NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE W. CRANE, *Plaintiff-Appellee,* vs. DANIEL RENTSCHLER, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

STATEMENT.

I.

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This action was commenced in the District Court of Bayonne. The plaintiff claimed the return of two hundred and fifty dollars ($250) which he had paid to the defendant for a lot in the Town of North Arlington, and upon which the defendant had built a house for the plaintiff subsequent to the sale of the lot.

Plaintiff contended that because of misrepresentations of the defendant, he was entitled to move out of the house and demanded his two hundred and fifty dollars ($250). The representations that the plaintiff claims the defendant made at the time of the sale were many, and the trial court's finding of fact eliminated all excepting representations as to sewer connections. The state of demand (case, page 5) bases the claim of the plaintiff upon a verbal contract, and as the issue was tried as a matter of contract, although origin-

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ally begun in tort, the Statute of Frauds applies.

The case for appeal shows that the plaintiff entered into negotiations first on November 10, 1914, as appears by receipt given at that time (Case, page 8). From that time until the 20th of January, 1915, there were negotiations between the plaintiff and defendant for the second payment on the lot and for the building of a house, all these agreements being verbal.

After remaining in the house about six weeks plaintiff decided to move, claiming that the house was built faultily, and said nothing at that time about the absence of sewer connections. As a matter of fact a cesspool had been built in the back yard before the plaintiff moved in and had been used by the plaintiff during his occupancy.

Although the case for appeal did not set this forth, it can be presumed that the plaintiff had some means of sewer use and disposal. It appears that the trial court eliminated all damages arising from not building house as agreed (Case, page 8), and the state of demand (Case, page 6) shows that the plaintiff abandoned his contract only on these grounds. Thus the trial court gave judgment for the plaintiff on facts found against him.

The various specifications of error set forth in the case (Case, page 13) are squarely presented from a reading of the State of Demand and the Case for Appeal. The defendant claims that these two pleadings confirm the facts in favor of the defendant, and not in favor of the plaintiff; that the plaintiff had accepted his bargain; had moved from the house for reasons which were found against him (Case, page 8); that he had plenty of opportunity to inspect the premises, which were as well within his knowledge as within the knowledge of the defendant.

It is further squarely presented in this case that the issue having been tried as a matter of contract,

the court must find some memorandum or contract within the meaning of the Statute of Frauds on which to base its conclusion.

If the trial court used the exhibits as set forth on pages 8 and 9 of the case as the contract, then the trial court erred on the facts, because nothing appears in these receipts concerning any representations whatsoever, and the court would be precluded from finding against the defendant on these receipts used as the contract.

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II.

The court erred as a matter of law because the case was tried as a matter of contract and the Statute of Fraud applies.

The Statute of Frauds, Section 5, Sub-Division 4, reads as follows: "That no action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereto shall be in writing and signed by the party to be charged thereafter or some other person thereto by him or her lawfully authorized."

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It will be seen from this provision of the Statute of Frauds that if the plaintiff should avail himself of any contract concerning the lot or the house to be built thereon, the same must be in writing. It matters not whether the action be a contract action or a tort action, the statute is clear; that before any such contract can be sued upon in a court of law it must be in writing. The statute is a rule of evidence, and by it no such contract is admissible in any action unless the same be in writing. It will appear here from the State of Demand (Case, page 5) that the contract was verbal. The contract was set forth therein as follows, to wit: "That on or about the 10th day of October, 1914, the plain-

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tiff and the defendant entered into a verbal contract whereby the defendant agreed to convey to the defendant a certain lot, &c." Further on the same page, and at the foot thereof, this language occurs in the said state of demand: "There was a further verbal agreement entered into whereby the defendant was to erect a one-story, five-room bungalow, the price of which was to be $1,900." The basis of the action then goes on to state that for breach of these two several contracts the plaintiff claims his damages.

In the state of the Case for Appeal (Case, page 8) it will be shown that the defendant moved for a nonsuit in due course, both at the beginning of the case and at its close, on the ground that the Statute of Frauds and Perjuries applied. The defendant's application should have been granted, as the defendant was called into court to meet the facts as set up in the State of Demand, and in no place in the State of Demand does there appear any writing or any memorandum that the plaintiff intended to rely upon, and therefore upon the plaintiff's own basis of action, the motion of the defendant should have been granted. The introduction at the trial of the two receipts were evidence, it appears, subsequent in the case, and did not avoid the defendant's legal right to move for the dismissal of the action, at the opening of the trial, upon the State of Demand. The defendant was entitled to the granting of his motion at the beginning of the action as a matter of right, and in refusing to grant the defendant's motion the trial court erred. Nor does it appear that the two memoranda as set up in the trial court's case for appeal, in any way cure the legal defect, and took the matter out of the Statute of Frauds when the same are taken in conjunction with the State of Demand, because it appears that the receipts were really not relied upon by the plaintiff as being an embodiment of the contract or a memorandum thereof in the meaning of

the statute. The State of Demand expressly sets up that the contract was verbal, and it does not allude in any way to any writing, which would take it out of the statute.

III.

The court erred as a matter of law in that there was a waiver of any representations by the defendant to the plaintiff by reason of the occupancy of the plaintiff in the premises in question as disclosed by the evidence. 10

It will be seen at the outset that the case for appeal as settled by the trial court (Case, page 8) disclose that the only misrepresentation of the defendant, concerned the sewer. The court then said that the plaintiff did not know the fact until he moved into the house; that on finding there was no sewer, he notified the defendant. It would appear, therefore, that the plaintiff having moved in on 20 December 16, 1914, knew at that time that there was no sewer in the house. Until January 20th, 1915, then, the plaintiff continued to live in said house, and it does not appear that he subsequently notified the defendant of his intention to move or rescind his contract in any way, but from the 16th of December, 1914, the day upon which plaintiff moved in and learned of the absence of the sewer, and until the 20th of January, 1915, absolutely nothing was said to the defendant concerning the 30 absence of the sewer connections, or the duty of the defendant with regard to this omission.

But it does appear from the State of Demand (Case, page 6) that the only complaint the plaintiff had on January 20, 1915, was that he was obliged to move on account of the uninhabitable condition of the house, due to the defendant's failure to carry out his agreement in many respects, to wit: "There were no cellar drains," &c., and not 40

because of the sewer absence.

If this court will then turn to the Case for Appeal set up by the trial court, it will be seen that none of these facts, which as the plaintiff says obliged him to move from the premises, were borne out by the evidence, as the trial court expressly says (Cace, page 8): "That the court eliminated all the damages arising from not building the house as agreed," and by the plaintiff's own State of Demand, these complaints concerning the building of the
10 house were the only reasons that induced him, or obliged him, to remove from the premises.

It will appear, therefore, that as a matter of law there was an actual affirmation of the contract by the continued use of the premises, on the part of the plaintiff, as far as the representation of the sewer is concerned. There was approximately six weeks of use of the premises by the plaintiff from the time of his moving into the place until he moved
20 out. We find here the control of the premises by him; the dealing with the same as his own; his delay in taking any action, and then finally, his action being the result of complaints as to the building, and which were not found as facts by the court, and all of which show, as a matter of law, that the plaintiff elected to waive any objection as to the misrepresentations concerning the sewer as a ground for rescinding his contract. Certainly the latches of the plaintiff in this respect were
30 detrimental to the defendant. Here we have a house which is built after the plaintiff's own personal specifications, after his own likes and dislikes, fit for his use especially. The plaintiff was never able to put the defendant in statu quo after the contract was executed.

IV.

The court erred as a matter of law on the doc-
40 *trine of caveat emptor.*

It will be seen from the case for appeal that the defendant moved at the close of the trial for a verdict on the ground, among others, that the doctrine of caveat emptor applied. (Case, page 10.)

The plaintiff went with the defendant to look at the lot presumably, and the facts show that the defendant among other representations said there was sewer in the street. This was a fact which was not within the knowledge only of the defendant. The fact as to whether a sewer does or does not exist in a street is a fact within the knowledge and open to the inspection of everybody alike.

The law has drawn the distinction between representation and a warranty or condition, and the fact of the existence of the sewer was found by the trial court to have been a representation and not a warranty or condition.

Words and Phrases, Vol. 8, page 7401, "Representation exists where the one gives information voluntarily without it being called for, and representation is part of the preliminary proceedings preceding and proposing a contract." Words and Phrases, page 7402, "and not necessarily incorporated in the contract at all." Therefore, it would appear that the defendant's representation by no manner of legal reasoning could be construed to impose in the plaintiff a right to rescind his contract in full.

There was no relation of trust or confidence here to take this case out of the rule.

V.

The court erred as a matter of law on the question of damages.

The law has early recognized the distinction between conditions or covenants which are independent and those which are precedent or concurrent.

If it can be granted for the purposes of argument that the representations as to the sewer can be considered a condition, then the result of the breach of that representation is not the right in the plaintiff to rescind his entire contract but to sue for the damages incurred by reason of that breach.

In *Kinney* vs. *Federal Laundry Company,* 75 Law 497, it is there stated that in construing contracts where promises are independent, there the breach of one does not avoid the other, but a recoupment or damage for such breach does exist. 10

The case of *U. & G. Rubber Manufacturing Co.* vs. *Conrad,* 80 Law, page 286, says that if there is a partial failure of consideration then this works only to reduce the amount of plaintiff's recovery. The right to rescind the entire contract and recover back full consideration could by no manner of means rest in the plaintiff by reason of any misrepresentations, as to a single fact by the defendant. 20 Before the plaintiff can rescind a contract, every case of record holds there must be fraud, and the plaintiff is compelled to put the defendant in statu quo. The cases permit recision only where the contract has been partly executed and not as in this case where the entire matter has been completed. But then no recision is possible unless there is actual fraud in the case.

The case at bar may be likened to those build- 30 ing contracts where the rule has been laid down repeatedly that substantial performance was sufficient to permit the builder to recover the amount of his contract, and then the person for whom the building was built could recoup. He could reduce the amount of recovery from the plaintiff's claim to an amount sufficient to make the completion not merely substantial, but entire as was said by Van Syckel, J., in *Luce* vs. *New Orange Industrial Association,* 68 Law, page, 31, "That the failure to per- 40 form a subsidiary part of the contract will support

an action for damages, but will not justify recision of the contract unless the conduct of the party in default be such as to embody an intention to abandon the contract or a design no longer to be bound by its terms."

For the misrepresentation of the sewer connection as found by the trial court here, there would lie an action for the damages, and that damages should be measured by the court and confined to the plaintiff's loss by reason of the non-existence of the sewer.

It is urged that the rule of damages applied in this case is erroneous. The court allowed recovery on the behalf of the plaintiff of the entire consideration paid by the plaintiff to the defendant, and thereby throws back upon the defendant the lot and the house built in conformity with the wishes of the plaintiff.

Respectfully submitted,

HARRY T. DAVIMOS,

Of Counsel for Defendant-Appellant.

New Jersey Court of Errors and Appeals

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George W. Crane, Plaintiff-Respondent, vs. Daniel Rentschler, Defendant-Appellant.	

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RESPONDENT'S BRIEF.

Briefly the facts in this case are these:

Plaintiff paid to the defendant the sum of Two hundred and fifty ($250) Dollars, as the purchase price for a lot in North Arlington, New Jersey, under an oral contract.

At the time of the agreement, defendant-appellant represented to the plaintiff-respondent that there were sewers in the street that could be connected with the lot in question.

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The action was originally brought in tort to recover back the purchase price and by consent of the parties, the case was tried on contract. The Court found, as a matter of fact, that the street had no sewer connections and this fact was also admitted by the defendant. The plaintiff paid for the lot on the representations of the defendant, that the street whereon the lot was located contained sewer connections. The Trial Court gave judgment

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for the plaintiff for the sum of Two hundred fifty ($250) Dollars.

This judgment was affirmed by the Supreme Court and this is an appeal from the judgment of the Supreme Court.

POINT ONE.

The Statute of Frauds does not apply.

The action was for the recovery of purchase money and the receipts used at the trial were purely introductory to the main issue. The action was not brought upon a contract for the sale of land but to recover moneys which had been paid under false and fraudulent representations.

POINT TWO.

The Statute of Frauds cannot be invoked.

The converse proposition to the one in question, but wherein the same principle is involved, is discussed by Mr. Justice White in Birch vs. Baker et al., 90 Atl. Rep., 302, as follows:

> "Clearly they have accepted performance of the verbal contract of sale, and have received the benefit of such performance. They now propose to retain the benefit, and, by invoking the statute, to decline to pay what they agreed to pay. That to permit them to do so would be to sanction a use of the statute for the prevention of fraud to perpetrate a fraud is equally clear."

Plaintiff did not waive any of his rights because as soon as he had found out that there was no sewer connection, he vacated the premises as set forth by the Judge's finding of fact.

20 Cyc., page 55.

POINT THREE.

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The doctrine of caveat emptor does not apply.

It is an admitted fact that the representations concerning the sewer were false and that representation was one of the inducements by the defendant whereon plaintiff relied and purchased the lot.

In the case of Turner vs. Houpt, reported in 53 Equity, page 526, V. C. Pitney says:

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"False representations, knowingly made by a vendor to a vendee previous to the sale, as to the character, condition and value of the property, are presumed to have influenced the mind of the purchaser, even though he had full opportunity to observe and know the actual truth, and the burden is on the vendor to prove clearly that such false representations did not influence the vendee in making the sale."

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35 Cyc., page 68.

POINT FOUR.

The defendant's motion was properly disposed of.

The Court properly overruled the defendant's motion before the opening of the case, because the motion was made before the case was moved by

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the plaintiff and Court had nothing before it upon which to pass judgment.

Besides this fact the state of demand contained an allegation that there had been performance of the contract and that fact was also proved at the trial. The Trial Court had a perfect right to find whatever facts it did from the evidence adduced
10 at the trial and on appeal the Court cannot review any question of fact.

POINT FIVE.

The judgment of the Supreme Court should be affirmed, with costs.

Respectfully submitted,

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ALEXANDER SECLOW,
Attorney for Plaintiff-Respondent.

ABRAHAM LEVITAN,
of Counsel.

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21136

New Jersey Court of Errors and Appeals

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GEORGE W. CRANE, Plaintiff-Respondent, vs. DANIEL RENTSCHLER, Defendant-Appellant.	}

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ALEXANDER SECLOW,
Attorney for Plaintiff-Respondent.

Abraham Levitan,
of Counsel.

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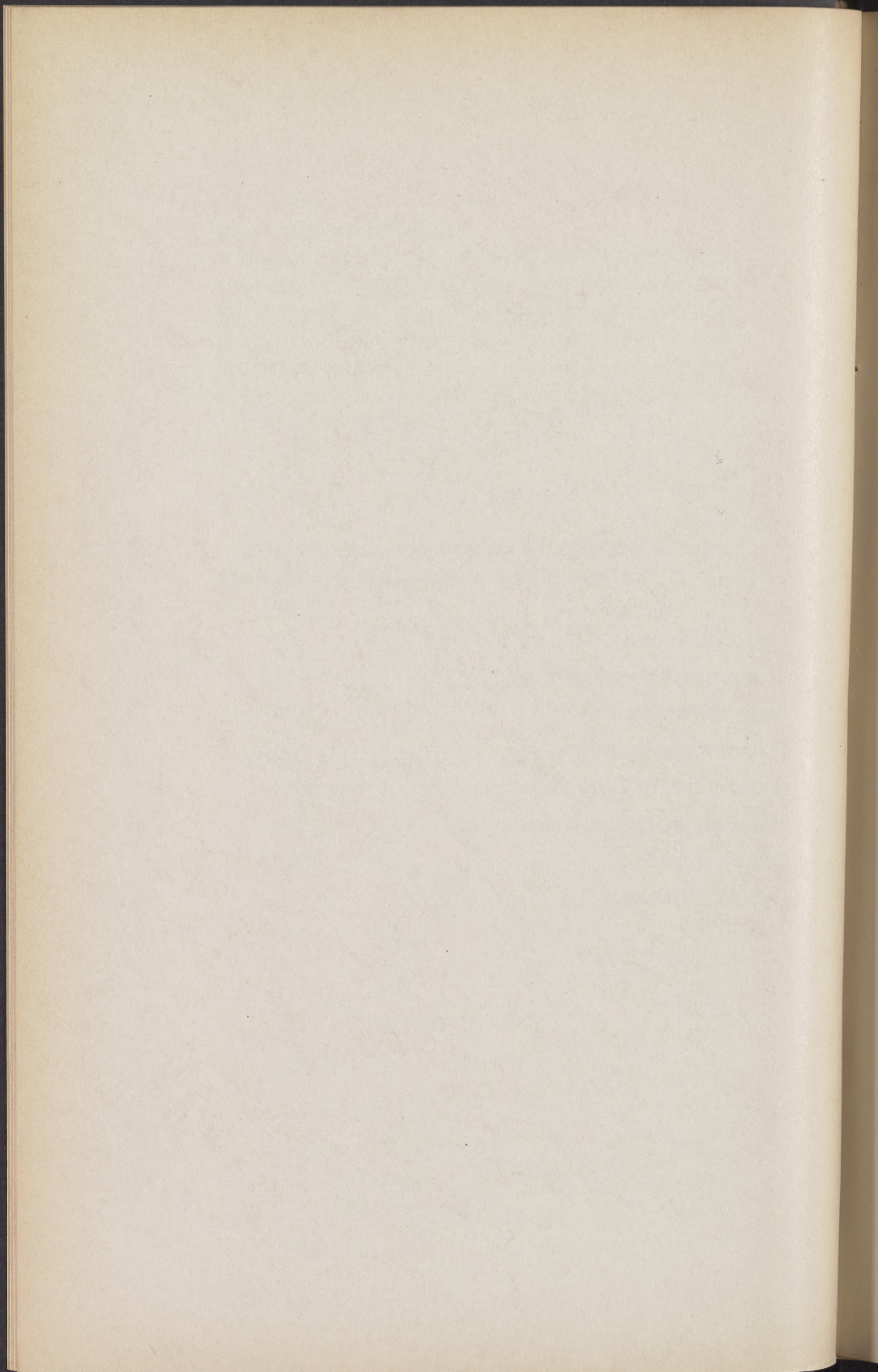

DISTRICT COURT OF THE CITY OF BAYONNE.

George W. Crane,
Plaintiff,
vs.
Daniel Rentschler,
Defendant.

In Tort.
Notice of Appeal

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(Filed March 7th, 1915.)

Alexander Seclow,
472 Broadway,
Bayonne, N. J.

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Sir:—Take notice that the defendant appeals from the judgment of the District Court of the City of Bayonne, entered in favor of plaintiff and against the defendant on the 28th day of April, 1915, to the Supreme Court of the State of New Jersey.

Dated April 29, 1915.

HARRY T. DAVIMOS,
Attorney for Defendant.

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DISTRICT COURT OF THE CITY OF BAYONNE, N. J.

IN TORT.

COUNTY OF HUDSON,
STATE OF NEW JERSEY, } *ss.*
CITY OF BAYONNE.

TITLE Transcript of Clerk's Docket

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H. T. Davimos, Defendant's Attorney.

A. Seclow, Plaintiff's Attorney.

No. 15787.

GEORGE W. CRANE,
Plaintiff,

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vs.

DANIEL RENTSCHLER,
Defendant.

A summons was issued dated March 11th, A. D. 1915, returnable March 23d, A. D. 1915, at ten o'clock in the forenoon.

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The Sergeant-at-Arms returned the summons as follows, viz.:

I served the within summons March 16th, A. D. 1915, on Daniel Rentschler, the defendant, by reading the same to him and delivering him a copy thereof.

Joseph Fedorko, Sergeant-at-Arms.

Plaintiff's demand was filed March 11th, A. D.

40 1915.

This cause was called for trial March 23d, A. D. 1915, at ten o'clock in the forenoon.

March 23d, A. D. 1915, the plaintiff appearing and the defendant appearing, the trial of the cause was proceeded with as follows:

On the part of the plaintiff—George W. Crane, Josephine Crane, Jacob Tucker, sworn.

On the part of the defendant—Mrs. Johnson, Jacob Romm, Daniel Rentschler, H. T. Davimos, sworn. 10

Decision reserved.

Whereupon it is on this 28th day of April, A. D. 1915, by this court considered and adjudged that said George W. Crane, plaintiff, recover against said Daniel Rentschler, defendant, the sum of two hundred and fifty dollars and no cents, debt, and sixteen dollars and seventy cents, cost of suit.

Transcript made April 29th, 1915. 20

Notice of appeal filed May 7th, 1915.

Appeal bond filed May 7th, 1915.

Order filed May 12th, 1915, extending time to make up state of the case.

Order filed July 2d, 1915.

Time for perfection of the appeal in the above entitled cause is hereby extended to July 15th, 1915. 30

Dated June 26th, 1915.

Peter Stillwell,
Judge Bayonne District Court.

Order filed July 15th, 1915, extending time to make up state of the case unto August 1st, 1915.

Order filed July 31st, 1915, extending time to make up state of the case unto August 15th, 1915. 40

State of the case filed August 2d, 1915.

State of the case mailed to H. T. Davimos, 9-15 Clinton Street, Newark, N. J., August 4th, 1915.

I do hereby certify that this is a true transcript of the record of the above entitled cause.

GUSTAV RUH,
Clerk.

Dated August 11th, 1915.

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DISTRICT COURT OF THE CITY OF BAYONNE.

GEORGE W. CRANE,
Plaintiff,
vs.
DANIEL RENTSCHLER,
Defendant.

In Tort
State of Demand

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The plaintiff, residing in North Arlington, New Jersey, complains of the defendant as follows:

On or about October tenth, nineteen hundred and fourteen, the plaintiff and defendant entered into a verbal contract whereby the defendant agreed to convey to the said plaintiff a certain lot of land known as Number 25 Rutherford Place, in the Township of North Arlington, New Jersey, the pur- 20 chase price being two hundred and fifty dollars ($250), and one hundred dollars ($100) was paid on account. The defendant agreed to deliver a deed of warranty when the balance of two hundred and fifty dollars ($250) was paid, which defendant failed to do. At the time the said agreement was entered into, the defendant represented that there were gas, water, sewer and electric connections right up to the curb, and on the strength of these representations the plaintiff was induced to pur- 30 chase.

When the plaintiff paid the balance of the purchase price, to wit, the sum of one hundred and fifty dollars ($150), on November twenty-eighth, nineteen hundred and fourteen, there was a further verbal agreement entered into whereby the defendant was to erect a one-story, five-room bungalow, the price of which was to be nineteen hundred dollars ($1,900). The defendant showed the plain- 40

tiff a set of plans which were to be followed with the exception of the number of rooms, and further agreed to construct and erect a dwelling house such as he had built in the vicinity, and which house when completed was to be to the satisfaction of the plaintiff. The bungalow was to be properly painted, fitted with copper leaders and gutters, there were to be gas, water, sewer and electric connections and equipment in the house; the foundation from the ground to the baseboard was to be of concrete blocks; the cellar was to be properly drained; and the work was to be complete in every respect and
10 satisfactory to the owner.

The plaintiff further avers that the defendant agreed to secure a building and loan mortgage for at least fifteen hundred dollars ($1,500), and that the said defendant agreed to take a second mortgage up to the amount of nineteen hundred dollars ($1,900). This he failed to do, although the plaintiff at various times requested him to do so.

The plaintiff further says that he moved into the
20 said house on December sixteenth, nineteen hundred and fourteen, and resided there until January twentieth, nineteen hundred and fifteen, when he was obliged to remove on account of the uninhabitable condition of the house due to the defendant's failure to carry out his agreement, in a great many respects, to wit: there were no cellar drains and as a result the cellar was constantly flooded with water to a depth of over ten inches, and as a result of which the plaintiff was unable to use the cellar
30 in any manner, and as a result of which the dwelling was in a damp condition, which resulted in the illness of the plaintiff's children, and obliged the said plaintiff to expend large amounts of money for medical care.

The plaintiff further avers that there were no water, sewer, electric light or gas connections not only up to the curb, but even in the street on which the house stood, and that the defendant, knowingly, willfully and fraudulently misrepresented the facts
40 in order to induce the plaintiff to pay over the sum

of two hundred and fifty dollars ($250).

The plaintiff further says that the bungalow was not built in a workmanlike manner, nor accordance with the houses in the vicinity as agreed, and says in fact that the house was not properly painted, having received but one prime coat of paint; that the plastering is cracked throughout; that owing to the poor work in the roof, the rain leaks in when it rains; that there are no gutters on the house; that the porch has not been painted at all; that the varnish on all inside woodwork is extremely poor, and has peeled off; that the tub covers are of poor quality and are broken; that there are no steps from the sidewalk to the house, and that it is necessary to climb up the terrace; that there are no steps from the terrace to the porch; that there are no lighting fixtures in the bath-room; that the water-closet tank is of poor quality, and the enamel is off same; that the medicine closet in the bath-room is unfinished; that the back entrance to the cellar is unfinished and permits the water from yard to run into the cellar.

The plaintiff says that the defendant knowingly and fraudulently procured two hundred and fifty dollars ($250) from him by reason of the representations as aforesaid, and by reason of his failure to properly carry out his agreement; and by reason of which premises the plaintiff was obliged to remove from the house and find other premises. And by reason of which the plaintiff was obliged to spend a large sum of money for medical care of his children, and for moving, and for time lost from his work while obliged to move, and for the discomfort and illness suffered by him and his family, and by reason whereof he was obliged to spend money for other habitation, and by reason of which the defendant procured his lot.

The plaintiff demands the sum of five hundred dollars ($500) damages.

ALEXANDER SECLOW,
Attorney for Plaintiff.

DISTRICT COURT OF THE CITY OF BAYONNE.

GEORGE W. CRANE,

Plaintiff,

vs.

DANIEL RENTSCHLER,

10 *Defendant.*

In Tort,
State of the Case,
For Appeal.

The parties to the above cause having failed to agree upon a state of the case, the court makes up the state of the case as follows:

The court eliminated from the case all damages arising from not building the house as agreed.

The court finds the following facts: That on or about October 10, 1914, the defendant entered into a verbal agreement with the plaintiff to convey to
20 the plaintiff a lot of land known as 25 Rutherford Place, Arlington, N. J., for $250. One hundred dollars was paid at the time. That the balance of the purchase price was paid November 28, 1914. That defendant gave receipts for the one hundred dollars and one hundred and fifty dollars which was introduced in evidence as Exhibits 1 and 2, a copy of which receipts are as follows:

COPY OF EXHIBIT ONE.

30 Oct. 10th, 1914.

Received from G. W. Crane

One hundred..............................Dollars for

deposit on lot No. 25 Rutherford Place, for lot cost.

$250.00 $150.00 to be paid when deed is complete.

$100.00/100

Daniel Rentschler.

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COPY OF EXHIBIT TWO.

November 22nd, 1914.

Received from George Walter Crane

Two hundred and fifty 00/100.........Dollars in full of lot No. 25 Rutherford Place.

$250.00 Deed to be given when mortgage is right.

Daniel Rentschler.

The court further found that at the time of the agreement to sell the defendant represented to the plaintiff that there were gas, water, sewer, electric light connections in the lot at the time the agreement was made. 10

Afterwards an agreement was made that the defendant erect a house upon the lot costing $1,900. The house was built. The defendant moved in on December 16, 1914.

The court found that there was no sewer connections to the lot. That the plaintiff did not know the fact until he moved into the house. That on finding there was no sewer he notified the defendant, that the defendant did not put it in, and on January 20, 1915, after notifying defendant, plaintiff moved from the house. 20

Court found that the representation that there was a sewer was one of the inducements to purchase lot and pay $250, and that the plaintiff relied upon the representation of defendant.

By agreement the case was tried as contract case. 30

At the close of the case the attorney for the defendant moved for direction of verdict because the contract as established and objected to in due course during the course of the trial was a verbal one and was inadmissible under the Statute of Frauds, and secondly, that misrepresentation as to the sewer connection in the lot was waived as a matter of law by the occupancy of the plaintiff in the premises from the 16th day of December, 1914, 40

until the 20th day of January, 1915, and that as a matter of law, the absence of the sewer was a question of caveat emptor in the premises, all of which contentions the court overruled.

And the court gave judgment for the plaintiff against the defendant in the sum of two hundred and fifty ($250) dollars, the amount of the account, together with the costs.

PETER STILLWELL,
Judge of Bayonne District Court.

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SPECIFICATIONS OF ERRORS OF THE BAYONNE DISTRICT COURT.

GEORGE W. CRANE,
Plaintiff,
vs.
DANIEL RENTSCHLER,
Defendant.

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On appeal from the Bayonne District Court.

The defendant is dissatisfied in point of law with the determination and judgment of the Bayone District Court as follows:

1. The court erred as a matter of law upon the facts in this case.

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2. The court erred as a matter of law because the case was tried as a matter of contract and the Statute of Frauds applies.

a. Because the state of demand shows that the subject matter was a contract concerning lands, tenements and hereditaments, and as such should have been in writing, whereas the evidence disclosed it to be verbal.

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3. The court erred as a matter of law in that there was a waiver of any representations by the defendant to the plaintiff by reason of the occupancy of the plaintiff in the premises in question as disclosed by the evidence.

a. Because the plaintiff was estopped from setting up any misrepresentations by occupying the premises as shown in the facts, and as a matter of law, his occupancy was a waiver.

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4. The court erred as a matter of law on the question of damages.

a. Because by misrepresentations as shown in the facts should have determined the amount of damage which is not the full consideration as allowed by the trial court.

Respectfully submitted,

Dated , 1915.

HARRY T. DAVIMOS,
10 Attorney for the Defendant.

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COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

GEORGE W. CRANE, *Plaintiff*, vs. DANIEL RENTSCHLER, *Defendant*.	*Notice of Appeal from the New Jersey Supreme Court to the Court of Errors and Appeals of the State of New Jersey.*

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(Filed April 25th, 1916.)

To Abraham Levitan, 665 Newark Avenue, Jersey City, N. J., Attorney of the Plaintiff:

Sir:—Take notice that the defendant appeals from the whole of the judgment entered in this cause on the following grounds:

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1. The court erred as a matter of law upon the facts in this case.

2. The court erred as a matter of law because the case was tried as a matter of contract and the Statute of Frauds applies.

a. Because the state of demand shows that the subject matter was a contract concerning lands, tenements and hereditaments, and as such should have been in writing, whereas the evidence disclosed it to be verbal.

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3. The court erred as a matter of law in that there was a waiver of any representations by the defendant to the plaintiff by reason of the occupancy of the plaintiff in the premises in question as disclosed by the evidence.

a. Because the plaintiff was estopped from setting up any misrepresentations by occupying the premises as shown in the facts, and as a matter of

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law, his occupancy was a waiver.

4. The court erred as a matter of law on the question of damages.

a. Because by misrepresentations as shown in the facts should have determined the amount of damages which is not the full consideration as allowed by the trial court.

Dated April 17, 1916.

HARRY T. DAVIMOS,
Attorney for Defendant-Appellant.

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NEW JERSEY SUPREME COURT.
November Term, 1915.

GEORGE W. CRANE,
vs.
DANIEL RENTSCHLER,

(Filed March 10th, 1916.)

Argued November Term, 1915. Decided February Term, 1916.

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Alexander Seclow, for plaintiff.

Abraham Levitan, for defendant.

Appeal from Bayonne District Court.

Argued before Justices Parker, Minturn and Kalisch.

The opinion of the court was delivered by Minturn, J.

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The plaintiff paid the defendant $250 as the purchase price of a lot in North Arlington, under the terms of a verbal contract, which included in its provisions that the street abutting the lot was sewered for house connections. The trial court found that there was no sewer in the street, and that the plaintiff moved from the premises within a reasonable time after the discovery of the fact.

The suit was brought to recover the consideration paid upon the ground of the misrepresentation.

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It is argued that the Statute of Frauds applies to the situation and prevents recovery, but such is not the case.

Birch vs. *Baker,* 90 Atl. 302.

20 *Cyc.* 55, and cases cited.

The doctrine of caveat emptor also is invoked, but in this class of action it has no application.

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2 *Kents Com.* 615.

35 *Cyc.* 68, and cases cited.

In such a situation the vendee had a legal right to rescind, and sue for the purchase price.

2 *Kents Com.* 614.

Thomton vs. *Wynn,* 12 Wheat 183.

The judgment will be affirmed.

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NEW JERSEY SUPREME COURT.

GEORGE W. CRANE, *Plaintiff-Respondent,* vs. DANIEL RENTSCHLER, *Defendant-Appellant.*	*On Appeal to the Supreme Court. Rule of Affirmance.*

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This cause having been duly argued at the November term of this court, by Abraham Levitan, of counsel for the plaintiff-respondent, and Harry T. Davimos, of counsel for the defendant-appellant, and the court having considered the same, and finding no error in the record or proceedings in the District Court; it is thereupon ordered and adjudged that the judgment of the District Court removed by appeal in this cause, be affirmed with costs, and that the record be remitted to the District Court to be proceeded with, in accordance with this judgment and the practice of this court. 20

Entered March 17, 1916.

On motion of Abraham Levitan, attorney for plaintiff-respondent.

A true copy,

WM. C. GEBHARDT,
Clerk. 30

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