Term, 1928; decided November , 1928.

On Appeal from Second District Court of Newark.

For appellant, Cohen & Klein.

For respondent, Fleming & Handford.

Before Justices Trenchard, Kalisch and Lloyd.

Per Curiam:

This was an action to recover damages in the sum of $500 for breach of contract of employment. On June 13, 1927, plaintiff was engaged to work for the defendant at a salary of $6,500 per year, payable $125 weekly. Plaintiff remained in the employment but a short time when it is claimed the contract was annulled by the employer and the plaintiff discharged.

In the state of the case as settled by the judge it appears that five days after entering into the contract defendant advised plaintiff that it did not continue to employ him on a salary basis but

offered to engage him on a commission. This offer the plaintiff refused. Then defendant offered to pay the first instalment of $125 provided the plaintiff would execute a general release terminating all relationship between the parties. This also the plaintiff refused. Two days later when the first instalment of salary was due, plaintiff agreed to execute the release as asked for but the defendant refused to carry it out, its president stating that he would take the matter up with counsel.

Appellant contends that this action of the defendant did not constitute a rescission of the contract. We think it did. It was notice from the employer to the employee that it would not continue the contract and offering other terms. If wrongful the employee was entitled to recover the damages sustained thereby.

It is also claimed that there was later a mutual rescission. This is not the case. The subsequent negotiations pertained wholly to an adjustment of the damages sustained because of defendant's wrongful act, and had no bearing otherwise on the former contract between the parties.

It is contended finally that it was the duty of the plaintiff to continue to tender his services. This is not true if as appears he had been definitely dimissed. It was not incumbent on him to pursue a fruitless offer to continue to work for one who had terminated the contract.

The judgment is affirmed.

RULE OF AFFIRMANCE AND REMITTITUR.

NEW JERSEY SUPREME COURT.

#414, May Term, 1928.

P. GEROME DIFFLEY,
Plaintiff-Appellee,

vs.

JACOBSON MANUFACTURING CO., a corporation,
Defendant-Appellant.

On Contract.

On Appeal from the Second District Court of the City of Newark.

Rule of Affirmance and Remittitur.

This cause having been duly submitted at the May Term, 1928, of this court by Cohen & Klein, Esqs., of counsel with the appellant, and Messrs. Fleming & Handford, of counsel with the appellee, and the Court having inspected the record and judgment below and considered the specifications of the determination and directions of the Second District Court of the City of Newark, with which the said appellant was dissatisfied in point of law, and the Court having duly rendered its opinion thereon;

It is, thereupon, ORDERED and ADJUDGED that the judgment of the Second District Court of the City of Newark, removed to this court on appeal, be and the same hereby is in all things affirmed with costs to be taxed and that the record be remitted to the said Second District Court of the

Rule of Affirmance and Remittitur.

City of Newark to be proceeded with in accordance with this judgment and the practice of said Court.

Entered November 28th, 1928.

On motion of

FLEMING & HANDFORD,
Attorneys of Plaintiff-Appellee.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

P. Gerome Diffley, *Plaintiff-Appellee,* *vs.* Jacobson Manufacturing Co., Inc., a corporation, *Defendant-Appellant.*	*On Contract.* *Notice of Appeal and Grounds.*

To Fleming & Handford, Esqs., attorneys for plaintiff-appellee.

Sirs:

Please Take Notice that the defendant-appellant in the above-entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the Supreme Court erred in affirming the judgment of the Second District Court of the City of Newark, rendered in favor of the plaintiff and against the defendant, in that:

(a) The District Court erred in entering judgment for the plaintiff and against the defendant.

(b) The District Court erred in entering judgment for the plaintiff and against the defendant in the sum of $500.

(c) The District Court erred in entering judgment for the plaintiff and against the defendant upon the facts.

(d) The District Court erred in entering judgment for the plaintiff and against the defendant in that the plaintiff failed to prove the allegations set forth in his state of demand.

(e) The District Court erred in entering judgment for the plaintiff and against the defendant upon the law.

(f) The District Court erred in entering judgment for the plaintiff and against the defendant on the ground that there was no evidence to support the averment in the plaintiff's state of demand that the plaintiff had been discharged.

(g) The District Court erred in entering judgment for the plaintiff against the defendant in that the plaintiff failed to prove that he returned to his position with the defendant or attempted to return to his position.

Dated: November 30, 1928.

Respectfully yours,

COHEN & KLEIN,
Attorneys of Defendant-Appellant.

Service of a copy of the within notice of appeal and grounds is hereby acknowledged this 5th day of December, 1928.

FLEMING & HANDFORD,
Attorneys for Plaintiff-Appellee.

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

New Jersey Court of Errors and Appeals

P. GEROME DIFFLEY,
Plaintiff-Appellee,

vs.

JACOBSON MANUFACTURING CO., INC., a corporation,
Defendant-Appellant.

On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

Plaintiff brought suit against the defendant alleging in his state of demand that he claimed $500 damages from the defendant, by reason of the fact that on or about June 13, 1927, defendant hired the plaintiff to work for it for one year, at a salary of $6,500 per year, payable in weekly installments of $125, and that on or about June 18, 1927, defendant failed to pay the plaintiff his salary in accordance with the terms of the contract, and dismissed the plaintiff from its employ (State of Case, p. 4).

In the State of Case settled by the trial court (State of Case, p. 7), it is alleged that the defendant corporation, through its president, advised the plaintiff on June 18, 1927, that defendant did not continue to employ the plaintiff upon a salary basis, but offered to engage plaintiff upon a commission basis, which offer the plaintiff refused. Subsequently, defendant offered to pay the plaintiff the first installment of $125 on the condition that plaintiff execute a general release to the defendant which the plaintiff refused to do. That thereafter, plaintiff returned

and agreed to execute such a release, and to accept payment of said first installment, on which occasion the defendant, through its president, refused to pay such installment.

Subsequently plaintiff entered the employ of another corporation, at a reduced salary, where he remained for a period of eight weeks, and then plaintiff remained out of work until September 19, 1927, at which time he again obtained a position at a weekly salary of $125 per week. The damages proved by the plaintiff, as appears from the State of Case settled by the Court (State of Case, p. 8), exceeded $500, which excess was waived by the plaintiff at the trial, no waiver of the excess appearing in the state of demand. Judgment was entered for the plaintiff and against the defendant for $500.

The appeal is from the Rule of Affirmance of the Supreme Court (State of Case, p. 19).

ISSUES.

1. The facts set forth in the state of case settled by the Court do not disclose a wrongful discharge of the plaintiff by the defendant.

2. Plaintiff elected to rescind the contract of employment.

3. From the facts disclosed by the state of case settled by the Court, plaintiff, if entitled to anything at all, was entitled to recover only the sum of $125.

ARGUMENT.

POINT I.

The facts set forth in the state of case settled by the court do not disclose a wrongful discharge of the plaintiff by the defendant.

It is the contention of the defendant that the plaintiff was not discharged by the defendant. All that the State of Case, settled by the Court, discloses on this point is that on June 18, 1927, the defendant, through its president,

> "advised plaintiff that defendant did not continue to employ him upon a salary basis, but offered to engage plaintiff upon a commission basis. Such offer plaintiff refused"; and "defendant then offered to pay plaintiff first installment due at that time, providing plaintiff would execute a general release to the defendant, terminating all relationship between them. That plaintiff declined to do. On the Monday following the day when first installment of salary was due, plaintiff returned and agreed to execute such release upon payment of installment then due. At that time Mr. Jacobson refused to pay such installment, stating to the plaintiff that he would take the matter up with counsel." (State of Case, p. 7, ll. 37 to 40, and p. 8, ll. 1 to 18.)

Paraphrasing the above excerpt from the State of Case settled by the trial court, all that the defendant corporation attempted to do was to change the terms of the contract then existing beween the plaintiff and the defendant. The contract provided a one year term of employment, upon a definite salary basis of $6,500 for the year, payable in weekly installments of $125. Subsequent to the making of said contract the defendant negotiated with the plaintiff, which it had a perfect right to do, with the end in view of inducing the plaintiff to change from a salary

to a commission basis. These negotiations were fruitless because the plaintiff refused to accede to such a change. This, then, left the contract between the plaintiff and the defendant in its original posture. This being so, it was the duty of the plaintiff to continue to render the services required of him by the contract, and to continue to perform the duties required of him by said contract, in which event he would have become entitled to receive from the defendant his weekly pay of $125. Then, having continued in the employ of the defendant, and having rendered the services and performed the duties of him required by said contract, the plaintiff could have enforced payment of the weekly salary due him, in accordance with the terms of said contract, by suit against the defendant at the end of each week, if the defendant refused to pay the weekly installments due. But the State of Case settled by the trial court discloses that the plaintiff elected to leave the employ of the defendant, which in effect, constituted a rescission of the contract between the plaintiff and the defendant.

The State of the Case fails to disclose any breach of the contract by the defendant. There is no finding that at the end of the week commencing June 13, 1927, the defendant refused to pay the plaintiff the first installment due. Nowhere is there a statement that the defendant demanded payment of the first installment unconditionally, which was refused by the defendant. The negotiations instituted by the defendant for a change in the terms of the contract consisting of an offer on the part of the defendant to engage the plaintiff on a commission basis, and a refusal of such an offer by plaintiff, and the conditional offer by the defendant to pay the plaintiff the first installment, and the refusal by the plaintiff

to accept the conditional payment, are not such facts as constitute a discharge by the defendant of the plaintiff as matter of law. No one on the part of defendant corporation, stopped the plaintiff or hindered him from continuing in his employment. No one deprived him of his duties. No impediments were put in his path making it impossible for him to continue to discharge his obligations under the contract, or render the services required of him.

Plaintiff's action is predicated entirely on the theory of a wrongful discharge; yet the findings of the trial court, as appears from the State of Case settled by it, nowhere disclose a wrongful discharge of the plaintiff by the defendant as matter of law.

In the case of *O'Brien* v. *Straight Filament Lamp Co.*, 86 N. J. Law, p. 352, at p. 354, Mr. Justice White said:

> "If the plaintiff did all that he was bound to do in performance of his contract, the action of the defendant in excluding him from the premises, not once, but daily, for a long period of time until he stopped coming, and forcibly preventing him from going to the place where he had to perform his work, and cutting off his salary, was tantamount to a discharge, and the learned trial judge was right in so holding."

From this opinion it is clear that in order to constitute an unlawful discharge as matter of law, more must appear than mere negotiations for the change in the terms of a contract, and a failure to pay the salary due, and that before plaintiff employee can recover as for an unlawful discharge, he must do all that he was bound to do in the performance of his contract. This the plaintiff did not do. On the contrary, he voluntarily elected to leave the employ of the defendant.

The burden of proof is on the plaintiff to show the unlawful discharge. No facts appear in the State of Case settled by the Court from which the Court could have concluded that the defendant was guilty of an unlawful discharge. The duty is upon the employee, when the employer creates a situation unfavorable to the employee, to return to work or attempt to return to work, and the burden of proof is upon the plaintiff employee to show that he continued to work or attempted to continue to work. *Phelps* v. *Fuchs & Lang Mfg. Co.*, 82 N. J. Law, p. 474, at p. 476, where Mr. Justice Bergen says:

> "There is no evidence to support the averment in the plaintiff's declaration that he had been discharged * * *."

And again, further in the same case, Mr. Justice Bergen says:

> "* * * he (referring to the plaintiff employee), did not accept the situation and return, or attempt to return to his work, but remained away * * *."

And again, further in the same opinion, Mr. Justice Bergen says, at page 476:

> "Our conclusion is that the case proved by the plaintiff failed to show a discharge; on the contrary it conclusively shows that the plaintiff quit the service of the defendant of his own motion because he was denied authority over the shipping clerk without which he was unwilling to remain in defendant's service. His subsequent repentance, if he did repent, would not destroy the effect of his previous notice to the defendant that he would quit its service, following it by acts indicating the execution of such purpose, in which the defendant apparently acquiesced. The non-suit was properly allowed, and we find no error in the action of the trial judge in that regard."

The State of Case settled by the trial court shows that the plaintiff Diffley returned on the Monday following the day when the first installment of salary was due; but he returned not to continue in its employ, or attempt to continue in its employ, nor to offer to continue in its employ, but, on the contrary, he returned to obtain the first installment of salary, and to execute the general release theretofore demanded by the defendant, through its president.

In such a posture of affairs it is clear, beyond all possibility of any other inference, that the plaintiff Diffley accepted the situation and voluntarily quit the service of the defendant. This constituted on the part of the plaintiff, a complete rescission of the contract.

In the case of *Barnett* v. *Cohen,* 110 New York Supplement, p. 835, Mr. Justice Greenbaum said:

> "The gravamen of plaintiff's complaint is that on March 23, 1907, he was wrongfully discharged by the defendant, with whom he had a contract of employment for one year, ending November 17, 1907. Upon the facts as testified to by the plaintiff, he left defendant's employ, not because he was discharged or told to leave by defendant, but because the latter refused to pay him the balance of $180.00 apparently concededly due plaintiff at the time when he ceased working for defendant.
>
> "The plaintiff was clearly justified in his refusal to continue to work for defendant upon defendant's failure to observe his obligation of payment * * * , but that is quite a different proposition from holding that such a breach on the part of the defendant was tantamount to a discharge. (Wheaton *v.* Higgins, (Sup.) 90 N. Y. Supp. 1041.) The plaintiff could have continued in defendant's employ and brought suit to recover the amount due him, or he might have rescinded

the contract and refused to work thereunder. Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. 589.

"Plaintiff's action operated as a rescission of the contract and a voluntary abandonment of the contract of employment."

Koch v. *Siff*, 154 N. Y. Supp. 223:

"As the evidence clearly shows that the plaintiff left the employ of the defendants on account of fear of strikers, who had assaulted him on the street, and was not discharged or requested to leave, there is no ground for allowing him to recover his unearned wages. On the other hand, the defendants consented to his leaving, and should not be allowed to retain the $50 deposit.

"The recovery should therefore be reduced to $62, the amount of deposit, and $12 for the three days' work, for which he received no pay, plus costs and disbursements, and as modified, affirmed, without costs to either party."

All that can be deduced from the acts of the president of the defendant corporation is that he refused to pay the plaintiff the first installment due him for wages.

In 39 *Corpus Juris*, p. 147, we find the following statements:

"*Refusal to pay*—Where an employer refuses to pay an employee his wages in the amount and at the times agreed upon, the employee may leave and recover for services rendered at the agreed price. Abramoff *v.* Podratz, 13 Sask. L. 215. 51 Dom. L. R. 313 (1920) 2 West Wkly 6,"

in the footnote; 6 (b).

"Sec. 195 (b) If the employee has good cause for quitting, he may recover for the services actually performed * * * but not an additional amount in the form of salary or wages for the rest of the term."

In 39 *Corpus Juris*, p. 91, we find the following:

> "In an action for wrongful discharge, the servant must show his readiness and willingness to carry out the contract, but an actual offer to perform or a demand for work is unnecessary. Where, however, a clear unequivocal act of dismissal has not been established, there must be some affirmative act on the part of the servant to show a tender of service."

In *Larkin* v. *Herksher*, 51 N. J. Law, p. 133, at p. 137, Mr. Justice Scudder says:

> "It is also said that, by remaining after notice, he waived his objection. He testifies that he did not, and insisted on his employment for the year. The act, in itself, is consistent with a purpose to remain so long as he was permitted to stay, and assert his right when finally dismissed.
>
> "If he had left immediately, without objection, it might be said he assented to go and abandon his contract."

POINT II.

Plaintiff elected to rescind the contract of employment.

From the above citations, and particularly the cases of *Barnett* v. *Cohen*, 110 N. Y. Supp., p. 835, and *Larkin* v. *Hecksher*, 51 N. J. Law, p. 133, it is apparent that the plaintiff employee, after the situation unfavorable to him had been created by the defendant employer, had the option either to remain or attempt to remain to work, and hold the employer responsible for damages resulting to him as for a breach of contract, or to accept the situation created by the defendant, thus causing a rescission and an abandonment of the contract, in which latter event plaintiff employee was entitled to recover only

for the services actually rendered by him. From the facts appearing in the State of Case, it is obvious that the plaintiff elected to pursue the latter course, namely, to accept the situation created by the defendant employer, thereby causing a rescission of the contract, as a result of which plaintiff Diffley became entitled to recover his salary for the one week during which he rendered services, amounting to $125.

The statement contained in the State of Case settled by the trial court (State of Case, p. 8, ll. 11 to 17), shows conclusively that the plaintiff at that time determined for himself to accept payment in the sum of $125, representing the salary due him for the first week of this contract, during which week he actually rendered services to the defendant, and to execute and deliver to defendant a general release. This action on the part of the plaintiff constituted an election of his remedies, as a result of which plaintiff was forever barred from demanding general damages as for a breach of contract, and plaintiff was forever limited to a recovery of damages in the specific amount of $125, representing the wages to which he was entitled by rendering services during the first week of his employment.

Blum Building Co. v. *Ingersoll, et al.*, 99 N. J. Eq., p. 563, affirmed by the Court of Errors and Appeals in 137 Atl., p. 916, at p. 568:

> "The complainant, having by its original bill elected to be no longer bound by the contract, is not privileged to again choose to be bound. Having committed itself to a recovery of the deposit, its right to have the property is forever gone. The election is irrevocable. Claron *v.* Thommessen, 96 N. J. Eq. 650, 126 A. 308; Heller *v.* Elliott, 44 N. J. Law, 467."

And also:

"'A party.' says Bigelow, 'cannot, either in the course of litigation or in dealing *in pais,* occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent causes of action he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position.' Bigelow on Estoppel (6th Ed.) 732. A comprehensive statement of the effect of an election is given in 20 *Corpus Juris,* p. 38, thus:

"An election once made between coexisting remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar to any action, suit or proceedings based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent rights."

And also, at p. 569:

"An election once made, being irrevocable, nothing short of a contract reviving the lost remedy will restore it."

Keeping in mind the law as enunciated in this case by Vice-Chancellor Backes, affirmed by our Court of Errors and Appeals, it is apparent that the plaintiff had two alternatives open to him:

One: to hold the defendant to its contract of employment, in which event the plaintiff would have been obligated to do everything possible to perform those terms of the contract which the said contract imposed upon him. If the plaintiff did all that he was bound to do under

the contract, or if the defendant would have rendered such performance by the plaintiff impossible, by shutting its doors to him, or by stripping him of his duties, or by the imposition of any other imaginable obstacles in rendering the performance by the plaintiff impossible, then in either of these events, plaintiff could have held the defendant to strict accountability for all of the damages proximately resulting from the breach of the contract, to which contract he was still holding the defendant accountable for his own benefit.

Or two: Plaintiff could have acquiesced in his discharge, in which event he would have rendered no further services to the defendant, nor offered to render any services to the defendant and would simply have quit the employ of the defendant, whereupon he would have been entitled to recover for the services rendered at the rate of the salary agreed upon.

There can be no question from a reading of the State of Case settled by the trial court (State of Case, p. 8, ll. 11 to 17), that the plaintiff Diffley elected the latter course, which action on his part was irrevocable. It is of no legal importance that the defendant did not act upon the election made by the plaintiff, for, quoting from Vice-Chancellor Backes' opinion again, in *Blum Building Co.* v. *Ingersoll, supra,* at page 568, we find the following quotation from Bigelow on Estoppel (6th Ed.) 732:

> "It, (referring to an election), cannot be withdrawn though it has not been acted upon by another by any change of position."

Plaintiff's conduct, therefore, by his failure to perform or offer to perform the terms of said contract of employment, and by his quitting said employment voluntarily, and by his act in de-

manding from the defendant the sum of $125, representing the installment due for the first week of the employment, during which week he rendered services, and his offer to the defendant to execute and deliver to it a general release, constituted an irrevocable election on his part, resulting in a rescission and an abandonment of the contract by him, the plaintiff, and resulting also in a final determination of the legal rights then existing between the plaintiff and the defendant from which determination the plaintiff could not later escape. This final determination of his legal rights, brought about solely by himself, gave the plaintiff the right to recover from the defendant the sum of $125 only, representing the salary for the first week of his employment at the agreed rate, during which week he rendered services.

POINT III.

From the facts disclosed by the State of Case settled by the Court, plaintiff, if entitled to anything at all, was entitled to recover only the sum of $125.

The plaintiff was entitled to recover, if anything at all, only for the one week during which he rendered services, because:

(1) no evidence of unlawful discharge was offered by the plaintiff, and

(2) the plaintiff failed to sustain his burden of proving that he was unlawfully discharged, and

(3) the only possible inference to be drawn from the State of Case settled by the Court disclosed that the plaintiff voluntarily left the employ of the defendant, resulting in a rescission of the contract on the part of the plaintiff, and

(4) plaintiff, by returning to the employer, not for the purpose of working, but to receive his pay for the one week during which he worked, amounting to $125, and to execute a general release to his employer, waived his rights to demand general damages, and by an election restricted his right to recover only the sum of $125.

In this situation, and referring to the authorities cited above, it is the contention of the defendant that the plaintiff's damages should have been restricted and limited to the sum of $125.

For these reasons, therefore, namely: that plaintiff failed to show an unlawful discharge by the defendant; that plaintiff failed to sustain his burden of proof; that plaintiff, by his conduct in failing to return to work, or attempt to return to work, rescinded the contract of employment; that plaintiff returned to his employer and place of employment, for the purpose not of returning to work, but only to receive the salary for one week and execute a general release to the employer, thus effecting an election; that plaintiff on the record of the State of Case, if entitled to anything, was entitled to a judgment in the sum of only $125, the defendant respectfully contends that the judgment should be reversed, or, in the alternative, modified to be reduced to the sum of $125.

Respectfully submitted,

COHEN & KLEIN,
Attorneys for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

P. GEROME DIFFLEY, *Plaintiff-Appellee,* *vs.* JACOBSON MANUFACTURING CO., INC., a corporation, *Defendant-Appellant.*	*On Appeal from the Supreme Court.* *Brief of Plaintiff-Appellee.*

FACTS

Plaintiff brought suit against the defendant for $500.00 damages for breach of contract to employ the plaintiff as retail sales manager at the agreed salary of $6,500 per year, payable in equal weekly instalments. After the plaintiff had been in the employ of the defendant for about one week, the defendant's president refused to pay the plaintiff any salary and notified the plaintiff "that defendant did not continue to employ him upon a salary basis, but offered to engage plaintiff upon a commission basis. Such offer plaintiff refused." (State of Case, p. 7, l. 40; p. 8, l. 1-2-3.)

In the State of Case settled by the trial court (State of Case, p. 7), it is stated that the defendant corporation, through its president, advised the plaintiff on June 18, 1927, that defendant did not continue to employ the plaintiff upon a salary basis, but offered to engage plaintiff upon a commission basis, which offer the plaintiff refused. Subsequently, defendant offered to pay the plaintiff the first installment of $125 on the condition that plaintiff execute a general release to the defendant, which the plaintiff refused to do. That thereafter, plaintiff returned and agreed to execute such a release, and to accept payment of said first installment, on

which occasion the defendant through its president refused to pay such instalment.

Subsequently plaintiff entered the employ of another corporation, at a reduced salary, where he remained for a period of eight weeks, and then plaintiff remained out of work until September 19, 1927, at which time he again obtained a position at a weekly salary of $125. per week. The damages proved by the plaintiff, as appears from the State of Case settled by the Court (State of Case, p. 8), exceeded $500., which excess was waived by the plaintiff. Judgment was entered for the plaintiff and against the defendant for $500.

The Supreme Court affirmed the judgment of the District Court, and the defendant again appeals.

ARGUMENT

POINT I.

THE DEFENDANT COMMITTED A WRONGFUL BREACH OF THE CONTRACT BY REFUSING TO EMPLOY THE PLAINTIFF ON A SALARY BASIS.

The State of Case settled by the Court discloses that the defendant through its president,

> "* * * advised plaintiff that defendant did not continue to employ him upon a salary basis, but offered to engage plaintiff upon a commission basis. Such offer plaintiff refused.
>
> "Defendant then offered to pay plaintiff first installment due at that time, providing plaintiff would execute a general release to the defendant, terminating all relationship between them. That plaintiff declined to do. On the Monday following the day when first installment of salary was due, plaintiff returned and agreed to execute such release upon payment

> of installment then due. At that time, Mr. Jacobson refused to pay such installment stating to the plaintiff that he would take the matter up with counsel." (State of Case, p. 7, l. 40, and p. 8, l. 1 to 18.)

The language used could not be more plain. It was not merely a refusal to pay one week's salary. The president of the defendant corporation said as plainly as anyone could say it that the contract to hire the plaintiff on a salary basis *was at an end forever,* but that the defendant would hire the plaintiff on a commission basis. As stated by the defendant at page 3 of its brief, this was *changing the terms of the contract.* A very vital part of this contract was the salary, and when the defendant repudiated this part of it, it committed a material breach thereof which warranted the defendant in instituting this action.

Nor can the president's repudiation of the contract be considered the beginning of negotiations to induce the plaintiff to change the terms of the contract. A person who wishes to "negotiate" does not commence with words such as those used by the president. When he told the plaintiff that he "did not continue to employ him upon a salary basis," he committed a breach of the contract which warranted the plaintiff in suing for damages for the entire term of the contract.

And the president of the defendant corporation then offered to pay the plaintiff his first week's salary if the plaintiff would execute a general release terminating the relationship between them, which plaintiff declined to do. This has a twofold significance. In the first place it shows that the president admitted the making of the contract and knew that by flatly refusing to employ the plaintiff longer on a salary basis he was committing a material

breach of it. Otherwise there would have been no occasion for demanding that the plaintiff execute a general release. And secondly it shows that the plaintiff was from the outset anxious to proceed with his original contract and when he found the president to be unchangeable in his repudiation of it, he intended to hold the company in damages for its breach.

Matters stood this way until the following Monday when the plaintiff offered to settle the dispute by executing a release if the plaintiff would pay him $125. The president refused to pay anything but *said he would take the matter up with counsel.* Therefore nothing came of the Monday conference. If the president had been willing on Monday to continue the plaintiff in the employ of the company on a salary basis the contract would have been performed according to its terms, but the statement of the president that he would take the matter up with counsel, shows that he was determined "that the defendant did not continue to employ him on a salary basis." It was then that the plaintiff found he could do nothing more with the president, and consulted counsel with the result that it became necessary to institute this action to recover his damages caused by the wrongful breach of the contract.

The case of *Colloraff* vs. *Hickson, Inc.,* 159 N. Y. Supp. 177 (May, 1916), was an action instituted by the plaintiff to recover damages for a breach of a written contract of employment. The plaintiff was hired as a ladies' tailor during the spring season of 1916 commencing in February and ending June 30th, at a salary of $30.00 per week. In February, 1916, the defendant changed its system of hiring and required the employees to continue under a

"piece work" arrangement. The plaintiff refused to continue work under the changed conditions. At page 178, the Court said:

> "The defendant contends that, since the amount of the work had not been lessened and the earning capacity of the plaintiff had not been restricted, there was no breach of the contract. The Court apparently adopted this view, and dismissed the complaint at the end of the plaintiff's case. Even though a wider opportunity of more remunerative employment were opened to the plaintiff, yet he was justified in standing upon his written contract, and the defendant was bound to respect its terms. The plaintiff having been prevented from performing his contract, he was not required to accept the modification of the same, and, having refused to continue under the new arrangement, he has not defeated his right of action."

Coy vs. *Martin, et al.*, 51 N. Y. Supp. p. 962 (N. Y. Sup. Court, Appellate Division, May 20, 1898).

Plaintiff was employed for one year by defendant's testator to manage a salesroom and warehouse in New York at a yearly wage of $5,000. He was to begin work on July 8th, 1895. On March 12th, 1896, plaintiff was notified by letter that his services were no longer required but if he desired to make sales in Ohio he might put on paper what they consisted of and Campbell would give the matter his best attention. Defendant's contention is that the letter sent to plaintiff did not constitute a discharge. The Court held on page 963:

> "The plaintiff had been employed to perform certain specified duties in the City of New York. Campbell notified him that he would no

longer be kept in that employment. If the notification had stopped there, it would have been a discharge of the plaintiff, and a breach of the contract by Campbell. The fact that Campbell expressed a willingness to employ him as a traveling salesman upon a different contract did not take away the fact of the discharge from the previous employment. There was practically no defense to the action, and the jury could not have made any other finding than they did upon the case presented."

Baldwin vs. *Marqueze, et al.,* 18 S. E. Rep. 309, Supreme Court of Georgia (Mar. 27, 1893).

The parties had entered into a contract by correspondence whereby plaintiff was employed by the defendant company as a traveling salesman to procure orders for defendant on cash and on credit for the entire season of 1890 and to be paid on a commission basis. Later he was restricted to selling only for cash. Court held on page 309 (Syllabus by the Court):

"2. It was a breach of the contract for the defendants to withdraw the power to take orders for credit sales, and restrict the plaintiff to the procurement of orders for cash sales only. As this breach would result naturally, or most probably, in a material reduction of plaintiff's compensation, he was justified in discontinuing his services, and in declining to execute the contract on his part.

"3. By the breach above referred to, the plaintiff had a cause of action for all the damages which he sustained thereby.

"Bleckley, *C. J.* It would be a reproach to the law if one seriously injured by a breach of

> contract could not recover therefor all the damages which he actually sustains."

Coates vs. *Allegheny Steel Co.*, 83 Atl., p. 77, Sup. Court of Pennsylvania (Jan. 2, 1912).

The defendant wrote a letter to the plaintiff saying that his salary had been stopped because, after notice, he had made no attempt to get other employment. At page 79:

> "The rule is that no set form of words is necessary to constitute a discharge. Words which show a clear intention on the part of an employer to dispense with the services of an employe, equivalent to a declaration that the services of the employe will be no longer accepted, are sufficient."

The New York cases of *Barnett* vs. *Cohen*, 110 New York Supplement, 835, and *Koch* vs. *Siff*, 154 N. Y. Supp., 223, cited by the defendant are distinguishable from the case at bar. In the *Barnett* case the plaintiff left the employ of the defendant solely because his salary had not been paid. The defendant in that case did not repudiate the salary arrangement or refuse to further employ him on a salary basis. In the *Koch* case the plaintiff left because of fear of strikes which is clearly no reason at all; while in the case at bar the defendant refused to further employ the plaintiff on a salary basis, which is a repudiation of the contract.

The defendant cites *O'Brien* vs. *Straight Filament Lamp Co.*, 86 N. J. L., 352, as showing that the actions of the president in the case at bar do not constitute a breach of contract, but that case merely holds that *on the facts therein* there was a wrongful discharge. From that case it may well be that other things besides the acts done in that case would constitute a wrongful breach. And the

defendant also cites *Phelps* vs. *Fuchs and Lang Mfg. Co.*, 82 N. J. L., p. 474, to sustain its argument. But in that case the plaintiff left the employ because he had an argument with a fellow employee. Clearly this is not a breach of contract by the employer.

The defendant also cites a quotation from *Larkin* vs. *Hecksher*, 51 N. J. L., 133, as follows:

> "It is also said that, by remaining after notice, he waived his objection. He testified that he did not, and insisted on his employment for the year. The act, in itself, is consistent with a purpose to remain so long as he was permitted to stay, and assert his right when finally dismissed.
>
> "If he had left immediately, without objection, it might be said he assented to go and abandon his contract."

But the facts in that case are that the defendant said she would not employ the plaintiff *after* she was able to obtain another gardener; and the plaintiff stayed until she did so employ another to take his place. In that case the defendant's statement was a discharge *in futuro* while in the case at bar the statement of the defendant's president was *in presenti.*

> " * * * the defendant did not continue to employ him upon a salary basis * * * ." (State of Case, p. 7, l. 40.)

POINT II.

THE MEASURE OF DAMAGES FOR BREACH OF CONTRACT OF EMPLOYMENT BY THE EMPLOYER IS BASED UPON THE AMOUNT OF WAGES AGREED FOR, LESS THE AMOUNT THE DEFENDANT CAN EARN

IF HE IS ABLE TO OBTAIN SIMILAR EMPLOYMENT DURING THE TERM.

Larkin vs. *Hecksher,* 51 N. J. L., 133, at page 137 the Court said:

> "The refusal of a new trial on the ground of excessive damages, and for the alleged violation of the rule of damages, in such cases, was not erroneous. In actions for breach of contract of hiring brought for a wrongful discharge, soon after the dismissal, the amount of damages is, usually, a question for the jury to determine, or for the judge where a jury is waived, based on the amount of wages agreed for, or the usual rate for the employment contracted for, where no specific wages have been agreed upon, and estimating what time will reasonably be lost before similar employment can be obtained by using proper diligence. In such case the recovery should be limited to the amount of damages actually sustained by the unlawful discharge."

Meyers vs. *Potoker,* 128 Atl. 601 (N. J. Sup. Court, 1925):

> "*Per Curiam.* This action was tried in the district court of Orange, without a jury. The judgment was for plaintiff for $50. being two weeks' wages. The state of the case, as settled by the court, shows that the action was brought to recover two weeks' wages alleged to be due under a written contract of employment. The services for which claim was made were never rendered, because of plaintiff's discharge by defendant. The action, therefore, should have been for breach of contract."

It is clear therefore that the damages claimed are unliquidated and it is respectfully submitted

that it was unnecessary for the plaintiff to waive any excess over the jurisdiction of the Court. But by claiming $500.00 damages plaintiff did waive such excess.

Lochanowski vs. *McKeone,* 60 N. J. L., 118 (affirmed per curiam without opinion, 61 N. J. L., 288, Gummere, *J.,* 1897). At page 119, the Court says:

> "The section provides 'that in any suit in any District Court in this State it shall be lawful for the plaintiff, or for the defendant in a set-off, to waive the excess over two hundred dollars.' That, it seems to us, the parties to this suit each of them did! the plaintiff in his state of demand, by express words, *and the defendant by claiming from the plaintiff, in her set-off, only that amount.* * * *"

And furthermore, the plaintiff expressly waived any amount over the jurisdiction of the District Court as shown by the State of Case settled by the Court, page 8, lines 31 and 32. *Bowler* vs. *Osborne,* 75 N. J. L., 903. We have examined the State of Case on file in the Office of the State Librarian, State House, Trenton, New Jersey, and can find no waiver in that case of the excess over the jurisdiction of the District Court *in the written State of Demand.* The facts therefore regarding the waiver of the excess are as contained in the opinion of Justice Trenchard in the Supreme Court, which is reported in 74 N. J. Law, 216. In that case therefore the Court of Errors and Appeals holds that it is unnecessary to expressly waive the excess in writing by amending the State of Demand and that it is sufficient if counsel states orally during the progress of the trial that his client waives all excess over the jurisdiction of the District Court.

POINT III.

THE DOCTRINE OF ELECTION HAS NO APPLICATION TO THIS CASE.

From the above citations and especially the cases of *Coy* vs. *Martin,* 51 N. Y. Supp. p. 962, and *Colloraff* vs. *Hickson, Inc.,* 159 N. Y. Supp. p. 177, it is apparent that the plaintiff was justified in instituting this action when he was told that he was no longer employed upon a salary basis and in no sense can this be considered an abandonment of the contract by the plaintiff. The defendant had repudiated the contract. Nor would the offer of the defendant's president to pay $125.00 if the plaintiff would execute a general release terminating all relationship between them change the situation, because, when, for the sake of compromising the cause of action which had already accrued, the plaintiff agreed to accept settlement on this basis, the defendant's president refused to pay anything and said that he would take the matter up with counsel. This left matters in the same situation as they were immediately after the president had told the plaintiff that the defendant would no longer employ the plaintiff under the contract.

Haas, et al. vs. *Selig,* 58 N. Y. Supp. p. 328 (May 24, 1899).

This was an action for goods sold and delivered, and at page 329 the Court said:

> "A mere demand by the plaintiffs of the goods of the sheriff, who had seized them under writs of replevin issued by third parties, not followed up by the institution of any legal proceedings or the recovery of the possession of the goods, is not an election of a remedy inconsistent with an action for the price."

Rhinelander vs. *National City Bank,* 55 N. Y. Supp. p. 229, at page 230 the Court said:

> "It is asserted that he instituted an action against Sands and Co. for the conversion of his stocks, and that thus he selected that remedy; but there is no proof that such an action was ever brought. All that appears is that in the testimony of the defendant, Ayer, some reference is made to an affidavit which seems to have been prepared by his attorney in anticipation of an action being brought for conversion, but there is no proof that such an action was brought, or that a summons was served, or any further step whatever taken. It cannot be said that a remedy has been resorted to, simply because it may have been in the contemplation of a party at some time to avail himself of that remedy."

And by stating that he would consult counsel and refusing to pay anything, the defendant's president again repudiated the contract which entitled the plaintiff to institute his action for damages caused by the defendant's wrongful repudiation of the contract of hire.

After the defendant had twice repudiated the contract, and in such clear and unmistakable terms, it was the defendant's duty to attempt to seek other employment and if he had no done so after he was told that he would no longer be employed under the contract, his conduct might have been a defense to this action. *Larkin* vs. *Hecksher, supra.*

The case of *Blum Building Co.* vs. *Ingersoll, et al.,* 99 N. J. Eq. 563 (affirmed by the Court of Errors and Appeals in 137 Atl., p. 916) cited by the defendant has no application to the case at bar, for in that case there was an election of remedies by the filing of an original bill, while in the case at

bar, when the defendant's president told the plaintiff that the defendant would not continue to employ him upon a salary basis, and when he would not make any settlement but said he would take the matter up with counsel, the defendant repudiated the contract, and it was the plaintiff's duty to seek other employment for the balance of the term of the contract in order to minimize the damages, and he is entitled to be reimbursed by the defendant for all his losses, up to $500.00, which he sustained by the wrongful breach of the contract by the defendant.

It is respectfully submitted therefore, that the District Court did not err in entering judgment in favor of the plaintiff and against the defendant in the sum of $500.00; that the facts set forth in the State of Case settled by the Court clearly disclose a wrongful breach of the contract by the defendant; that the plaintiff by seeking other employment did what he was obliged by law to do to minimize his damages; and that by the State of Case settled by the Court the plaintiff was entitled to recover the sum of $500.00 damages.

THE PLAINTIFF RESPECTFULLY CONTENDS THAT THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

FLEMING & HANDFORD,
Attorneys for Plaintiff-Appellee.