INDEX.

Notice of Appeal.

Filed May 8, 1916.

District Court, First Judicial District

COUNTY OF ESSEX. 10

MINNIE L. BARTO, *Plaintiff,* *vs.* JOHN BENKER, *Defendant.*	*On Contract. Notice of Appeal.*

To Minnie L. Barto, or Messrs. McDermit & McDermit, attorneys of said Minnie L. Barto, plaintiff: 20

Take notice, that the defendant, John Benker, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court, First Judicial District, County of Essex, rendered in the above stated action, on the twenty-sixth day of April, nineteen hundred and sixteen.

April 27, 1916. 30

ALBERT C. PEDRICK,
Defendant's Attorney.

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Specifications of Determinations and Directions Appealed From.

Filed May 25, 1916.

New Jersey Supreme Court.

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MINNIE L. BARTO, *Plaintiff-Appellee,* *vs.* JOHN BENKER, *Defendant-Appellant.*	*On Contract.* *On Appeal from the District Court, First Judicial District, County of Essex.*

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The above named defendant appellant, John Benker, by Albert C. Pedrick, his attorney, hereby files with the Clerk of the New Jersey Supreme Court, the following specification of the determinations and directions of the District Court, First Judicial District, County of Essex, with respect to which the said defendant is dissatisfied in point of law, and upon the admission and rejection of evidence therein against the objection of the said defendant.

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1. By the record and proceedings in the said cause, it appears that judgment was given for the said plaintiff, Minnie L. Barto, and against the said defendant, John Benker, whereas judgment ought to have been given for the said defendant and against the said plaintiff.

2. Upon the trial of the said cause, the said Court erroneously refused to non-suit the said

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plaintiff, Minnie L. Barto, at the close of her case, on the application and motion of the said defendant..

3. At the trial of the said cause, the said Court, at the close of the evidence erroneously refused to find as a fact that no misrepresentations were made by the said defendant as to the sale or transfer of said liquor license.

4. At the trial of the said cause, the said Court, over the objection of defendant's counsel, allowed testimoney as to the alleged sale of said license, instead of allowing the written bill of sale to speak for itself.

5. At the trial of the said cause, the said Court, at the close of the evidence, refused to find as a fact that there was no rescission of the contract, and that plaintiff went into possession of the premises and carried on the business under the bill of sale and power of attorney until evicted for non-payment of rent, and until she lost her chattels sold to her by said bill of sale under foreclosure of the chattel mortgage made by her to said defendant.

6. At the trial of the said cause, the said Court, at the close of the evidence, refused to find as a fact that no notice of rescission had been given by the plaintiff to the defendant.

7. At the trial of said cause, the said Court, at the close of the evidence, erroneously refused to find that the bill of sale and power of attorney constituted the contract between the parties under seal, that the plaintiff went into possession of, and conducted the business, and received the benefit of the agreements, and that the contract could not be disaffirmed thereafter

on the ground of the alleged fraudulent misrepresentations.

8. At the trial of the said cause, the said Court, at the close of the evidence, erroneously gave judgment in favor of the plaintiff on the ground that the license was not transferred to the plaintiff, whereas the bill of sale did not cover, or attempt to transfer said license.

9. At the trial of the said cause, the said Court, at the close of the evidence, erroneously gave judgment in favor of the plaintiff and against the defendant for the sum of five hundred dollars ($500), whereas, upon the proofs in the case, the plaintiff was not entitled to recover, and judgment should have been given for the defendant.

10. The said judgment was in divers other respects irregular, erroneous and unlawful.

Dated May 25, 1916.

ALBERT C. PEDRICK,
Attorney of Defendant-Appellant.

District Court Summons on Contract.

THE STATE OF NEW JERSEY, }
ESSEX COUNTY, } *ss:*

To any constable of said county, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Essex.

SUMMON John Benker, to appear before the District Court of the First Judicial District of the County of Essex, to be held at the Council Chamber, No. 649 Bloomfield avenue (second floor), in the Town of Montclair, on the twenty-

second day of March, nineteen hundred and sixteen, at ten o'clock in the forenoon, to answer unto Minnie L. Barto, in an action upon contract wherein the Plaintiff demands from the Defendant Five Hundred Dollars. Hereof fail not.

Witness, James P. Mylod, Esq., Judge of said Court at Montclair, as aforesaid, the thirteenth day of March in the year one thousand nine hundred and sixteen.

JOSEPH F. MURPHY,
Clerk.

State of Demand.

Filed March 13, 1916.

MONTCLAIR DISTRICT COURT.

MINNIE L. BARTO, *Plaintiff,* vs. JOHN BENKER, *Defendant.*	*On Contract.* *State of Demand.*

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

1. On September 17th, 1915, plaintiff bar-
20 gained with the defendant for the purchase of a certain liquor license of a beer saloon, and for the purchase of a certain beer saloon, located at No. 260 Washington avenue, in the City of Newark, County of Essex and State of New Jersey: and the defendant to induce the plaintiff to buy said liquor license and beer saloon, and to pay $1,000 therefor declared to the plaintiff that he, the defendant, was the owner of the said liquor license and of the
30 said saloon, and as such owner had the free right and title to same, free from any right, title or interest of any other person whatever, and therefore could sell said liquor license and saloon to whomever he chose, and that plaintiff could therefore buy said liquor license and said saloon, and take the conduct of the same notwithstanding the fact that she, the plaintiff, had not been a resident of the City of Newark within the time required for a person to own
40 and conduct a liquor license and beer saloon.

2. Plaintiff, believing said statements to be true, and induced thereby, bought said liquor license and saloon, and paid $1,000, part of which sum was in cash, to wit, the sum of $550, and the balance in promissory notes, secured by a chattel mortgage obtained by the defendant from the plaintiff in payment for the purchase price of said license and saloon. 10

3. Defendant made said statements knowing them to be false, with intent thereby to induce the plaintiff to make said purchase and to defraud her.

4. Defendant was not in fact the owner of said liquor license or said beer saloon or the owner of said saloon, nor did he have the right and titles to same free from any right, the or interest of any other person or persons whomever and could therefore sell said license and saloon to whomever he chose; but that the Union Brewing Company, of Newark, New Jersey, had an interest in said liquor license and beer saloon, and that the defendant could not sell nor dispose of the same without the agreement and consent of the said Union Brewing Company; and that further that said contract for the purchase of said license and saloon, was void in law. 20 30

5. Plaintiff rescinded said contract for the purchase of said saloon and license on October 18th, 1915, and demanded of the defendant the return of said sum of $550, together with the promissory notes and chattel mortgage obtained by the defendant from the plaintiff.

6. Defendant ousted plaintiff from the possession of said saloon and liquor license of the aforesaid premises, and failed and refused to 40

State of Demand.

return to the plaintiff the purchase price as was demanded under her rescission.

7. Plaintiff hereby waives the excess over $500 and therefore brings her suit in this court.

Plaintiff demands $500 damages.

10 McDERMIT & McDERMIT,
Attorneys for Plaintiff.

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Copy of Clerk's Docket.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

MINNIE L. BARTO, *Plaintiff,* vs. JOHN BENKER, *Defendant.*	*On Contract.*

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PLAINTIFF'S COST.

Summons	$2.10
Mileage	.24
Listing	1.50

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McDermit & McDermit, plaintiff's attorney.

Albert C. Pedrick, defendant's attorney.

A summons in the above stated cause was issued on the thirteenth day of March, 1916, returnable on the twenty-second day of March, 1916, wherein the plaintiff demands of the defendant the sum of $500.

The plaintiff filed a state of demand March 13, 1916.

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The summons was served and returned as follows: The said defendant not being found, I served the within summons March 17, 1916, by leaving a copy thereof at his residence with a member of his family above the age of fourteen years informing her of its contents.

CHARLES REILLY,
Sergeant-at-Arms.

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Copy of Clerk's Docket.

This cause was adjourned by the plaintiff to April 5, 1916, and from time to time thereafter until April 26th, 1916.

The following witnesses were sworn on behalf of the plaintiff: Minnie L. Barto, Morris Barto, Charles H. Scheffmeyer, Robert C. Erb.

10 The plaintiff offered in evidence a Bill of Sale, P. No. 1, Power of Attorney, P. No. 2, also a Notice of Chattel Mortgage Sale Foreclosure, P. No. 3.

The following witnesses were sworn on behalf of the defendant, John Benker, Frank A. Wenzel.

The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of Five Hundred Dol-
20 lars, damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of $500 damages with costs of suit.

April 28, 1916, bond on appeal, Judge's approval thereon in appeal to the New Jersey Supreme Court, filed.

May 8, 1916, Notice of Appeal, defendant's attorney acknowledgment thereon in appeal to
30 the New Jersey Supreme Court, filed.

I hereby certify this to be a true copy,

JOSEPH F. MURPHY,
Clerk District Court of the First Judicial District of the County of Essex.

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State of the Case on Appeal.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

MINNIE L. BARTO, *Plaintiff,* *vs.* JOHN BENKER, *Defendant.*	*On Contract.*

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The parties to this action, or their attorneys, being unable to agree upon a State of the Case on Appeal, and having applied to me within the time limited by law, I do hereby settle the case, as follows:

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The case was tried before me without a jury.

This action was brought to recover damages in the amount of $500, being a part of a payment of $550 in cash and $450 in notes, made by the plaintiff to the defendant for the sale and transfer of a liquor business conducted by the defendant at 260 Washington avenue, Newark, N. J. The amount paid by the plaintiff to the defendant in excess of $500 was waived by the plaintiff.

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From the evidence I found that the plaintiff agreed to purchase the saloon fixtures and saloon business of the defendant for the sum of $1,000, payable $550 in cash and the balance $450 in promissory notes, the latter being secured by a chattel mortgage. A Bill of Sale and Power of Attorney, both of which were received in evidence, were made, executed and

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delivered by the defendant to the plaintiff and the plaintiff entered in possession of said business on or about September 17, 1915, and remained in possession until October 21st, 1915.

Prior to the execution and delivery of the Bill of Sale and Power of Attorney to the plaintiff, the defendant had executed a Power of Attorney to the Union Brewing Company of Newark, N. J. Repeated efforts were made to have the Union Brewing Company consent to the transfer of the business and the license in question to the plaintiff, but the consent was refused. The sale and transfer of the business and license included an agreement on the part of the defendant to effect a legal transfer of the license by having the transfer granted or acquiesced in by the Excise Board or licensing authorities of the City of Newark. At the time of the acceptance of the cash payment and the promissory notes, the defendant knew that the vendee, the plaintiff in this suit, had not been a resident of the City of Newark for a sufficient length of time to qualify the plaintiff to legally own or hold a liquor license in the city.

After the payment of the $550 in question, and the entry into possession, the plaintiff urged the completion of the transaction, and with the defendant called a number of times at the office of the Union Brewing Company, the holder of the prior Power of Attorney, in an effort to obtain the consent of the brewing company to the transfer. Failing to obtain a complete or legal transfer of the license, the plaintiff on or about October 18th, 1915, rescinded her agreement to purchase and demanded the return of the cash payment of $550 and the prom-

issory notes, which demand was refused by the defendant.

Defendant moved for a judgment of non-suit on the following grounds:

"That the plaintiff failed to prove any case; that the Bill of Sale and Power of Attorney constituted a contract between the parties, under seal; that the plaintiff went into possession of and conducted the business and received the benefit of the agreements, and that same could not be disaffirmed thereafter." Defendant's motion for a non-suit was denied.

No evidence was offered on the part of the defendant and judgment was accordingly entered in favor of the plaintiff and against the defendant in the sum of Five Hundred Dollars ($500.00).

All of which is respectfully submitted this twelfth day of September, nineteen hundred and sixteen.

JAMES P. MYLOD,
J.

EXHIBIT P. 1.

Know all men by these presents, that I, John Benker, of the First Part, for and in consideration of the sum of $1,000, one thousand dollars, lawful money of the United States, to me in hand paid, at or before the ensealing and delivery of these presents, by Minnie L. Barto, of the second part, the receipt whereof is hereby acknowledged have bargained and sold and by these presents doth grant and convey, unto the said party of the second part, his executors, administrators and assigns, all the goods and chattels particularly described and mentioned, and at present in the saloon and cellar in the house and premises known and designated as No. 260 Washington avenue, in the City of Newark, County of Essex, and the State of New Jersey for all goods according to inventory, in said saloon, cash register, glass ware, piano, and all stock of wines, liquors, and cigars, now in said saloon, the balance to be paid on electric piano which amounts to $680.

To have and to hold, the same unto the said party of the second part his executors, administrators and assigns forever. And I do for myself, my heirs, executors and administrators, covenant and agree, to and with the said party of the second part, to warrant and defend the sale of the said goods and chattels hereby sold unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever.

In witness whereof, I have hereunto set my hand and seal the seventeenth day of Septem-

ber in the year of our Lord nineteen hundred and fifteen.

Sealed and delivered in the presence of

GEO. M. TITUS.

Subject to a chattel mortgage held against the said saloon by the Union Brewing Co., of Newark, N. J. 10

JOHN BENKER. [Seal]

EXHIBIT P. 2.

Know all men by these presents, that I, John Benker, of the City of Newark, County of Essex and State of New Jersey have made, constituted and appointed, and by these presents do make, constitute and appoint Morris Barto, of the City of Newark, County of Essex and State of New Jersey, my true and lawful attorney for me and in my name place and stead, to run, manage, and conduct the saloon and saloon business at No. 260 Washington avenue, in the City of Newark, County of Essex and State of New Jersey, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof. 20 30

In witness whereof, I have hereunto set my hand and seal the seventeenth day of Septem- 40

ber in the year of our Lord one thousand nine hundred and fifteen.

Signed, sealed and delivered in the presence of

GEO. M. TITUS.

JOHN BENKER. [Seal]

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EXHIBIT P. 3.

CHATTEL MORTGAGE SALE.

Take notice, that by virtue of a chattel mortgage executed by Minnie L. Barto to John Benker bearing date September 17, 1915, and recorded September 18, 1915, in the Register's office of the County of Essex and State of New Jersey, and upon which default in payment has been made, I shall sell the property therein mentioned described as follows, viz.: One National cash register No. 88648, all glass and glassware, all stock of wines, liquors and cigars, one gas lamp in saloon, one gas range in kitchen, all crockery, knives, forks, plate and plated ware, and all cooking utensils in kitchen and in said premises in about belong to and containing said business, together with all and singular all other goods and chattels in, upon and about said premises belonging to said saloon and saloon business and not herein specifically enumerated, at public auction, on Tuesday, October 26, 1915, at 10:15 o'clock in the forenoon of that day, on the premises known as 260 Washington avenue, in the City of Newark, aforesaid County and State.

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Dated, October 21, 1915.

GUSTAVE HAAS,

Attorney for Mortgagee.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MINNIE L. BARTO, *Plaintiff-Respondent,* *vs.* JOHN BENKER, *Defendant-Appellant.*	*On Contract.* *On Appeal.*

Brief for Defendant-Appellant.

I.

The salient facts in this case are that the defendant sold to the plaintiff the saloon fixtures at 260 Washington avenue, Newark, New Jersey, for $1,000, payable $550 in cash and $450 in promissory notes secured by a chattel mortgage. It is contended by the plaintiff that the saloon business was intended to be sold. The written bill of sale under seal received in evidence shows that only the chattels were sold, no mention being made of the business as a going concern. The trial judge, in his state of the case on appeal, sets forth that a power of attorney to conduct the business, which was received in evidence, was made, executed and delivered by the defendant to the plaintiff and that the plaintiff had not been a resident of the City of Newark for a sufficient length of time to qualify the plaintiff to legally own or hold a liquor license in the city. An inspection of the said power of attorney, however, which is set forth on page 15, of the printed case, shows that said power of attorney was made to one *Morris* Barto, and there is no evidence to show that he was not legally capable of owning or holding a liquor license in the City of Newark.

The trial judge sets forth that no evidence was offered on the part of the defendant. The copy of docket, however, shows that the witnesses, John Benker and Frank A. Wenzel, were sworn on behalf of the defendant.

II.

It appears from the evidence that the plaintiff, at the time of the execution and delivery of said bill of sale and power of attorney, entered into possession of said business (September 17, 1915), and remained in possession until October 21, 1915. It further appears that on or about October 18, 1915, she rescinded her agreement. It does not appear that her title to the chattels sold to her and set forth in the bill of sale was ever disputed, nor does it appear that the *Morris* Barto, to whom the power of attorney was made, was ever interfered with in the exercise of said power.

The bill of sale constituted the executed contract between the parties, under seal; the plaintiff went into possession of and conducted the business, and received the benefit thereof, and the contract could not be disaffirmed thereafter on the ground of the alleged fraudulent misrepresentations. *Rogers* v. *Colt,* 21 N. J. L. 704.

III

The judgment below should be reversed.

Respectfully submitted,

ALBERT C. PEDRICK,
Attorney for Defendant-Appellant.

Opinion.

Filed February 16, 1917.

New Jersey Supreme Court.

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MINNIE L. BARTO, *Appellee,* vs. JOHN BENKER, *Appellant,*	*Appeal from District Court of First Judicial District of Essex County.*

Argued November Term, 1916, before Justices Garrison, Parker and Bergen. 20

Albert C. Pedrick, for appellant.

McDermit & McDermit, for appellee.

Per Curiam:

This is an action to recover money paid on account of a rescinded contract for non-performance by appellant.

The facts found by the District Court Judge are, that the plaintiff agreed to purchase the 30 business of the defendant, which included a license for the sale of liquors, the consideration being $1,000, upon which $550 was paid in cash and the balance in promissory notes; that a bill of sale was made by the defendant to the plaintiff and also a power of attorney permitting the plaintiff to carry on the business in defendant's name and to run and manage the saloon as fully as he could; that the plaintiff entered into possession; that prior to that time the defendant had executed a power of attorney to the Union 40

Brewing Company which refused to consent to the sale, or to transfer the license, whereupon the plaintiff rescinded the agreement and demanded the return of the cash payment, and this being refused she brought her suit for the amount paid, waiving the excess over $500 and recovered a judgment from which the defendant appeals, the only ground being a refusal to non-suit.

According to the state of the case settled by the trial court, no testimony appearing in the record, the plaintiff had a cause of action and a motion for a non-suit was properly refused.

The judgment should be affirmed.

Rule of Affirmance and Remittitur.

Entered March 10, 1917.

NEW JERSEY SUPREME COURT.

MINNIE L. BARTO, *Appellee,* vs. JOHN BENKER, *Appellant.*	*On Appeal.* *Rule of Affirmance and Remittitur.*

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This cause having been duly argued at the November Term, 1916, of this Court by the attorneys for the respective parties hereto, and the Court having considered the same and finding no error in the proceedings of the court below—

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It is ORDERED that the judgment of the District Court of the First Judicial District of the County of Essex from which appeal was taken to this Court be and the same is hereby affirmed with costs, and the record remitted to the court below to be proceeded with according to law and the practice of said court.

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Entered March 10, 1917.

On motion of

McDERMIT & McDERMIT,
Attorneys of Appellee.

A true copy.

WM. C. GEBHARDT,
Clerk.

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New Jersey Court of Errors and Appeals

MINNIE L. BARTO, *Plaintiff-Appellee,* *vs.* JOHN BENKER, *Defendant-Appellant.*	*Appearance of Substituted Attorneys.*

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The undersigned, Day, Day, Smith and Slingerland, substituted attorneys of the plaintiff-appellee, do hereby enter appearance in this cause as such substituted attorneys. This appearance is made and entered in accordance with rule 2 of the laws of the Court of Errors and Appeals of New Jersey.

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DAY, DAY, SMITH & SLINGERLAND,
Attorneys of Plaintiff-Appellee.

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Notice of Appeal and Reasons.

Filed.

NEW JERSEY SUPREME COURT.

MINNIE L. BARTO, *Plaintiff-Appellee,* *vs.* JOHN BENKER, *Defendant-Appellant.*	*On Contract.* *On Appeal.* *Notice of Appeal and Reasons.*

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To Messrs. Day, Day, Smith and Slingerland, Attorneys of Plaintiff-Appellee.

Gentlemen:

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Take notice that the appellant, John Benker, appeals from the New Jersey Supreme Court to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

1. That the Supreme Court affirmed the judgment of the District Court of the First Judicial District of the County of Essex, although there was error in so doing.

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2. Because the Supreme Court offirmed the refusal of the said District Court to grant a non-suit at the close of the plaintiff's case, although it was error so to do.

3. Because the bill of sale received in evidence and marked Exhibit P. 1, did not cover the license to sell liquors, and specifically stated that the said chattels were sold subject to a mortgage held by the Union Brewing Company of Newark, New Jersey.

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4. Because the power of attorney, marked Exhibit P. 2, was made to *Morris* Barto and there is no testimony to show that he was disqualified to act thereunder. The finding, therefore, by the Judge of the District Court that "at the time of the acceptance of the cash payment and the promissory notes, the defendant knew that the vendee, the plaintiff in this suit, had not been a resident of the City of Newark for a sufficient length of time to qualify the plaintiff to legally own or hold a liquor license in the city," had no bearing on this case.

5. Because the said District Court at the close of the evidence, erroneously refused to find that the bill of sale and power of attorney constituted the contract between the parties under seal, and that the plaintiff went into possession of, and conducted the business and received the benefit of the agreements, and that the contract could not be disaffirmed thereafter on the ground of the alleged fraudulent misrepresentations.

6. Because at the trial of the said cause the said District Court, at the close of the evidence, erroneously gave judgment in favor of the plaintiff on the ground that the license was not transferred to the plaintiff whereas the bill of sale did not cover or attempt to transfer said license.

Dated, November 26th, 1917.

ALBERT C. PEDRICK,
Attorney of Defendant-Appellant.

Notice of Appeal and Reasons.

Due and legal service of the within notice of appeal and reasons is hereby acknowledged as of time, and consent is hereby given that the same be filed as of October 29th, 1917.

DAY, DAY, SMITH & SLINGERLAND,
Attorneys of Plaintiff-Appellee.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MINNIE F. BARTO, *Plaintiff-Respondent,* *vs.* JOHN BENKER, *Defendant-Appellant.*	*On Contract.* *On Appeal.*

Brief of Plaintiff-Respondent.

The trial court found the following facts.

(1). Plaintiff agreed to purchase the business and fixtures from defendant. (2) Pursuant to this agreement defendant delivered, (a) a bill of sale for the chattels, (b) a power of attorney for the business, and (c) possession of the premises. (3) Because of a prior power of attorney to Union Brewing Co. defendant could not carry out his agreement to have the license transferred by the Excise Board of Newark. (4) Defendant knew, when payments were made, that plaintiff could not qualify as a licensee. (5) Plaintiff promptly rescinded the agreement as soon as it was determined that a transfer of the license could not be procured.

The suit was brought to recover back the money paid because of defendant's fraudulent representations. The only ground for appeal is the refusal of the trial court to enter a judgment of non-suit. The grounds of the motion were:

1. "That plaintiff failed to prove any case." It is submitted that the statement of case found by the trial judge renders such an argument untenable and groundless.

2. "That the bill of sale and power of attorney constituted a contract between the parties under seal." The trial court found as a fact that this was not true. The bill of sale and power of attorney were executed and delivered *in pursuance of the agreement.* The case of *Rogers* v. *Colt,* 21 N. J. Law, 704, cited by defendant, has no application. The case at bar does not rest upon an agreement under seal. Assuming that it did, contracts under seal are placed upon the same basis with respect to the defense of fraud, as parol contracts. See *Lord* v. *Brookfield,* 8 Vroom 552. It is fundamental that fraud is a ground for disaffirmance.

3. "That the plaintiff went into possession of and conducted the business and received the benefits of the agreement and the same could not be disaffirmed." During the plaintiff's possession of less than a month she sought to procure a complete fulfillment of the agreement and upon defendant's refusal she rescinded. Where subsequently discovered fraud entitles a party to rescind he does not lose his right because the contract has been partly executed and the parties cannot be fully restored to their former position. *Conlan* v. *Romer,* 52 N. J. Law 53. To deny the right to disaffirm because the contract had been partly executed would be to deny the effect of the defense of fraud. Whether the power of attorney was made to "Morris" Barto or "Minnie" Barto or any other person cannot now affect the judgment of the trial court, which found that the power of attorney delivered to plaintiff was ineffectual to transfer said business. The power of attorney was delivered to plaintiff pursuant to the agreement made between plaintiff and defendant. It was found that plaintiff could not obtain a transfer of the license;

that is, that defendant could not fulfill his agreement. His representations upon which the agreement was procured were fraudulent and plaintiff had suffered the loss of her deposit.

There is no reason for the reversal of the judgment of the Supreme Court.

Respectfully submitted,

DAY, DAY, SMITH & SLINGERLAND,
Attorneys of Plaintiff-Respondent.