INDEX

NOTICE OF APPEAL.

Filed July 3, 1926.

First District Court of the City of Newark

ROSY KERTESZ,
Plaintiff-Appellant,

vs.

JOSEPH FELDHEIM,
Defendant-Respondent.

In Tort.

Notice of Appeal.

To Herman Waldman, Esq., attorney of Joseph Feldheim.

SIR:

TAKE NOTICE that the plaintiff, Rosy Kertesz, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark, rendered in the above-stated action on the 24th day of June, 1926.

ISIDOR B. GLUCKSMAN,
Attorney for Plaintiff.

Dated, June 29, 1926.

Service of a copy of this notice of appeal is acknowledged this 1st day of July, 1926.

HERMAN WALDMAN,
Attorney for Defendant.

Filed July 3, 1926.

I certify this a true copy of the original on file.

CHARLES R. BALDWIN,
Clerk.

STATE OF DEMAND.

Filed June 7, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

ROSY KERTESZ,
Plaintiff,
vs.
JOSEPH FELDHEIM,
Defendant.

In Tort.
State of Demand.

Plaintiff, residing in the City of Newark, Essex County, New Jersey, says:

1. That on the 14th day of December, 1925, and continuing on to the second day of January, 1926, she was the owner of premises at 1142 Broad street and 31-35 Austin street, in the City of Newark, Essex County, New Jersey.

2. That on the said 14th day of December, 1925, defendant did enter into and upon said premises aforesaid without the knowledge or consent of plaintiff and did occupy same until the 2nd day of January, 1926.

3. That by reason of defendant's unlawful entry and occupation as aforesaid, defendant prevented plaintiff's use of the said premises aforesaid and plaintiff was deprived of the rents, issues and profits of said premises.

Plaintiff demands as damages the sum of five hundred (500) dollars together with interest and costs of suit.

ISIDOR B. GLUCKSMAN,
Attorney of Plaintiff.

DOCKET ENTRIES.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

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

No. 101922.

ROSY KERTESZ,
Plaintiff,
vs.
JOSEPH FELDHEIM,
Defendant.

In Tort.

Before Honorable Cecil H. MacMahon, Judge.

Isidor B. Glucksman, plaintiff's attorney.
Herman Waldman, defendant's attorney.

A summons in the above-stated cause was issued on the 7th day of June, 1926, returnable on the 17th day of June, 1926, wherein the plaintiff demands of the defendant the sum of five hundred ($500.00) dollars.

The plaintiff filed her state of demand on June 7, 1926.

The summons was served and returned as follows: "I served the within summons June 12, 1926, on the defendant by reading it to him and giving him a copy thereof."

MARTIN B. ROSE,
Constable.

Docket Entries.

1926.

June 17. This cause was adjourned to June 24th.

June 24. The plaintiff and the defendant appearing, the case was tried and determined at this time.

Proceedings dismissed on motion of attorney for defendant.

July 3. Notice of appeal filed.

July 9. Appeal bond filed ($1.00).

July 9. Order extending time to settle case ($1.00).

COSTS.

Summons	$2.10
Listing Fee	1.50
	$3.60

I, CHARLES R. BALDWIN, Esq., Clerk of the First District Court, Newark, N. J., certify that the said court is a court of record with seal, that the foregoing is a transcript and true copy of the record of a judgment of said court.

IN WITNESS WHEREOF, I have hereunto set my hand as Clerk of the First District Court of Newark, N. J., and affixed the seal of said court this 10th day of August, one thousand nine hundred and twenty-six.

CHARLES R. BALDWIN,
Clerk.

(SEAL)

State of Case Agreed Upon.

STATE OF CASE AGREED UPON.

FIRST DISTRICT COURT OF THE CITY OF NEWARK

ROSY KERTESZ,
Plaintiff-Appellant,

vs.

JOSEPH FELDHEIM,
Defendant-Respondent.

In Tort.

State of Case Agreed Upon.

Isidor B. Glucksman, attorney for plaintiff-appellant.

Herman Waldman, attorney for defendant-respondent.

The parties hereto (by their respective attorneys) submit the following as the state of case for appeal.

The action was brought in tort to recover damages resulting from defendant's unlawful entry and occupation of premises owned by the plaintiff and entered by the defendant without the knowledge or consent of the plaintiff. The case was heard by his Honor, Cecil H. MacMahon, Judge of the above court, on argument of respective counsel.

The attorney for plaintiff informed the Court that counsel had agreed to submit the case on the evidence previously before the Court in the form of memoranda filed by them in a former suit between the same parties; that the plaintiff had brought her prior action on contract and had sought to recover from the defendant a reason-

able value for the use and occupation of her premises, which were occupied by the defendant with her permission; and that the Court had rendered judgment for the defendant in the former suit on the ground that no relation of landlord and tenant existed between the parties and that no recovery could be had unless such relationship did exist.

Thereupon the Court ruled that the plaintiff had made an election of inconsistent remedies and that the matter was *res adjudicata,* and upon motion of the attorney for defendant a judgment was entered in favor of the defendant.

From this ruling of the Court plaintiff appeals.

ISIDOR B. GLUCKSMAN,
Attorney for Plaintiff-Appellant.

HERMAN WALDMAN,
Attorney for Defendant-Respondent.

Dated, August 28, 1926.

SPECIFICATION OF DETERMINATIONS.

NEW JERSEY SUPREME COURT.

No. 101922. *Between* ROSY KURTESZ, *Plaintiff-Appellant,* *and* JOSEPH FELDHEIM, *Defendant-Respondent.*	*On Appeal. From First District Court of the City of Newark.* *Specification Under Rule 145.*

The following is a specification of the determinations and directions of the First District Court of the City of Newark, N. J., with respect to which the appellant is dissatisfied in point of law.

The District Court erred in holding that the plaintiff had made an election of remedies and that the matter was *res adjudicata,* in that:

(a) As the same court had adjudged the previous action to be based on the choice of a mistaken remedy, its selection and prosecution did not constitute an election.

(b) One who pursues a remedy which turns out to be mistaken may at any time suspend or abandon the prosecution of the original action and institute a suit based on the correct remedy.

(c) Where two actions rest on grounds so different that the possibility of recovery in one precludes the possibility of recovery in the other, a judgment against the plaintiff in the former action in no way affects the latter.

ISIDOR B. GLUCKSMAN,
Attorney for Plaintiff-Appellant.

OPINION OF SUPREME COURT.

Filed December 31, 1927.

NEW JERSEY SUPREME COURT.

No. 413, October Term, 1926.

ROSY KERTESZ,
Plaintiff-Appellant,

vs.

JOSEPH FELDHEIM,
Defendant-Respondent.

On appeal from the First District Court of Newark.

Before Justices Kalisch, Katzenbach and Lloyd.

For the appellant Isidor B. Glucksman, Otto S. Stiefel, of counsel.

For the respondent Herman Waldman.

PER CURIAM:

The appellant, plaintiff below, brought her action in the First District Court of the City of Newark, against the respondent, defendant below, to recover damages resulting from defendant's unlawful entry and occupation of premises owned by the plaintiff, and entered upon by the defendant, without the knowledge or consent of the plaintiff. The case was tried before the Court, sitting without a jury. The judgment was for defendant. From this judgment the plaintiff appeals.

The agreed state of the case is as follows: "The attorney for plaintiff informed the Court that counsel had agreed to submit the case on evidence previously before the Court in the form of

memoranda, filed by them in a former suit between the same parties; that plaintiff had brought her prior action on contract and had sought to recover from defendant, a reasonable value for the use and occupation of the premises, which were occupied by the defendant without her permission; and that the Court had rendered judgment for the defendant in the former suit, on the ground that no relation of landlord and tenant existed between the parties, and that no recovery could be had unless such relationship exists. Thereupon the Court rules that the plaintiff had made an election of inconsistent remedies, and that the matter was *res adjudicata,* and upon motion of attorney for defendant, a judgment was entered in favor of the defendant.

The facts set forth in the agreed state of the case sufficiently point out that prior to the commencement of the present action the appellant sued the respondent in the same court, upon contract, alleging that the latter was her tenant in the possession of the premises in question, with her consent, and as has already been observed, the trial judge found that her right of recovery was defeated because she failed in proving the relationship of landlord and tenant.

It is conceded in the state of the case, that the present cause of action is founded upon the same facts which were the bases of the appellant's action for use and occupation. It further appears from the stated case that the testimony taken in the former action was in the shape of "memoranda" and was submitted to the trial judge, by the parties to the litigation, as testimony, upon which he was to base his finding. The testimony contained in the "memoranda" was not printed in the record, and we cannot say from

aught that appears before us, that the trial judge was in error in reaching the conclusion that the matter was *res adjudicata.* There appearing nothing to the contrary in the record, we must assume that the testimony contained in the "memoranda" tended to show that the issue presented for decision, arose out of the same cause of action. Furthermore, it is made apparent by the record that the appellant, in her state of demand, avers that the respondent entered into and occupied the premises in question with her, the appellant's permission, whereas in the present action she states in her state of demand, that he entered upon the premises without her knowledge or consent.

Whether or not the respondent entered into the premises with or without the appellant's consent, was a matter with which she must have been conversant before she commenced her first action. She must therefore be held to have elected to stand upon the assertion that the respondent, with her consent, entered into and occupied the premises in question, for which he was answerable to pay the reasonable value for the use thereof.

Moreover, according to the record before us, the appellant appealed from the decision of the trial judge rendered against her in her first action, which fact tends to emphasize her election of that remedy (rightly or wrongly), pursued by her.

"It is the inconsistency of the demand which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of actions are different." C. J. page 11.

These views lead to an affirmance of the judgment, with costs.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

No. 412, October Term, 1926.

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Respondent.*	*On Appeal from First District Court of the City of Newark, New Jersey.* *Rule for Judgment.*

This cause having been brought to a hearing on an appeal from the First District Court of the City of Newark, at the October Term, 1926, of this Court, and the Court having heard Otto S. Stiefel, of counsel with the appellant, and Herman Waldman, of counsel with the respondent, and having duly considered the questions brought up by said appeal;

IT IS, on this 4th day of February, 1928, on motion of Herman Waldman, of counsel with the said respondent, ORDERED, that the judgment of the First District Court of the City of Newark, entered in favor of the defendant-respondent, from which the appellant appealed, be and the same is hereby in all things, affirmed, with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered February 4, 1928.
On motion of
HERMAN WALDMAN,
Attorney.

NOTICE AND GROUNDS OF APPEAL.

Filed March 27, 1928.

NEW JERSEY SUPREME COURT.

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Appellee.*	*In Tort.* *Notice of Appeal to the Court of Errors and Appeals.*

TAKE NOTICE that plaintiff appeals from the whole of the judgment entered in the New Jersey Supreme Court on February 4, 1928, on the following grounds:

1. The Supreme Court should have reversed the judgment of the District Court below.

2. The Supreme Court should have entered judgment in favor of the plaintiff-appellant.

Dated March 1, 1928.

ISIDOR B. GLUCKSMAN,
Attorney of Plaintiff-Appellant.

To Herman Waldman, attorney of defendant-appellee.

Service of a copy of the within notice is hereby acknowledged this 2nd day of March, 1928.

HERMAN WALDMAN,
Attorney of Defendant-Appellee.

Notice of Appeal.

NOTICE OF APPEAL.

Filed June 7, 1926.

First District Court of the City of Newark

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Respondent.*	*On Contract.* *Notice of Appeal.*

To HERMAN WALDMAN, Esq., Attorney of Joseph Feldheim.

SIR:

TAKE NOTICE that the plaintiff, Rosy Kertesz, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark, rendered in the above-stated action on the 27th day of May, 1926.

ISIDOR B. GLUCKSMAN,
Attorney for Plaintiff.

Dated, June 5, 1926.

Service of a copy of this notice of appeal is acknowledged this 5th day of June, 1926.

HERMAN WALDMAN,
Attorney for Defendant.

Filed June 7, 1926.

I certify this a true copy of the original on file.

CHARLES R. BALDWIN,
Clerk.

~~10~~ 16

State of Demand.

STATE OF DEMAND.

Filed April 3, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

ROSY KERTESZ, *Plaintiff,* *vs.* JOSEPH FELDHEIM, *Defendant.*	*On Contract.* *State of Demand.*

Plaintiff residing in the City of Newark, Essex County, New Jersey, says:

1. That on the 14th day of December, 1925, and continuing on to the second day of January, 1926, she was the owner of premises at 1142 Broad street and 31-35 Austin street, in the City of Newark, Essex County, New Jersey.

2. That on the said 14th day of December, 1925, defendant did enter into and upon said premises aforesaid and did occupy same with the permission of plaintiff until the said second day of January, 1926.

3. That no agreement as to the amount of rent was made between the parties hereto.

4. That a reasonable value for the use and occupation of the said premises for the term aforesaid is four hundred ninety dollars and thirty-two cents ($490.32).

5. That plaintiff has demanded of defendant payment of the said rent aforesaid but defendant has refused and still refuses to pay same.

~~N~~ 17

State of Demand.

Plaintiff demands as damages the sum of four hundred ninety dollars and thirty-two cents ($490.32) together with interest and costs of suit.

ISIDOR B. GLUCKSMAN,
Attorney of Plaintiff.

Docket Entries.

DOCKET ENTRIES.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

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

No. 100302.

ROSY KERTESZ,
Plaintiff,

vs.

JOSEPH FELDHEIM,
Defendant.

On Contract.

Before Honorable Cecil H. MacMahon, Judge.

Isidor B. Glucksman, plaintiff's attorney.

Herman Waldman, defendant's attorney.

A summons in the above-stated cause was issued on the 3rd day of April, 1926, returnable on the 13th day of April, 1926, wherein the plaintiff demands of the defendant the sum of five hundred ($500.00) dollars.

The plaintiff filed her state of demand on April 3, 1926.

The summons was served and returned as follows: "I served the within summons April 6, 1926, on the defendant by reading it to him and giving him a copy thereof."

MARTIN B. ROSE,
Constable.

Docket Entries.

1926.

April 13. Defendant did not appear and case marked "No Appearance."

April 22. Stipulation filed setting case for trial April 23rd.

May 6. The plaintiff and the defendant appearing, the case was tried and determined at this time.
Case submitted on agreed state of facts.
Agreement in evidence.
The evidence being closed the Court reserved decision.

May 27. The evidence being closed, the Court rendered judgment in favor of the defendant and against the plaintiff with costs; whereupon judgment is entered in favor of the defendant and against the plaintiff with costs.

June 7. Notice of appeal filed.

June 12. Order filed extending time in settlement of case ($1.00).

June 16. Appeal bond filed ($1.00).

COSTS.

Summons	$2.10
Mileage	.16
Listing Fee	1.50
Total Costs	$3.76

Docket Entries.

I, Charles R. Baldwin, Esq., Clerk of the First District Court, Newark, N. J. certify that the said Court is a Court of record with seal, that the foregoing is a transcript and true copy of the record of a judgment of said Court.

In Witness Whereof, I have hereunto set my hand as Clerk of the First District Court of Newark, N. J., and affixed the seal of said Court this tenth day of August, One Thousand Nine Hundred and Twenty-six.

CHARLES R. BALDWIN,
(SEAL) Clerk.

State of Case Agreed Upon.

STATE OF CASE AGREED UPON.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

ROSY KERTESZ, *Plaintiff-Appellant,* vs. JOSEPH FELDHEIM, *Defendant-Respondent.*	*On Contract.* *State of Case Agreed Upon.*

Isidor B. Glucksman, attorney for plaintiff-appellant.

Herman Waldman, attorney for defendant-respondent.

The parties hereto (by their respective attorneys) submit the following as the state of case for appeal.

The action was brought on contract to recover the reasonable value for use and occupation of premises owned by the plaintiff and occupied by the defendant with the permission of the plaintiff. The case was submitted to his Honor, Cecil H. MacMahon, Judge of the above court, on memoranda of attorneys of plaintiff, filed on May 10th, and of defendant, filed on May 24th, from which the following facts appear.

Plaintiff was the owner of premises at 1142 Broad street and 31-35 Austin street, Newark, New Jersey. On November 16, 1925, plaintiff entered into a written contract with one, Samuel Ehrlich, to convey the said premises to him, the deed to be delivered on January 2, 1926. The

State of Case Agreed Upon.

said agreement also provided that the purchaser had the right to go into possession of the premises immediately, for the purpose of making repairs. On December 14, 1925, the said Ehrlich, without the knowledge of plaintiff, entered into a lease with defendant, which lease provided that defendant was to have possession of the premises as a tenant of the said Ehrlich on and after December 15, 1925, at a monthly rental of Eight Hundred (800) Dollars. On that day defendant went into occupation of the premises.

Several days thereafter the husband of the plaintiff appeared on the premises and notified the defendant that he would have to pay rent for the same immediately, otherwise he would put a padlock on the premises. The defendant told the plaintiff's husband that he held under a lease from Ehrlich and also told him that he was at liberty to put a padlock on if he thought he had the right to do so. Nothing was done by the plaintiff thereafter and the defendant continued in possession of the premises and paid rent to Ehrlich until January 2, 1926, on which day plaintiff conveyed the premises to Ehrlich.

The rental value of the premises for the period of occupancy by the defendant had been agreed upon by respective counsel to be Four Hundred (400) Dollars and if judgment had been rendered in favor of the plaintiff it was to have been in that amount.

On May 27th judgment was entered in favor of the defendant. The Court, upon request of the attorney for plaintiff to make findings of law and/or fact, found as a fact that the relationship of landlord and tenant did not exist between the plaintiff and defendant, and found, as a matter

State of Case Agreed Upon.

of law, that this action could not be maintained unless the relationship of landlord and tenant did exist between the plaintiff and defendant.

From these findings plaintiff appeals.

ISIDOR B. GLUCKSMAN,
Attorneys for Plaintiff-Appellant.

HERMAN WALDMAN,
Attorney for Defendant-Respondent.

Dated, August 28, 1926.

Specification of Determinations.

SPECIFICATION OF DETERMINATIONS.

NEW JERSEY SUPREME COURT.

No. 100302

Between

ROSY KERTESZ,
Plaintiff-Appellant,

and

JOSEPH FELDHEIM,
Defendant-Respondent.

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

Specification Under Rule 145.

The following is a specification of the determinations and directions of the First District Court of the City of Newark, N. J., with respect to which the appellant is dissatisfied in point of law.

The District Court erred in holding that the relation of landlord and tenant did not exist, in that:

(a) The relation of the landlord and tenant was implied by the occupation of the premises of the plaintiff by the defendant.

(b) The conduct of the plaintiff indicated an intention to hold the defendant as a tenant.

(c) The conduct of the defendant evinced an intention to hold the premises as a tenant.

(d) The only point of difference between the plaintiff and defendant was the identity of the landlord; since the plaintiff had the right to possession of the premises during the period of the occupancy, her landlordship cannot be denied.

ISIDOR B. GLUCKSMAN,
Attorney for Plaintiff-Appellant.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed December 31, 1927.

NEW JERSEY SUPREME COURT.

No. 412 October Term, 1926.

ROSY KERTESZ,
Plaintiff-Appellant,

vs.

JOSEPH FELDHEIM,
Defendant-Respondent.

On appeal from the First District Court of Newark.

Before Justices Kalisch, Katzenbach and Lloyd.

For the appellant Isidor B. Glucksman, Otto S. Stiefel, of counsel.

For the respondent Herman Waldman.

PER CURIAM:

The appellant, plaintiff below, brought her action in the First District Court of the City of Newark, against the respondent defendant below, to recover the reasonable value of certain premises of the said plaintiff, occupied by the defendant from the 14th day of September, 1925, until the 2nd day of January, 1926. The case was tried before the Court, sitting without a jury. Judgment was given for the defendant. From this judgment, plaintiff appeals to this Court.

The agreed state of the case is as follows: "The action was brought on contract, to recover the reasonable value for use and occupation of

premises owned by the plaintiff and occupied by the defendant with the permission of the plaintiff.....Plaintiff was the owner of premises at 1142 Broad street and 31-35 Austin street, Newark, New Jersey. On November 16, 1925, plaintiff entered into a written contract with one Samuel Ehrlich to convey the said premises to him, the deed to be delivered on January 2, 1926. The said agreement also provided that the purchaser had the right to go into possession of the premises immediately, for the purpose of making repairs. On December 14, 1925, the said Ehrlich, without the knowledge of plaintiff, entered into a lease with defendant, which lease provided that defendant was to have possession of the premises as a tenant of the said Ehrlich on and after December 15, 1925, at a monthly rental of eight hundred (800) dollars. On that day defendant went into occupation of the premises.

Several days thereafter the husband of the plaintiff appeared on the premises and notified the defendant that he would have to pay rent for the same immediately, otherwise he would put a padlock on the premises. The defendant told the plaintiff's husband that he held under a lease from Ehrlich and also told him he was at liberty to put a padlock on if he thought he had the right to do so. Nothing was done by the plaintiff thereafter and the defendant continued in possession of the premises and paid rent to Ehrlich until January 2, 1926, on which day plaintiff conveyed the premises to Ehrlich.

The rental value of the premises for the period of occupancy by the defendant had been agreed upon by respective counsel to be Four Hundred

(400) Dollars and if judgment had been rendered in favor of the plaintiff it was to have been in that amount.

On May 27th, judgment was entered in favor of the defendant. The Court, upon request of the attorney for plaintiff to make findings of law and/or fact, found as a fact that the relationship of landlord and tenant did not exist between the plaintiff and defendant and found, as a matter of law, that this action could not be maintained unless the relationship of landlord and tenant did exist between the plaintiff and defendant."

The bare statement of the facts makes it clear that the relation of landlord and tenant did not exist between the plaintiff and defendant, hence under the well settled legal rule, the plaintiff was not entitled to sustain her action for use and occupation.

Judgment affirmed, with costs.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

No. 413, October Term, 1926.

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Respondent.*	*On Appeal from First District Court of the City of Newark, New Jersey.* *Rule for Judgment.*

This cause having been brought to a hearing on an appeal from the First District Court of the City of Newark, at the October term, 1926, of this Court, and the Court having heard Otto S. Stiefel, of counsel with the appellant, and Herman Waldman, of counsel with the respondent, and having duly considered the questions brought up by said appeal;

IT IS, on this 9th day of January, 1928, on motion of Herman Waldman, of counsel with the said respondent, ORDERED, that the judgment of the First District Court of the City of Newark, entered in favor of the defendant-respondent, from which the appellant appealed, be and the same is hereby in all things, affirmed, with costs, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered January 9, 1928.
On motion of
HERMAN WALDMAN,
Attorney for Defendant-Respondent.

NOTICE AND GROUNDS OF APPEAL.

Filed March 27, 1928.

NEW JERSEY SUPREME COURT.

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Appellee.*	*On Contract.* *Notice of Appeal to the Court of Errors and Appeals.*

TAKE NOTICE that plaintiff appeals from the whole of the judgment entered in the New Jersey Supreme Court on January 19, 1928, on the following grounds:

1. The Supreme Court should not have affirmed the judgment of the District Court below.

2. The within action not having been argued or heard the Supreme Court was without right or power to pass judgment thereon.

Dated March 1, 1928.

ISIDOR B. GLUCKSMAN,
Attorney of Plaintiff-Appellant.

To Herman Waldman, attorney of defendant-appellee.

Service of a copy of the within notice is hereby acknowledged this 2nd day of March, 1928.

HERMAN WALDMAN,
Attorney of Defendant-Appellee.

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

New Jersey Court of Errors and Appeals

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Appellee.*	*In Tort.* *On Appeal from Supreme Court.*

BRIEF OF APPELLANT.

Statement of Facts.

Plaintiff was the owner of certain premises in Newark, N. J. (S. C., p. 21, ll. 35-36) and defendant was the occupant of same (S. C., p. 22, ll. 13-14). Plaintiff brought two separate actions in the First District Court of the City of Newark against defendant growing out of such ownership by plaintiff and such occupancy by defendant (S. C., pp. 2 and 16). The first suit was brought ON CONTRACT, plaintiff suing for the reasonable value of the use and occupation by the defendant (S. C., p. 16). The trial judge found as a fact that no relationship of landlord and tenant subsisted and found as a matter of law that no recovery could be had in the absence of such relationship *in that suit* (S. C., p. 22, l. 36, to p. 23, l. 6). Plaintiff immediately filed her notice of appeal to the Supreme Court (S. C., p. 15).

Simultaneously with the filing of said notice plaintiff instituted a second suit in the same district court against the defendant IN TORT (S. C., p. 2). The state of demand alleged the facts of ownership by the plaintiff and occupancy by the defendant, which facts had not been disputed

by the defendant in the contract action (S. C., p. 21, l. 30, to p. 22, l. 14). The state of demand further alleged that the entry of defendant into and upon the premises was without the knowledge or consent of plaintiff and that the said occupancy of the premises by defendant was therefore unlawful. The evidence at the trial of the tort action by agreement of the attorneys, consisted of the evidence which had been adduced at the previous trial of the contract action, which evidence was set forth at length in memoranda that had been supplied to the Court at its request by counsel at the conclusion of the contract action (S. C., p. 5, ll. 34-38). Thereupon the Court ruled that the plaintiff, by bringing the contract action, had made an election of inconsistent remedies, which was a bar to the tort action, and that the subject matter of the tort action was therefore *res adjudicata* (S. C., p. 6, ll. 11-15). From this judgment plaintiff again appealed to the Supreme Court (S. C., p. 1).

Plaintiff, with the consent of the defendant, then stayed the prosecution of her appeal in the contract action pending the determination of her appeal in the tort action. Counsel stipulated that the appeal in the contract action be marked "Off" and the tort appeal be marked "On Brief" at the October term 1926 of the Supreme Court. These stipulations were filed on September 18, 1926, in the Supreme Court and the List of Causes for the October term, 1926, was marked in accordance therewith. That Court affirmed the District Court judgments in both cases (S. C., pp. 9 and 25).

BRIEF OF ARGUMENT.

Appellant urges that the adjudication of the Supreme Court was erroneous in that the said Court should have reversed the judgment of the District Court and should have entered judgment in favor of the appellant for the following reasons:

1. Appellant had not made an election when she instituted her contract action.

2. The judgment of the trial court in the contract action was not a bar to the tort action.

3. The only "issue" in the contract action was whether the occupancy of the tenant was *legal* or *tortious* and the trial court's decision made this "issue," and only this "issue," *res adjudicata.*

4. The finding of the trial court in the contract action left no alternative but a judgment in favor of the plaintiff in the tort action.

5. The case of *William H. Jamoneau Co.* v. *Wetherill,* 98 N. J. L. 80, is dispositive of this case.

6. The filing of a notice of appeal in the contract action does not evince a binding election.

POINT I.

Appellant had not made an election when she instituted her contract action.

The Supreme Court found that the appellant by sounding her first action in contract had thereby made an election. In support of this conclusion the Court quoted as authority the following rule:

> "It is the inconsistency of the demand which makes the election of one remedial

right an estoppel against the assertion of the other, and not the fact that the forms of actions are different. 20 C. J., p. 11." (S. C., p. 11, ll. 35-39.)

We submit that a careful reading of Corpus Juris makes it clear that that authority is dealing here with two different remedial rights, *either one of which is available to the litigant,* whereas in the case *sub judice* we are dealing with a situation where the supposed remedy of plaintiff had been declared by the trial court (in the contract action) to be non-existent. In the chapter on "What Constitutes an Election Between Remedies" the same authority enumerates the requisites of an election, the first of which is:

> "1. There must be in fact two or more co-existing remedies between which the party has the right to elect." 20 C. J. 20.

The point that the trial court overlooked and of which the Supreme Court took no note was that the plaintiff in bringing her contract action sought to recover on a cause of action and obtain a remedy, which she *mistakenly* thought did exist, and that the trial court by its finding determined that such cause of action and such remedy never had existed.

> "Hence the fact that a party misconceives his right, or through mistake attempts to exercise a right to which he is not entitled, or prosecutes an action based upon a remedial right which he erroneously supposes he has, and is defeated because of such error, *does not constitute a conclusive election,* and does not preclude him from thereafter prosecuting an action based upon an inconsistent remedial right." 20 C. J. 21.

To the same effect are the following opinions:

> "The test for the application of this rule is whether the plaintiff had the two forms of remedy. If he did not, there was no chance for an election. A party cannot choose a remedy which he does not have." *Whipple* v. *Stephens,* 25 R. I. 563, 57 Atl. 375.

> "The rule that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy does not apply if in reality he had only one remedy." *Clark* v. *Heath,* 101 Me. 530, 64 Atl. 913.

> "A second mortgagee who brings an action at law on a fire policy containing a mortgagee clause to recover for a loss is not thereby estopped under the doctrine of election of remedies from suing in equity to reform the policy so as to correctly set forth the contract as relied on in the action at law." *Kelsey* v. *Agricultural Insurance Co.,* 78 N. J. Eq. 378.

POINT II.

The judgment of the trial court in the contract action was not a bar to the tort action.

There are numerous adjudications and authorities for this proposition.

> "Where the victim of a wrong has at his command inconsistent remedies and he is doubtful which is the right one, in the absence of facts creating an equitable estoppel, he may pursue any or all of them until he recovers through one, since the prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one. *A party is not required to select his procedure at his peril."* 20 C. J. 25.

Another authority on the point above postulated enunciates the rule thus:

> "It is a well established rule that the choice of a fancied remedy that never existed and the futile pursuit of it, either because the facts turn out to be different from

what the plaintiff supposed them to be, or the law applicable to the facts is found to be other than supposed, tho the first action proceed to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy.'' 9 R. C. L. 962.

The tendency toward liberality in this regard is reflected in the following New Jersey citation in a case where Mr. Justice Trenchard wrote the opinion for the Supreme Court:

> ''A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence, which is necessary to sustain the second action, would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit. 23 Cyc. 1158.'' *Hoffmeier & Son* v. *Trost,* 83 N. J. Law 360. Quoted with approval in *Meirick* v. *Wittemann Lewis, etc., Co.,* 98 N. J. Law 531 (Court of Errors and Appeals, 1922).

POINT III.

The only ''issue'' in the contract action was whether the occupancy of the tenant was legal or tortious and the trial court's decision made this ''issue,'' and only this ''issue,'' res adjudicata.

In order to recover in her contract action plaintiff was obliged to prove only these three facts: (1) that she was the owner of the premises and as such was entitled to the rents and profits thereof; (2) that the defendant was occupying the premises; and (3) that such occupancy was by agreement between the parties, express

or implied. The first two facts were not disputed by the defendant at the trial (S. C., p. 5, l. 38, to p. 6, l. 5). The third was. The judgment of the Court established that no relationship of landlord and tenant in fact existed (S. C., p. 6, ll. 5-10) and was in effect a finding that the occupancy of the defendant was *not* upon any agreement, express or implied, between the parties.

This conclusion follows logically and inevitably from the circumstances of the case. If, then, the only ''issue'' in the case was the character of the occupancy of the premises by the defendant and that ''issue'' was determined by the Court upon the trial of the contract action, that ''issue'' and only that ''issue'' was *res adjudicata,* upon the following authorities: *Cromwell* v. *Sac County,* 94 U. S. 351, (opinion by Mr. Justice Field); *City of Paterson* v. *Baker,* 51 N. J. Eq. 49, (Vice-Chancellor Van Fleet); *Clark Thread Co.* v. *William Clark Co.,* 55 N. J. Eq. 658; *Mercer Co. Trac. Co.* v. *United N. J. R. R. and Canal Co.,* 64 N. J. Eq. 588; *Rosenstein* v. *Burr,* 80 N. J. Eq. 424; *In re Walsh's Estate,* 80 N. J. Eq. 565 (Court of Errors and Appeals); *Schilstra* v. *Van Den Heuval,* 82 N. J. Eq. 161, affirmed by Court of Errors and Appeals in 82 N. J. Eq. 612; *Sarson* v. *Maccia,* 90 N. J. Eq. 433; *McGarvey* v. *Young,* 134 Atl. 744; *Perth Amboy Dry Dock Co.* v. *Crawford,* 135 Atl. 897, (Court of Errors and Appeals); they lay down this rule:

> ''But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a different

cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action—not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

POINT IV.

The finding of the trial court in the contract action left no alternative but a judgment in favor of the plaintiff in the tort action.

This, again, is a logical and inevitable conclusion from the premises above stated. In order for plaintiff to recover in her tort action it was incumbent upon her to prove the existence of these three facts: (1) that she was the owner of the premises and therefore entitled to the rents; (2) that the defendant was occupying the said premises; and (3) that such occupancy was against the consent of the plaintiff. The first two facts were admitted in the contract action and by the stipulation of counsel were evidentiary facts in the tort action (S. C., p. 5, l. 38, to p. 6, l. 5). The third fact was the "issue" which was determined by the trial court in the contract action and which by operation of law became *res adjudicata* in the tort action, therefore requiring no proof. In this posture of affairs it was the province and duty of the trial court to render judgment in favor of the plaintiff in the tort action.

POINT V.

The principle of William H. Jamoneau Co. v. Wetherill, 98 N. J. L. 80, is dispositive of this case.

In the Jamoneau case the plaintiff sued on contract to recover the price of a machine alleged

to have been sold to the defendant. The trial court found that there had been no sale and gave judgment for the defendant. Thereupon plaintiff brought suit in tort to recover damages for the unlawful conversion of the machine and the court again gave judgment for the defendant upon the theory of *res adjudicata*. Mr. Justice Minturn, in delivering the opinion of the Supreme Court, spoke as follows:

> "The first suit was on contract, involving only the question whether the defendant was liable upon her contract for the money claimed to be due thereunder. This suit is in tort, or trespass at common law, involving the question whether or not the defendant is guilty of a violation of the property rights of the plaintiff. Manifestly, these issues are entirely of a different legal character, involving, perhaps, different testimony, and resulting in a different verdict, and in different consequences upon execution in satisfaction of the judgment. * * *
>
> "Here the cause of action is in tort, involving a trespass, and a judgment in a cause of action on contract obviously can present no legal bar to it. Since the determination in the Duchess of Kingston's Case, 4 C. B. 898 (56 E. C. L. R.), the rule has stood, that to operate as an estoppel the first judgment must be directly upon the point in issue, and not collaterally incidental to the issue." *William H. Jamoneau Co.* v. *Wetherill,* 98 N. J. L. 80. See also *Mershon* v. *Williams,* 63 N. J. Law 398.

Appellant respectfully urges that the judgments of the trial court and the Supreme Court in the case *sub judice* ignore or impugn the principle of law laid down in the Jamoneau case and others therein cited. Appellant believes that in principle his case is "on all fours" with the Jamoneau case and is content to submit it on that adjudication.

POINT VI.

The filing of a notice of appeal in the contract action does not evince a binding election.

The opinion of the Supreme Court contains the comment that: "Moreover, according to the record before us, the appellant appealed from the decision of the trial judge rendered against her in her first action, which fact tends to emphasize her election of that remedy (rightly or wrongly) pursued by her" (S. C., p. 11, ll. 29-34). The first, and of course most logical, answer to this statement is that if there were no election in the first instance, nothing that plaintiff would do thereafter could add emphasis to or detract emphasis from such election. While one can mathematically add to or subtract from zero, one cannot in law improve or impair a right that, through failure to exercise, is legally non-existent.

The second answer to the above statement is that, if the facts in the case emphasize anything, they emphasize what is diametrically opposed to that which the Court here suggests. The record shows that the appellant elected to argue her tort appeal while she marked the appeal in the contract action "Off" the calendar. These actions bespeak an intent on the part of the appellant not to proceed with the contract action any farther than was necessary to preclude loss of right to appeal. The appellate Court was therefore in error in concluding that the appellant had evinced an intention to make a binding election by merely filing a notice of appeal in the contract action.

Conclusion.

It is respectfully submitted that for the reasons above stated the judgment of the Supreme Court affirming the judgment of the District Court should be reversed and for nothing holden.

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New Jersey Court of Errors and Appeals

ROSY KERTESZ, *Plaintiff-Appellant,* *vs.* JOSEPH FELDHEIM, *Defendant-Appellee.*	*In Tort.* *On Appeal from Supreme Court.*

BRIEF OF APPELLEE.

Facts.

Plaintiff-appellant sued the defendant-appellee ON CONTRACT, in the First District Court of the City of Newark. The state of demand alleged that the defendant-appellee did on December 14, 1925, enter into and upon the plaintiff's premises and did occupy the same *with the permission of the plaintiff*. It further alleged that no agreement as to the amount of rent was made between the parties and that the *reasonable value for the use and occupation of said premises is $490.32.* The Court in the contract action found *as a fact,* that the relationship of landlord and tenant did not exist between the plaintiff and defendant, and entered judgment in favor of the defendant-appellee on the ground that the action could not be maintained by the plaintiff-appellant unless such relationship did in fact exist.

On June 7, 1926, the plaintiff-appellant filed a notice of appeal in the contract action and on the same day, issued a summons against the defendant-appellee IN TORT. The state of demand in the tort action alleged that the defendant-appellee did on December 14, 1925, enter into and upon the plaintiff's premises *without the knowledge or con-*

sent of the plaintiff, and did occupy the same. It further alleged that by reason of *defendant's unlawful entry and occupation,* the defendant prevented plaintiff's use of the said premises and the plaintiff was deprived of the rents, issues and profits of said premises. Upon the tort action coming to trial, the attorney for the plaintiff-appellant informed the Court that the evidence upon which he expected to recover, was the same as in the first action, which was ON CONTRACT, whereupon, on motion of the attorney for the defendant-appellee, the Court entered a judgment in favor of the defendant on the ground that the plaintiff had made an election of inconsistent remedies and that the matter was *res adjudicata.* From this ruling, the plaintiff also appealed to the New Jersey Supreme Court.

The plaintiff-appellant perfected the appeal in the contract action, and gave notice of argument for the October term, 1926, of the Supreme Court. The argument, however, was not moved in accordance with the notice, because of the stipulation of counsel, that the same be taken off the list for the October term, 1926.

ARGUMENT.

POINT I.

A party who asserts in one suit a given state of facts, cannot assert another or entirely different and inconsistent state of facts in another suit between the same parties.

20 *C. J.,* p. 11.

"It is the inconsistency of the demand which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of actions are different."

Thompson v. *Howard,* 31 Mich., page 309, Supreme Court.

A party may not take contradictory positions; and where he had a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

The doctrine of election is applied in this case to preclude one from bringing an action in case for the unlawful enticing away and harboring his minor son, after he had first brought assumpsit for the son's wages during the same period on the basis of an implied contract.

The first action extended to the minor's services from the beginning; and when the plaintiff brought it, he thereby virtually affirmed that his son was with the defendant in virtue of a contract between the latter and himself, and not by means of conduct which was tortious against him.

His proceedings necessarily implied that the defendant had the young man's services during the time *with plaintiff's assent,* and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away into defendant's service *against the plaintiff's assent.*

The case does then, subject to the doctrine before stated and the election involved in the first suit, preclude the plaintiff from maintaining this action for the wrong.

In the first suit which was on contract, the plaintiff-appellant attempted to recover by asserting that the defendant-appellee entered into and occupied her premises *with her permission.* The facts in the case disclosed, that there was

no such permission. She then instituted the tort action and asserted that the defendant-appellee entered her premises *without her knowledge or consent.* The assertions in the second suit certainly are different and inconsistent with the state of facts alleged in the former suit.

The case at par is parallel and analogous with the case of *Thompson* v. *Howard,* in 31 Mich., page 309, *supra.* That case is the leading case in the country and is cited with approval in all the text-books. That case has also been approved and the language adopted by the Court of Chancery of New Jersey, in an opinion written by Vice-Chancellor Backes in *Blum Building Co.* v. *Ingersoll,* 134 Atl. Rep., page 176. If the principle laid down by that case is not followed by this Court, and if the plaintiff-appellant should be permitted to come along after an adverse decision in the contract case to say that the defendant did not enter and occupy the premises with her permission as asserted by her in the said contract action, but that he did enter and occupy the same without her knowledge or consent, there would be no end to any litigation, for in each case, a defeated plaintiff would change his facts, sue over again, and proceed indefinitely until successful.

15 *R. C. L.,* page 958 (after foot note No. 20).

The doctrine of *res judicata* is also related to the doctrine that where a party asserts in one suit a given state of facts, he cannot ordinarily in another suit between the same parties, assert another and entirely different inconsistent state of facts. * * * If the right to shift grounds and adopt inconsistent positions were permissible, there would be no end of litigation, for with every defeat a party might change his ground, mend his hold and proceed indefinitely.

Freeman on Judgments, Vol. 2, 5th Ed., page 1329, Sec. 631.

It is a well settled rule based upon the principle of estoppel, which is sometimes applied in determining the effect of a judgment, that a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits.

Citing *Royal Ins. Co.* v. *Stewart,* 129 N. E., page 853; *Snouffer and Ford* v. *Tipton,* 129 N. W., page 345, and numerous other cases.

Bigelow on Estoppel, 6th Ed., page 783.

If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; * * * But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them.

It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately, in the course of a litigation must act consistently with it; one cannot play fast and loose.

Hughes v. *Vermont Copper Mining Co.,* 14 N. Y. Supreme Court, Reports page 677.

Action against a corporation for conversion of stock is inconsistent with action to recover dividends subsequently declared on the stock.

One proceeds on the ground that he has been illegally divested of the stock, while the other rests upon the allegation that he owned it. * * *

Sacker v. *Marcus,* 86 N. Y. Supp. 83.

Where an action is brought on a contract on the theory that it created a partnership,

> plaintiff is bound by his election, and *cannot during the pendency thereof* sue on the same contract on the theory that it is one of employment. Both theories cannot be correct.

The plaintiff-appellant in Point V of her brief, argues that the principle of the case of *William H. Jamoneau Co.* v. *Wetherill,* 98 N. J. L. 80, decided by the New Jersey Supreme Court, is dispositive of this case. That case was decided by the New Jersey Supreme Court in 1922, while the case at bar, was decided in 1927. It is elementary and no citation of authority is necessary for the proposition, that a later decision on the same point by the same Court, impliedly reverses a former decision, if such later decision is contrary to the earlier one. The New Jersey Supreme Court in the case at bar, had this *William H. Jamoneau Co.* v. *Wetherill* case before it, at the time it decided this case, as it was brought to their attention in detail in the plaintiff-appellant's brief, and it must be assumed that it was the intention of the New Jersey Supreme Court to disregard that decision.

The defendant-appellee contends that the doctrine which disposes of the case at bar and upon which the estoppel is based, is that which is known as "inconsistent positions in judicial proceedings." This doctrine, while it is well settled and adjudicated in the law courts of our sister states, has never been adjudicated upon in this State, excepting in the opinion heretofore referred to by Vice-Chancellor Backes in the case of *Blum Building Co.* v. *Ingersoll,* in 134 Atl. Rep., page 176, and was probably never called to the attention of the New Jersey Supreme Court in the *William H. Jamoneau Co.* v. *Wetherill* case. It was in the present case, however, called to their attention by the brief of the defendant-appellee, and they adopted that doctrine and laid it down as a rule of law by saying in their opinion "it is the inconsistency of the demand which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of action are different."

A reading of the cases hereinafter cited under this point, or an examination of the various textbooks on the point under discussion, discloses the fact that the terms "election of inconsistent remedies, estoppel, *res adjudicata* and inconsistent positions in judicial proceedings" are used loosely and interchangeably. The defendant-appellee contends that the ruling of the trial court holding that the plaintiff had made an election of inconsistent remedies and that the matter is *res adjudicata,* has the same legal effect as though the trial court had ruled that the plaintiff was estopped from proceeding with the second suit because of the inconsistent and different state of facts between the two suits.

> 34 *C. J.,* page 744, Sec. 1155.
>
> The law of *res judicata* is frequently treated as a branch of the law of estoppel, and both terms have been used indiscriminately to indicate the force and effect of judgments and decrees.
>
> Citing *Harper, etc., Co.* v. *Mountain Water Co.,* 65 N. J. E., page 479.
>
> Election of remedies is but another name for estoppel. See 20 C. J., page 4, Sec. 2, and 10 R. C. L., page 703, Sec. 30. The doctrine of election of remedies is generally regarded as being an application of the law of estoppel. See Baker *v.* Edwards, 176 N. C., pages 229, 233, and Crittenden *v.* St. Hill, 166 Pac. 1016.
>
> There is no inconsistency in the holding that the appellant is precluded both by the doctrine of *res adjudicata* and the doctrine of

election (See Kalberg *v.* Newberry, 170 N. W., pages 113, 117).

POINT II.

Proceeding with the contract action by appeal, constituted a binding election on the part of the plaintiff-appellant, and bars the tort action.

9 *R. C. L.,* page 962, Sec. 9.

"Persistence of a party in an erroneous course of procedure *after his true remedy has been disclosed to him,* may constitute a binding election."

The case of *People, ex rel. Warschauer* v. *Dalton,* 29 Misc. 154, 60 N. Y. Supp. 876, lays down the same rule.

It is the plaintiff-appellant's contention in her brief, that she brought her first action on the theory that the relationship of landlord and tenant existed, but as the Court found the facts to be repugnant to this claim, she contends that she was mistaken in the choice of her remedy, and that she is not precluded from thereafter invoking the proper remedy which she claims is the tort action.

The plaintiff-appellant served the defendant-appellee, with a notice of appeal in the contract action, and on the same day instituted the tort action under which she was defeated and upon which the present appeal is based. After her defeat under the tort action, she proceeded with the contract appeal and perfected the same to the point where it can be argued, as she has given the defendant-appellee a notice of argument. Notwithstanding the plaintiff-appellant's contention, she has proceeded with the appeal of the contract action; *i. e.,* the erroneous course of procedure or mistaken remedy; instead of relying upon and proceeding exclusively with the tort action; *i. e.,* the proper remedy.

It was her duty to proceed with the tort action only, and her failure to abandon the contract action, has constituted a binding election on her part and bars the tort action. Her true remedy was disclosed to her when the trial court *found as a fact,* that the relationship of landlord and tenant did not exist between the parties, but she has persisted in an erroneous course of procedure thereafter.

Conclusion.

It is most respectfully submitted that the judgment of the New Jersey Supreme Court affirming the judgment of the District Court should be affirmed.

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