

1960

# Robert J. Erishman and Darlyne L. Erishman v. Marr B. Overman : Brief of Appellants

Utah Supreme Court

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Sherma Hansen; Attorney for Plaintiffs and Appellants;

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THE STATE OF UTAH D

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ROBERT J. ERISHMAN and Clerk,  
DARLYNE L. ERISHMAN, his wife,  
*Plaintiffs and Appellants,*

vs.

MARR B. OVERMAN,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

## BRIEF OF APPELLANTS

Case No. 9226

APPELLANTS' BRIEF

# Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

**SHERMA HANSEN**  
Attorney for Plaintiffs  
and Appellants

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# IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT J. ERISHMAN and  
DARLYNE L. ERISHMAN, his wife,  
*Plaintiffs and Appellants,*

vs.

MARR B. OVERMAN,  
*Defendant and Respondent.*

BRIEF OF  
APPELLANTS

Case No. 9226

## APPELLANTS' BRIEF

### STATEMENT OF FACTS

This action was originally commenced by Plaintiffs for the purpose of recovering possession of certain real property owned and conveyed by them to Defendant under the terms of Escrow Agreement, subsequent to forfeiture of the Escrow Agreement by the plaintiffs for the default of the Defendant, and to further recover payments due, attorney's fees and costs, pursuant to the provisions of the said Escrow Agreement, and treble damages for unlawful detainer by Defendant. Plaintiffs were granted possession of the said premises upon the completion of the District Court trial; with the Court awarding to the defendant the sums of money paid by her on the purchase

price of said property, the value of certain improvements made by her upon the said property, interest thereon, and costs from which portion of the judgment plaintiffs now appeal.

Appellants and Respondent, on or about the 20th day of March, 1957, entered into an Escrow Agreement, by the terms of which the party of the second part, Respondent, was to pay the parties of the first part, Appellants, the sum of \$50.74 per month, on or before the 1st day of each month. Plaintiffs' Exhibit No. 10 shows that the respondent was, after the first four months, continually late with payments and in March of 1958 completely missed a payment and again in July of 1958, and that she made her last payment on August 1, 1958, being at that time two payment delinquent. Appellants spoke with respondent about bringing these payments up to date (R 42, 43, 100) with respondent agreeing to do so.

Prior to making the August payment, respondent write to appellants requesting that they agree to a refinancing proposition to help respondent out of financial difficulties in which she found herself because of certain alleged improvements she had made in the home (Def. Ex 1). Appellant agreed to taking a second mortgage and a cash settlement (Def. Ex. 2), subject to arrangements being made for the making of the delinquent payments, and the receipt of a schedule of the amount that would be due under the second mortgage.

Subsequently, it was learned by respondent that the property was not connected to the sewer and she wrote to appellants as follows:

“I am perfectly aware that the installation of my furnace is my responsibility, as is the repair to the back steps and the cleaning of the lot. However, I do feel that you have some responsibility regarding the sewer connection.” (Def. Ex. 2)

Appellants replied that they would make a \$100 allowance for the connection of the sewer (Def. Ex. 4) and, as indicated in Defendant’s Exhibit 5, informed respondent, prior to September 19, 1958, that they would not accept a second mortgage.

Respondent wrote appellants (Def. Ex. 5) that she had consulted an attorney and had been told that the cost of the sewer connection should be all appellants’ (Def. Ex. 5) and requested that the sewer connection costs be credited on the Escrow Agreement.

Respondent made no further payments on the Escrow Agreement and was informed the 1st part of December that if she did not bring her payments up to date, appellants would declare a forfeiture of the contract. Respondent’s response was to inform appellants’ attorney that she had tried to secure financing, had been unsuccessful and had asked the real estate department of the company where she worked to sell the home. She also stated that she would start reducing the balance due on the contract by monthly payments, and this as late as February 5, 1959 (Def. Ex 6).

There were no payments made on the Escrow Agreement and on the 12th day of March, 1959, appellants caused Notice Declaring Escrow Agreement Null and Void to be served on the escrow agent, the First Security

Bank of Utah, N. A., Logan, Utah, and Notice of Forfeiture of Escrow Agreement to be served upon Marr B. Overman (Tr. 5, 6)

Respondent refused to vacate the premises after the forfeiture and thereupon, on the 22nd day of May, 1959, plaintiffs filed their Complaint (Tr. 1) seeking resitution and possession of the premises, treble damages for rentals accrued during the period of time respondent held the premises, for payments actually due on the premises, and for attorney's fees and costs.

### STATEMENT OF POINTS

In connection with this appeal, Plaintiff contends:

#### POINT I

THE COURT ERRED IN MAKING AND ENTERING ITS FINDINGS OF FACT NUMBERED 3 AND 7; ITS CONCLUSIONS OF LAW NUMBERED 1, 2, 3, AND 4; AND ITS JUDGMENT IN FAVOR OF THE DEFENDANT.

A. THE EVIDENCE IN FACT, AND CONTRARY TO THE COURT'S FINDING OF FACT NUMBER 3, SHOWS THAT THE MATTER OF WHETHER OR NOT THE PROPERTY IN QUESTION WAS CONNECTED TO THE SEWER WAS IMMATERIAL TO THE RESPONDENT; THE LAW, WHEN SUCH IS THE EVIDENCE, DOES NOT JUSTIFY A RECISSION, CONTRARY TO THE COURT'S CONCLUSION OF LAW NUMBER 1.

B. THE EVIDENCE, CONTRARY TO THE COURT'S FINDING OF FACT NUMBER 7, IS CONTRADICTIONARY AND INCONCLUSIVE AND FAILS TO SUPPORT THE COURT'S CONCLUSION OF LAW NUMBER 2 AS THE AMOUNT IN WHICH THE IMPROVEMENTS MADE BY RESPONDENT ENHANCED THE VALUE OF THE PROPERTY.

C. THE EVIDENCE SHOWS, AS IS INDICATED BY THE COURT'S FINDING OF FACT NUMBER 5, THAT THE RESPONDENT WAIVED ANY MISREPRESENTATION THERE MAY HAVE BEEN AND SHOWED BY HER ACTIONS THAT SHE ELECTED TO SEEK DAMAGES; THE LAW IN SUCH CASES BEING, CONTRARY TO THE COURT'S CONCLUSIONS OF LAW NUMBERS 1 AND 3, THAT RESPONDENT THEN HAD NO RIGHT TO RESCIND.

## POINT 2

THAT THE PARTIES HAD IN FACT SIGNED AN EARNEST MONEY RECEIPT AND AGREEMENT TO PURCHASE, WHICH WAS A BINDING CONTRACT UPON THE PARTIES, AND WHICH CONTRACT DID NOT PURPORT TO CONVEY A HOUSE CONNECTED TO A SEWER LINE.

## POINT 3

A. THE COURT ERRED IN MAKING ITS FINDING OF FACT NUMBER 8 WHEREIN IT FOUND "THAT EXCEPT AS ABOVE EXCEPTED ALL OF THE ALLEGATIONS OF COUNTERCLAIM ARE TRUE AND CORRECT AND THOSE CONTAINED IN THE COMPLAINT INCORRECT."

B. THE COURT FURTHER ERRED IN MAKING ITS CONCLUSION OF LAW NUMBER 1 WHEREIN IT STATED THAT THE DEFENDANT IS ENTITLED TO A RECISSION OF THE CONTRACT ON THE GROUNDS THAT THE PREMISES WERE MATERIALLY MISREPRESENTED TO HER, FOR THE REASON AND ON THE GROUND THAT THE CONTRACT RELIED UPON BY THE DEFENDANT HAD BEEN PREVIOUSLY TERMINATED AS ALLEGED IN PLAINTIFFS' COMPLAINT (TR. 1) AND ADMITTED IN DEFENDANT'S COUNTERCLAIM. (TR. 7)

## ARGUMENT

### POINT 1

THE COURT ERRED IN MAKING AND ENTERING ITS FINDINGS OF FACT NUMBERED 3, 7 AND 8; ITS CONCLUSIONS OF LAW NUMBERED 1, 2, 3 AND 4, AND ITS JUDGMENT AND DECREE IN FAVOR OF THE DEFENDANT.

A. THE EVIDENCE IN FACT, AND CONTRARY TO THE COURT'S FINDING OF FACT NO. 3, SHOWS THAT THE MATTER OF WHETHER OR NOT THE PROPERTY IN QUESTION WAS CONNECTED TO THE SEWER WAS IMMATERIAL TO THE RESPONDENT; THE LAW, WHEN SUCH IS THE EVIDENCE, DOES NOT JUSTIFY A RECISSION, CONTRARY TO THE COURT'S CONCLUSION OF LAW NUMBER 1.

There is no evidence whatsoever in the record to show that respondent "made particular note" (Finding of Fact No. 3) of the statement that the property was con-

nected to the Logan City Sewer line. In fact, the testimony would indicate the contrary.

Q But you did go down and investigate some of the items on the listing agreement, didn't you?

A That's right.

Q To make sure they were there and to make sure everything was all right. Did you contact anyone at all about the sewer connection?

A No, I did not.

Q You didn't call the City?

A No.

Q You didn't ask Mr. Baugh about it other than to observe the listing?

A Yes, I did. That is, I didn't ask him. He quoted to me that "I have a home that is connected to the sewer, it's down close to the school, it's within walking distance from town," and he said, it's completely furnished."

Q Now, did you ask Mr. Erisman about the home?

A No.

Q Did you ask Mrs. Erisman about the home?

A No.

Q Did you talk with them at all?

A No . . .

The law under these circumstances is well established.

"A "mistake of fact," warranting cancellation of a

contract for sale of land. . . must be material to contract and affect substance thereof, and must affect both parties in reference to the same fact which, though connected with agreement, is merely incidental and not a part of its subject matter or essential to any of its terms.”

Patterson vs. McComas, 37 N E 2d 655

“ . . . before granting relief it must be made to appear that the fact concerning which the mistake was made was one that animated and controlled the conduct of the parties. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.”

9 Am. Jur. — Cancellation of Instruments, Sec. 32, P. 377

“To entitle one either to maintain an action of deceit because of false representations or to rescind a K made made in reliance thereon, it must appear that such representations were made for the purpose of influencing the complaining party, and w/ the intent that they be acted upon by him, or in a manner naturally calculated to induce him to act upon them.”

23 Am. Jur. — Fraud and Deceit, Sec. 117, P. 902.

The evidence further shows that respondent was active in business, that she had worked in various departments of a real estate and loaning business; that she had been responsible for drawing legal papers, for closing and processing loans (R 44, 45, 46) and in general was most familiar with all, or nearly all, phases of real estate transactions.

The respondent thus had every opportunity, and every reason, because of her knowledge and experience,

to insert the matter of the sewer connection in the space provided, had she considered it important.

American Jurisprudence in Volume 23, Fraud and Deceit, Section 112, page 896, sets forth the general rule under such circumstances:

“The contract itself may show that certain representations were not regarded as material, as where the complaining party could have inserted provisions therein to protect himself against the contingencies covered by the representations, but failed to do so.

The preliminary contract of the parties in this case did not show the sewer connection to be considered material. It therefore appears that the verdict of the jury as to the materiality of the sewer connection, the Court’s Finding of Fact Number 3 and Its Conclusion of Law Number 1, particularly wherein the Court states that the “defendant’s signing of the real estate contract was induced by a material misrepresentation of the plaintiffs to the effect that the sewer on said premises was connected to the Logan City Sewer,” are wholly and completely unsupported by the evidence.

## POINT I

### B

THE EVIDENCE, CONTRARY TO THE COURT’S FINDING OF FACT NUMBER 7, IS CONTRADICTORY AND INCONCLUSIVE AND FAILS TO SUPPORT THE COURT’S CONCLUSION OF LAW NUMBER 2 AS TO THE AMOUNT IN WHICH THE IMPROVEMENTS MADE BY RESPONDENT ENHANCED THE VALUE OF THE PROPERTY.

There is considerable confusion in the record as to the value of the capital improvement placed upon the premises by the respondent.

Mr. Glen P. Baugh, the real estate agent who sold the home to respondent, was asked by the Court (R 67):

“How much would that house, how much could it be moved for on time?”

A On the going market?

The Court: Yes. In round figures.

A Well, I'd have to —

The Court: Just a round figure.

A Oh, in round figures on comparing it with other homes, I'd say maybe fifty-five.

This figure, quoted by respondent's witness, is \$600 less than the \$6100 for which the property was originally sold.

Another of respondent's witnesses, George Judah, testified (R 64) that the home should go “somewhere in the neighborhood of around \$7,000.00.”

The record shows that appellants purchased a new furnace in the spring of 1956; that a heat survey was made of the home and a furnace of reputable make, and larger than would be considered adequate, was installed (R 72, 73, 74). It is true that insulation should have been placed in the attic, at the cost of \$65 (R 74), for greatest heat efficiency. Respondent was informed of this at the time, or shortly after, she purchased the home (R 81, 82).

Respondent testified that her change over to natural gas was motivated by the cost of the propane gas — \$43 per month during the three coldest months (R 47).

This testimony was refuted by that of Grant W. Campbell who delivered gas to respondent and who produced bills showing the following charges for gas over a period of 1 year (R70, 71).

Q Did you deliver propane to the residence of Mrs. Overman?

A Yes, ma'am.

Q And did you keep a record of the costs of heating?

A I have the bills that she used while she was there, heating.

Q And would you give us those figures?  
The Court: By month you mean?

Q Yes. Give us the figures that you have as to the costs of heating.

A The figures that I have only carries for one year.

Q Well, that's fine.

A On October twelfth there was 250 gallons of propane delivered at a cost of \$43.35. On December 19th there was 219 gallons delivered, \$37.98. On January 28th there was 245 gallons delivered, \$42.49.

The Court: What year is this?

A Fifty-six—fifty-seven.

Q Are these deliveries to Mrs. Overman?

A Yes, ma'am.

Q All right.

A On March 16th is 225, \$39.02. And on May 4th was 250, October 2nd there was 171, \$30.30.

A review of these figures reveals that respondent did not pay \$43 per month for propane gas for any one month and that the average cost per month for one year was approximated \$17.10.

The evidence therefore shows that respondent did not enhance the value of the home to the extent she testified (R 56) by her installation of a new furnace and the change over to natural gas.

The record also shows that some of the improvements were made by respondent after the property was discovered not to be connected to a sewer line. (R 41)

Q Now, you testified that you purchased materials worth a hundred three dollars. Will you explain to us what all that included? A storm door—

A One hundred twenty-three dollars.

Q Yes, \$123, excuse me.

A That included the celotex or plaster board, whatever it is, for the back porch, and the lumber for the back porch, the two ceilings that had to be put in, and the storm door.

Q And the labor was \$81 for all those repairs?

A For all of them.

Q When did you put in the furnace, Mrs. Overman?

A It was the latter part of June or the first of July.

Q When did you repair the steps?

A After the sewer was in. That was in late September.

Q When did you repair the cracked ceilings?

A At the same time as the steps were repaired.

Q When did you put the storm door in?

A The same time as the steps.

Q So all those improvements you made on your home were made after the sewer was connected?

A That's right.

The Trial Court does not take into consideration in its finding of Fact Number 7 and Conclusion of Law Number 2, which Finding and Conclusion relate to the making of improvements and the time the improvements were made. The Court refers to the improvements having been made prior to the time respondent was informed by appellants of appellants' refusal to pay for the sewer and to go along with the refinancing arrangements. However, if respondent is seeking her remedy in rescission for misrepresentation, the proper measure of damages is set forth in *Corpus Juris Secundum*, Volume 37, Page 624, Sections 141 and 142, entitled Nature of Contract and Nature of Property:

The damages recoverable must have proximately resulted from the fraud.

Expenses unnecessarily incurred, as where voluntarily incurred after discovery of the fraud, cannot be recovered.

A defrauded person may recover such amount as will compensate him for the loss occasioned by the fraud and damages are ordinarily computed with reference to the time and place of the transaction and fixed as of the date on which the fraud was discovered.

## POINT 1

### C

THE EVIDENCE SHOWS, AS IS INDICATED BY THE COURT'S FINDING OF FACT NUMBER 5, THAT THE RESPONDENT WAIVED ANY MISREPRESENTATION THERE MAY HAVE BEEN, AND SHOWED BY HER ACTIONS THAT SHE ELECTED TO SEEK DAMAGES, THE LAW IN SUCH CASES BEING, CONTRARY TO THE COURT'S CONCLUSIONS OF LAW NUMBERS 1 AND 3, THAT RESPONDENT THEN HAD NO RIGHT TO RESCIND.

That respondent did not intend, or express any intent, to rescind the Escrow Agreement at any time, prior to the filing of a counter claim (Tr. 7) by her attorneys, is clearly shown by respondent's own testimony (Def. Ex. 3, 5, 6; R 42, 43)

A An then I told him that another thing had arisen since my last letter, and that was the sewer had gone out and — or that I had to connect to the sewer, and I asked him what he wanted to do about it.

Q You asked him what he wanted to do about it?

A Yes.

Q Did you tell him that you didn't want to keep the property any more since you had found out it wasn't on the sewer?

A No.

Q Did you tell him you wanted all your money back because you hadn't got what you bargained for?

A No.

Q Now, after you had told Mr. Erisman that the Sewer had gone out, in that letter, what did you do next?

A I went ahead and negotiated for its repair. We couldn't live in the place as it was.

Q. I see. But you intended on continuing to live in the house?

A Yes.

Q When did you decide, Mrs. Overman, that you didn't want the property any more?

A I don't know whether I ever decided I didn't want the property any more.

The law is clear that a vendee wishing to rescind must give notice thereof and if she fails to do so within a reasonable length of time, or continues to act as though the property were her own, she thereby waives any right she may have had to rescind the Agreement, and must then proceed with her legal remedy for damages.

“In *Carpenter v. First Trust & Sav. Bank* (1936) 54 P (2d) 495 (California), where it seems that the instalment purchaser had become entitled to rescind

and recover back money paid. . . it was held that since (according to the findings of the trial court as supported by the evidence) the purchaser, after discovery of the facts justifying rescission, had conducted himself as though the contract subsisted and had given assurance of being able to make his payments, and his contention that his failure to rescind promptly had resulted from assurances of the vendor's agent that the improvements would be replaced, was, in view of competent evidence, rejected by the trial court, the right to rescind was lost."

134 ALR 1064

"A contract of purchase of land induced by false and fraudulent representations, or mutual mistake, is voidable and not void, and if injured party, with knowledge of the false and fraudulent representations, or mutual mistake, exercises dominion over the property and treats it as his own, he waives his right to rescind. *Kerns v. Bank of Manitou*, 242 P. 2d 817 (Colorado.) 24 Am. Jur., Sec. 210, P. 36

"Rescission by a vendee implies that he must in some way give notice of intention to rescind."  
*Hawkins vs. Stoffers* (1929), P. 452 (Wyoming)

"A notice given by the vendee to the vendor which was not intended as a rescission of the contract when given, cannot be so considered thereafter."  
*Eckhause vs. Berwyn Estate* (1929) 146 A 65 (N. J.)

Where purchasers of apartment units did not deliver up the premises and demand down payment upon discovery that premises allegedly were unfit for habitation as rental units, purchasers could not rely on fraud to defeat action by vendors to recover possession and for forfeiture of amount paid under agreement to purchase. "It should be observed that as to

the premises being unfit for habitation as rental units, the defendants upon the discovery of said conditions failed to offer to deliver up the premises and demand the down payment. If defendant intended to rely up fraud as alleged, such action would have been essential.

“Defendants can hardly be heard to say, “we know we didn’t carry out our contract and we know that we were given 18 months to try and comply with it, and we know that plaintiffs didn’t want the property back, but we think that plaintiffs should take a further loss and refund to us what we paid because we are being penalized.” We see no occasion for the intervention of equity to impose a further loss on plaintiffs, nor can we see that the remedy of forfeiture, reluctantly accepted by plaintiff, is inequitable.”

Peck vs. Judd, 326 P. 2nd 712; 7 Utah 2nd 420

See also 12 Am. Jur. — Contracts, Sec. 447, time when right to rescind must be exercised, page 1029.

So, in view of the Court’s Finding of Fact No. 5, which Finding is amply supported by the testimony and Exhibits pertaining to respondent’s actions after discovering appellants’ alleged misrepresentation, which actions come well within the puvieu of the numerous cases cited above, the trial Court surely erred in entering its Conclusions of Law Numbers 1 and 3.

## POINT 2

THAT THE PARTIES HAD IN FACT SIGNED AN EARNEST MONEY RECEIPT AND AGREEMENT TO PURCHASE, WHICH WAS A BINDING CONTRACT UPON THE PARTIES, AND WHICH CONTRACT DID

## NOT PURPORT TO CONVEY A HOUSE CONNECTED TO A SEWER LINE.

This item merits special attention.

The preliminary contract signed by the parties (Pl. Ex. 8) contains an integration clause, wherein the parties specifically agree that the terms thereof constitute the entire preliminary contract between the purchaser and seller and that no verbal statements made by anyone relative to the transaction shall be construed to be a part of the transaction.

Professor Ronan E. Degnan, had made an excellent summarization of the Utah law on this point in his article “Parol Evidence — Utah Version,” 5 Utah Law Review, No. 2, quoting from page 162:

“This final agreement is the agreement of the parties; it is the jural act to which the law attributes changes in legal relationships. In short, the later agreement supersedes all former. Thus former negotiations or even agreements are excluded from a trial not because evidence as to their existence would be untrustworthy but because they are legally immaterial; if their existence were proved or even admitted it would not affect the rules of the law to be applied in determining the disposition of the case.”

### POINT 3

#### A

THE COURT ERRED IN MAKING ITS FINDING  
OF FACT NUMBER 8 WHEREIN IT FOUND “THAT  
EXCEPT AS ABOVE EXCEPTED ALL OF THE ALLE-

GATIONS OF COUNTERCLAIM ARE TRUE AND CORRECT AND THOSE CONTAINED IN THE COMPLAINT INCORRECT.”

B

THE COURT FURTHER ERRED IN MAKING ITS CONCLUSION OF LAW NUMBER 1 WHEREIN IT STATED THAT THE DEFENDANT IS ENTITLED TO A RESCISSION OF THE CONTRACT ON THE GROUNDS THAT THE PREMISES WERE MATERIALLY MISREPRESENTED TO HER, FOR THE REASON AND ON THE GROUND THAT THE CONTRACT RELIED UPON BY THE DEFENDANT HAD BEEN PREVIOUSLY TERMINATED AS ALLEGED IN PLAINTIFFS’ COMPLAINT (Tr. 1) AND ADMITTED IN DEFENDANT’S COUNTERCLAIM (Tr. 7)

The complaint of the plaintiffs alleges as follows (Tr. 1):

“5. That upon the continuing default of the defendant, pursuant to the terms of said Escrow Agreement, plaintiffs caused notice to be served upon defendant on the 12th day of March, 1959, of the forfeiture and termination of said Escrow Agreement, and requested in said notice that defendant forthwith vacate said premises.”

The answer of the defendant to this allegation was a denial of any continuing default on the part of defendant, and an admission of the balance of the said Paragraph 5 (Tr. 7).

Thus respondent has actually admitted the forfeiture of the Escrow Agreement between the parties.

That the forfeiture of the Escrow agreement was properly carried out both with regard to the provisions of the Escrow Agreement and the Laws of the State of Utah, (Forcible Entry and Detainer, Title 78, Chapter 36, Utah Code Annotated, 1953) will appear from the Notices which were served upon the respondent and the escrow agent (Tr. 5, 6).

Respondent has denied in her answer (Tr. 7) a continuing default, and has also stated in her answer, as a part of her further defense, that she immediately discontinued all payment under the agreement immediately after discovering that the home had never been connected to the City sewer line, thus inferring that she ceased making payments on the Escrow Agreement because of the sewer trouble. The evidence contradicts this inference. In the first place, she was behind two payments when she made her last payment, and secondly, respondent, in her own exhibit (Def. Ex. 6) states as follows:

“This month I will start reducing the balance due on the contract by monthly payments but the home is to be sold as soon as possible.”

The necessary conclusion, then, is that the Escrow Agreement having been legally and completely forfeited by appellants because of the default of the respondent, there was no existing contract for the Court to rescind, as it purported to do in its said Conclusion of Law Number 1; that is was, therefore, further error for the Court to conclude, as it did in its conclusion of Law Number 3, that the respondent could be restored to her former position, and for the Court to enter its Judgment and Decree declaring the contract to be null and void.

The Minnesota case of *West vs. Walker*, (1930), 231 N. W. 826, 74 A. L. R. 165, though dealing with a fact situation distinct from that of the present case, arrives at a legal conclusion directly in point. The plaintiff there had been induced to enter into a contract for the purchase of a building and lot. He became delinquent in his payments, whereupon defendant, complying strictly with the laws pertaining to forfeiture, cancelled the contract. The plaintiff then brought action for damages, claiming fraud. The Court held:

“We think the instant case is not distinguishable from *Olson v. Northern Pac. Ry. Co.* 126 Minn. 229, 148 N. W. 67, L. R. A. 1915F, 962, where it was held that a right of action for damages for fraudulent representations inducing the purchase of land upon executory contract does not survive the cancellation of the contract. . . . When the cancellation is completed, there remains to neither vendee nor vendor any cause of action against the other growing out of the land transaction, except that the vendee might sue for money had and received. . . .”

Thus the decision in the cited case would go beyond the argument urged by appellants that a completed forfeiture of a contract terminates the contract, leaving no valid agreement in existence to be rescinded, and holds that not only would the contract be terminated by the forfeiture, but that a plaintiff would also lose his remedy at law for damages suffered because of any misrepresentations that may have been made in obtaining the contract.

## CONCLUSION

In conclusion, appellants respectfully request the Court to reverse the decision of the Honorable Lewis Jones

rescinding the contract between the parties hereto and placing the respondent in status quo by awarding to her all sums paid under the Escrow Agreement, less a reasonable rental, and the value of improvements placed upon the premises by her, for the reasons and upon the grounds: that even though the sewer listing was a misrepresentation, respondent did not, by her actions, nor according to her testimony, consider it material; that whether the home was or was not connected to the sewer line did not animate and control the conduct of the parties, nor determine the fact of contracting, and was therefore not material; that the parties had signed a preliminary contract for sale which did not require appellants to deliver a home connected to the sewer, which contract contained the entire agreement between the parties, and which could not be altered by outside statements; that inasmuch as the Escrow Agreement had been forfeited by proper procedure, there was no existing agreement for the District Trial Court to declare rescinded by respondent; that the evidence is clear that respondent elected to recover her damages rather than avoid the agreement, until the time of filing her counterclaim, and by her actions waived what right she may have had to rescind the contract; and for the further reason that the sums awarded respondent for her equity in the property and for the value of the improvements placed thereon by her cannot be justified by the record.

Respectfully submitted,

Sherma Hansen.