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

New Jersey Court of Errors and Appeals

ABRAHAM EISLER and ESTHER EISLER,
Appellants,

vs.

SOLOMON M. HALPERIN and RACHAEL HALPERIN,
Respondents.

On Appeal from Supreme Court.

Brief for Appellants.

The Action.

This is an action brought by the appellants, to recover from the respondents, two hundred dollars, which sum they paid unto the respondents on December 19th, 1911, on account of the purchase price for certain lands and premises, situate in the City of Newark, and which property the respondents agreed to convey to the appellants (see agreement, Ex. P. 1, case pp. 12-14), **by warranty deed, free and clear of and from all encumbrances, on or before the fifteenth day of February, nineteen hundred and twelve.** The agreement further stipulated that possession of the property would be delivered to the purchasers on the last mentioned date.

The appellants base their right to a recovery on the ground that at the time agreed upon for the passing of title, the respondents were not seized of an estate in fee simple in the said land and premises, and were unable, at the time aforesaid, to convey a good title thereto, pursuant to

the terms of said agreement. (See demand, case pp. 1-3.)

At the trial the case took a wider range, in that it was proved, and the Court so found, that possession of the property could not be delivered to the appellants on the day agreed upon. (See case p. 9, l. 31-34.)

The Trial Court's Findings.

As to the facts, the Court of first instance, trying the case without a jury, found that:

a. The parties entered into the agreement, Exhibit P. 1 (see case pp. 12-14).

b. On the fourteenth day of February, nineteen hundred and twelve, they met in the office of Emanuel Lowenstein, a lawyer, for the purpose of passing title. At this meeting, one, Blacher, was present.

c. At this meeting, upon inquiry, the defendant, Solomon Halperin, admitted to the plaintiffs that he held the title to the property in trust for said Blacher, a married man, whose wife was then in Europe, and who, jointly with his wife, owned the property until May twenty-sixth, nineteen hundred and eleven, when they conveyed it to Halperin. Blacher made the same admission. Lowenstein, who was retained by the plaintiffs to examine and pass upon the title, advised the plaintiffs that Mrs. Blacher, under the law of this state, had an inchoate right of dower in the land in question, and that unless this right was released, it would be unsafe for them to accept a deed thereto.

d. Later, the defendant, Solomon Halperin, admitted to Lowenstein that he had loaned some money to Blacher, and that he held the property as security for the loan.

e. The said Blacher was in possession of the property, and refused to vacate immediately, or to definitely fix any time when he would remove therefrom.

f. That before or at the time of making the agreement, the defendants were informed by the plaintiffs that they desired to take actual possession of the property, upon closing of title, and to occupy the same for their own use, and that they were obliged to move from the place they then occupied.

For all of the foregoing reasons, **and immediately upon discovering them,** the plaintiffs, on the fourteenth of February, nineteen hundred and twelve, and on the twenty-sixth of February, nineteen hundred and twelve, rescinded the contract and demanded a return of the deposit.

I. The trial court rendered judgment for the amount demanded in favor of the plaintiffs, which was appealed to the Supreme Court. The case was argued before Justices Garrison, Trenchard and Minturn, and that Court for the reasons stated in the opinion of Justice Minturn reported in 85 N. J. L. 139, reversed the judgment of the District Court, holding the following proposition:

> "Where the record title to real estate is otherwise clear the vendee in a contract of sale cannot legally reject the title upon the ground of an alleged oral declaration of trust by one of the vendors, since such a declaration if made is invalid under the Statute of Frauds."

This appeal is taken to test the accuracy of this decision.

Plaintiff's Right to Recover.

I.

To enable the plaintiffs to recover in this action, they were bound to establish that they had the right to rescind. This right accrued to them only in the event that the vendors could not convey to them such a title as in law they were entitled to receive. The right to recover in this action also accrued to them if the vendors were unable to perform any material part of the contract.

We contend that in both respects the plaintiffs established their right to a recovery in this action: for as much as the defendants were not alone unable to convey a title such as the plaintiffs had, in law, a right to demand of them, but were also unable to deliver possession of the property.

> "A breach by the vendor of material provisions of the contract entitles the purchaser to rescind." 39 Cyc. p. 1404, b.

This brings us to a consideration of the first question, to wit:

Under an agreement to convey by warranty deed free and clear of encumbrances, what title is the vendor bound in law to convey to his vendee?

The law is well stated in 39 Cyc. 1406 IV.:

> "In every executory contract for the sale of land, in the absence of agreement to the contrary, there is an implied condition that the title of the vendor is good and marketable, and that he will transfer to the purchaser, by his deed of conveyance, a title unencumbered and without defect. The right of a purchaser to a good title is a right not merely growing out of the agreement between the parties, but is given by the law."

And on page 1429, Vol. 30, the same authority states:

"The purchaser, in rescinding for a defect in the vendor's title, must act promptly on discovering the defect, or his right to rescind for that reason will be waived."

With this condition the plaintiffs have complied.

See *Crim* vs. *Umbsen,* 155 Cal. 607, 103 Pac. Rep. 178.

Easton vs. *Montgomery,* 90 Cal. 307.

Dwight vs. *Cutler,* 3 Mich. 566.

S. C., 64 Am. Dec. 105.

Burwell vs. *Jackson,* 9 N. Y. 418.

In the case of *Crim* v. *Umbsen, supra,* the vendor's title was not deducible, because of the destruction of the public records, caused by the great San Francisco fire of 1906, and no title deeds, it seems, were produced by him. The vendee rescinded and brought an action to recover the deposit.

The opinion of the Court bears out the text, cited above from Cyc. on page 179 of 103 Pac. R.

The case of *Easton* v. *Montgomery,* 90 Cal. 307, 27 Pac. Rep. 280, 25 Am. St. Rep. 123, also supports the text.

The same rule is laid down in 1 *Sugden on Vendors,* 24.

And in our own state this question has received thorough consideration both at law and in equity.

Johnson v. *Smock,* Coxe 106.

Conover v. *Tindall,* Spencer 513.

Affirmed in 1 Zab. 651 (E. & A.).

Lounsberry v. *Locander,* 10 C. E. Gr. 554 (E. & A.).

Beardslee ads. Underhill, 8 Vroom, 310.

Keim v. *Lindlay* (Ch. Ct.) 30 At. Rep. 1063, *aff.* 54 N. J. E. 418.

In the case of *Johnson* v. *Smock, supra,* the Supreme Court held that the true construction of a covenant to convey free from incumbrance, is to make a good title.

In the case of *Conover* v. *Tindall, supra,* it was held that, **in an agreement to sell and convey land, containing a covenant to make and deliver a "good and sufficient deed, with covenants of warranty," the existence of an outstanding right of dower, at the time fixed for delivering the deed, is a valid objection to the title, which will discharge the vendee from the contract.**

The decision was affirmed by the Court of Errors and Appeals in 1 Zab. 651.

The case of *Beardslee* v. *Underhill, supra,* was an action for breach of contract to accept a conveyance. On page 310, the Court says: **"If the title was good in law or rather if it was what the law holds to be merchantable title, the defendant was bound to be satisfied."** And on page 311—"As the case stood at the trial, **the plaintiff's title appeared imperfect,** because of **Mrs. Lorillard's inchoate right of dower** * * * upon the evidence advanced, **it clearly appeared that his title could not have been satisfactory, and he should have been non-suited, or verdict rendered for the defendant."**

In the case of *Lounsberry* v. *Locander, supra,* Judge Depue, speaking for the Court of Errors and Appeals, lays down the following law (page 556):

"In every contract for the sale of lands, an agreement is implied to make good title, unless that liability is expressly included. The estate which the purchaser bargained for, whether in fee simple, or for a lesser interest, will be ascertained from the terms of the agreement, or if the agreement be silent in that respect, from the circumstances attending the transaction. For such estate,

whatever it be, the purchaser has a right to a good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give. This right does not grow out of the agreement between the parties, but is given by law, and the purchaser may insist upon it, not because it is stipulated for in the agreement, but on the general right of a purchaser to require it. The vendor will not, either at law or in equity, be deemed to have complied with his contract, by tendering a conveyance in legal form with such covenants (if any) as were stipulated for in the agreement, if, in fact, he has not the title he contracted to sell." And later, on page 557, he says: **"As a general rule, an agreement to convey means a conveyanec in fee."**

See also *Zimmerman* v. *Branyan,* 62 N. J. L. 478.

Hofman v. *Hammer,* 18 N. J. E. 83.

II.

Now, what was the trouble with the title of the defendants?

Halperin made two admissions in reference thereto, to wit:

FIRST. That he held the title in trust for Blacher.

SECOND. That he held the title as security for a debt.

Now, as to the first admission, the title was bad, because Blacher was a married man, and his wife had an inchoate right of dower.

The first section of our Dower Act (Vol. 2 Comp. St. of N. J., p. 2043) provides as follows:

"That the widow, whether alien or not, of any person dying intestate or otherwise, shall

> be endowed, for the term of her natural life, of the one full and equal third part of all the lands, tenements and other real estate, whereof her husband, or any other to his use, was seized of an estate of inheritance, at any time during the coverture, to which she shall not have relinquished or released her right of dower, etc."

This section was construed in the Court of Chancery, by Vice-Chancellor Emery, in the case of *Radley* v. *Radley,* 4 Robbins, 248. The facts of the case were that the complainant and her husband conveyed certain property to Acken to hold the same in trust for the husband. The learned Vice-Chancellor held that by joining in the deed the widow did not release her dower, and that she was entitled to an admeasurement of it.

See also *Cushing* v. *Cushing,* 30 N. J. E. 689.
Young v. *Young,* 45 N. J. E. 27.

So in the case at bar, Mrs. Blacher had an inchoate right of dower in her husband's equitable estate in the property in question. Therefore, under the authority of *Beardslee ads. Underhill,* 8 Vroom, 310, and *Conover* v. *Tindall,* Spencer, 513, the title of Halperin was bad, and the plaintiffs had the right to rescind.

As to the second admission, Halperin had no title at all, because he held it as security, and although the property was conveyed to him by a deed absolute on its face, yet it was defeasible. It was an equitable mortgage, and the fee vested in Blacher.

III.

The Court found as a fact that immediate possession could not be delivered to the plaintiffs, and it goes without saying, that it is an elementary principle of law, that for this breach, the plaintiffs had the right to rescind.

Schinn v. *Roberts,* 20 N. J. L. 445.
Cranwell v. *Branyan,* 62 N. J. L. 478.
Griggs v. *Landis,* 1 N. J. E. 494.
39 Cyc. 1337.

IV.

On the plaintiffs' case, then, the judgment given by the District Court is correct and should not be disturbed.

V.

But the Supreme Court held that the admissions of Halperin as to the title, were illegally received in evidence; that the plaintiffs tried to establish the existence of a trust estate by methods prohibited by our statute.

Our answer to the foregoing contentions is threefold:

FIRST: The reasoning leading to the conclusion of the Supreme Court is fallacious.

SECOND: Admitting, for the sake of argument, that an express trust cannot be established by parol evidence, and that parol evidence cannot be received to vary, alter or change a deed, yet these propositions do not affect the questions dealt with in the case at bar.

In the first place, the plaintiffs had notice that Halperin either held the title in trust for Blacher, or as security for a debt. This notice was given

to them by the owner of the record title. Such admissions are properly receivable in evidence.

See Jones on Evidence, par. 241.
Gibblehouse v. *Strong,* 3 Rawle (Pa.) 437.
Horner v. *Stillwell,* 35 N. J. L. 307.
Outcalt v. *Ludlow,* 32 N. J. L. 239.
Robinson v. *Montjoy,* 7 N. J. L. 173.

In the case of *Gibblehouse* v. *Strong, supra,* the Court says: "The declarations of a person, while in the possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him."

What was decided in this case, is the identical proposition we contend for, to wit, **that the declarations of a person while holding the legal title to an estate, that he was merely a trustee for another, are admissible in evidence against those claiming under him.**

The rule as stated above prevails in this state. See *Homer* v. *Stillwell, supra.*

It is too narrow and inconclusive to say that the parol declaration of trust is invalid and so cannot be offered in evidence. The parol declaration of trust in real estate creates a valid express trust.

Smith v. *Howell,* 3 Stock. 349.
McVey v. *McVey,* 43 N. J. E. 47.
Jamison v. *Miller,* 12 C. E. Gr. 586.

The Statute of Frauds is merely a rule of evidence. The statute says a trust in real estate "shall be manifested and proved by some writing" and not that it shall be created in writing. The statute simply precludes the proof of the existence of the trust by parol but not the proof of its creation.

Newkirk v. *Place,* 47 N. J. E. 477.

The manifestation in writing of the trust may come at any subsequent period, even as late as ten years after the oral declaration, and will there-

upon create a valid trust enforceable against all but a bona fide purchaser without notice, and in behalf of all but one who is estopped from asserting his beneficial ownership.

Smith v. *Howell,* 11 N. J. E. 349.

The bearing of all this on the case in hand is obvious. There is an oral declaration of trust of which the plaintiff is cognizant. The vendor-trustee may at any time subsequent to the deed to the purchaser manifest the trust in writing and thus give the *cestui* a right against the purchaser. The *cestui* Blacher, may, it is true, have barred himself by estoppel by taking part in the sale but not so with the other *cestui,* Mrs. Blacher. She was a *cestui* to the extent of her dower. A woman who releases her dower for a certain purpose does not release it beyond the scope of that purpose.

Butler v. *Farry,* 68 N. J. E. 760.

When the purpose is fulfilled, unless the dower has been extinguished in the course thereof the dower revives. So here, the dower would revive against any but a bona fide purchaser without notice if the oral trust was subsequently manifested in writing. However not having been a party to, and having had no notice of the transactions involved in this case, she could in no way be precluded by them from asserting her dower right if the trust were subsequently manifested in writing. Such a possibility obviously makes the title offered the plaintiff uncertain and consequently unmarketable. The purchaser is entitled to be free from any such doubt as to the marketability of the title offered.

The appellants respectfully submit that such an oral declaration of trust constituting in the above described manner, so serious an infirmity in the title offered, gave them just and legal cause to reject the title so made uncertain by the aforesaid oral declaration of trust.

THIRD: The Supreme Court erred in deciding that the District Court erred in admitting testimony of declarations made by the defendants showing they held the record title to the property in question in trust for one Blacher.

Evidence inadmissible for one purpose may nevertheless be admissible for another.

Wigmore on Evidence, section 18.

In the case at hand, the plaintiffs admit the oral declarations were inadmissible to prove the existence of a trust. But that was not the purpose of the testimony. The testimony was offered to show an infirmity in the title offered resulting from such oral declarations. For this purpose the evidence was obviously admissible.

In *Smith* v. *Howell,* above, Chancellor Williamson says:

> "Suppose a judgment or some other lien is attached to the property in the interval between the execution of the deed and the declaration of trust, it would be necessary in order to defeat such a lien to show that the trust was bona fide created at the time of the execution of the deed. This may, however, be done by parol evidence, because the statute does not require that the trust shall be created but only manifested by writing."
>
> *Jamison* v. *Miller,* 12 C. E. Gr. 586.

It is the creation not the proof of this trust that constituted the defect of title complained of as described above in this brief, and this the evidence is calculated to prove, and for this purpose it is admissible.

VI.

Was the evidence that Halperin held the title as security for the repayment of a loan admissible?

We think it was, on the same authority above discussed.

It is true that at law parol evidence cannot be admitted to show that a deed absolute on its face, is in effect, a mortgage.

Jones on Mortgages, 6th Ed. par. 282.

But in equity parol evidence is admissible for such purpose.

Jones on Mortgages, 6th Ed. par. 282 *et seq.*
Sweet v. *Parker,* 22 N. J. E. 453, 457.
Crane v. *Bonnell,* 2 N. J. E. 264.

VII.

If then, the plaintiffs had notice that the deed was a mortgage, it follows that they knew that Mrs. Blacher had an inchoate right of dower in the property, which could be enforced in equity.

The title, therefore, was not good and merchantable, and the plaintiffs are entitled to a rescission.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

SAMUEL F. LEBER,
Of Counsel with Appellants.

New Jersey Court of Errors and Appeals

ABRAHAM EISLER, et al, *Appellants,* vs. SOLOMON M. HALPERIN, et al, *Respondents.*	*Action at Law.* *On Appeal to Supreme Court.*

BRIEF OF BENJAMIN M. WEINBERG FOR RESPONDENTS.

The appellants, plaintiffs below, brought suit in the Second District Court of the City of Newark to recover the sum of two hundred dollars, being the amount paid as a deposit on account of the purchase price of certain premises in the City of Newark, belonging to the said respondents, upon the theory that the defendants could not give good title to the same. Judgment was thereupon entered in favor of the said plaintiffs for the sum of two hundred dollars and costs, which judgment was appealed by the defendants, the respondents, to the Supreme Court, which court reversed the judgment of the District Court with costs. (See opinion, 85 N. J. L., p. 139.)

The plaintiffs thereupon appealed to this court and have given notice of argument at all the intervening terms thereof, but have as yet neither served their brief upon the respondents, nor filed the same with the court. Should a brief be filed hereafter, and the matter considered by the court, the respondents, for answer thereto, refer to and stand upon the opinion of the Supreme Court above referred to, deeming it unnecessary to submit further authorities on the subject.

It is therefore respectfully submitted that upon the merits of the case and also under Rule 35 of this court, the appeal should be dismissed with costs, and the judgment of the Supreme Court affirmed.

BENJAMIN M. WEINBERG,
Attorney of Respondents.

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EXHIBIT.

New Jersey Supreme Court

State of Demand

(Filed June 17, 1912.)

SECOND DISTRICT COURT OF THE CITY OF NEWARK

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants.	On Contract.

The plaintiffs demand of the defendants the sum of five hundred dollars due them as follows: For that on the nineteenth day of December, nineteen hundred and eleven, the defendants entered into a written agreement with the plaintiffs wherein and whereby the defendants agreed to sell and convey unto the plaintiffs certain lands and premises known and designated as Number 132 West Street, in the City of Newark, for a certain consideration therein agreed to be paid by the plaintiffs to the defendants; and for that the defendants agreed to convey the said lands and premises to the plaintiffs by deed of warranty free from all encumbrance; and whereas it was agreed that the title should be passed on the fifteenth day of February, nineteen hundred twelve; and for that the plaintiffs paid to the defendants on ac-

count of the purchase price the sum of two hundred dollars; and for that the plaintiffs were ready, able and willing to perform their part of the said agreement and to pay the purchase price upon the delivery to them of a warranty deed conveying the said title free and clear of and from all encumbrance; and for that the defendants were,, and still are, unable to convey a good title to the said lands and premises, pursuant to the terms of the said agreement; wherefore the plaintiffs became entitled to the return to them of the aforesaid deposit of two hundred dollars and of every reasonable expense incurred in and about the examining of the title to the said lands and premises; yet the said defendants have refused and still refuse to pay the said several sums of money unto the plaintiffs, although often requested so to do, wherefore the plaintiffs bring this suit.

Judgment will be demanded for the sum of two hundred dollars, together with interest and costs of suit.

LOWY, LOWENSTEIN & LEBER
Attorneys for Plaintiffs.

Amendment to State of Demand

SECOND DISTRICT COURT OF THE CITY OF NEWARK

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants.	On Contract

The state of demand filed in the above entitled cause is amended as follows:

The clause reading as follows, "and for that the defendants were and still are, unable to convey a good title to the said land and premises, pursuant to the terms of said agreement" contained in lines 19, 20, 21 and 22 on the first page of said state of demand, is stricken therefrom, and the following inserted instead "and for that the defendants were not, at the time agreed upon for the passing of title, seized of an estate in fee simple in land and premises and were consequently unable at the time aforesaid to convey a good title to the said lands and premises, pursuant to the terms of said agreement."

LOWY, LOWENSTEIN & LEBER,
Attorney for Plaintiffs.

Summons

(Filed)

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants.	On Contract

Plaintiff's Costs:

Summons	$ 2.50
Listing fee	1.50
Attorneys fee	10.00
Total costs	14.00

LOWY, LOWENSTEIN & LEBER,
Plaintiff's Attorneys.

Summons

A summons in the above stated cause was issued on the seventeenth day of June, 1912, returnable on the twenty-fourth day of June, 1912, wherein the plaintiffs demand of the defendants the sum of five hundred dollars.

The plaintiffs filed a state of demand June 17, 1912.

The summons was served and returned as follows: "I served the within summons June 17, 1912, on the defendants by reading it to them and giving them a copy therof.

Ph. Newmark, Constable."

1912.

June 24. This cause was adjourned by the plaintiff to July 17, and from time to time thereafter until September 16, when plaintiffs not appearing the cause was marked "Not Moved."

Oct. 4. Notice to list cause October 7th, filed.

Oct. 7. This cause adjourned by plaintiffs to Oct. 14.

Oct. 14. This cause adjourned by plaintiffs to Oct. 18th.

Oct. 18. The plaintiffs and defendants appeared and this cause was partly tried at this time.

Emanuel Lowenstein, Alfred Popik and Esther Eisler were sworn on behalf of the plaintiffs.

Charles Elin and Harry Blacher were sworn on behalf of the defendants and trial adjourned to October 21, 1912.

Oct. 21. Trial resumed.

Simon Hahn agreed to act as interpreter.

Samuel Halperin was sworn on behalf of the defendants.

Abraham Eisler was sworn on behalf of plaintiffs.

The evidence being closed the Court rendered

judgment in favor of the plaintiffs and against the defendants in the sum of two hundred dollars damages with costs, whereupon judgment is entered in favor of the plaintiffs and against the defendants in the sum of two hundred dollars damagees with costs.

1912.

Oct. 22. Statement for docketing judgment in th Court of Common Pleas issued.

Oct. 31. Defendants filed Notice of Appeal and Bond.

Certificate

SECOND DISTRICT COURT OF THE CITY OF NEWARK

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants.	On Appeal

I, John H. O'Connor, Clerk of the above Court do hereby certify that attached hereto are true copies of the summons and state of demand filed in the above cause in said court and the foregoing is a true transcript of the record and proceedings had therein.

(L. S.) JOHN H. O'CONNOR, Clerk,
Second District Court of the City of Newark.

State of the Case

(Filed December 31, 1912)

SECOND DISTRICT COURT OF THE CITY OF NEWARK

SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants and Appellants and ABRAHAM EISLER and ESTHER EISLER, Plaintiffs and Appellees.	On appeal

The parties to this action being unable to agree and their attorneys having applied to me to settle the case on appeal, I, Thomas J. Lintott, Judge of the Second District Court of the City of Newark settle the case as follows:

This suit was brought to recover the sum of two hundred dollars deposited by plaintiffs with defendants on account of the purchase of lands described in the agreement for sale, marked Exhibit P-1. It was tried before the Court without a jury on October 18th and October 21st, 1912, and resulted in a judgment on the latter date in favor of the plaintiffs and against the defendants for two hundred dollars.

It was admitted that the lands in question were conveyed by Harry Blacher and wife to the said Solomon M. Halperin by warranty deed dated May 26th, 1911, purporting to convey an estate in fee simple which deed was recorded in the Register's office of Essex County, July 5th, 1911; that the agreement for sale above mentioned, was duly executed and delivered and that plaintiffs paid the sum of two hundred dollars on account of the purchase money therein mentioned.

State of the Case

It was established on the part of the plaintiffs that the parties met at the office of Emanuel Lowenstein, one of the attorneys of the plaintiffs on February 14th, 1912, for the purpose of passing title, and that the said Harry Blacher was also present at that time. The deed of conveyance from said defendants to plaintiffs had been prepared by the said attorney and was then executed by defendants; and the other papers mentioned in said agreement for sale were also prepared. Upon inquiry of the defendant Solomon M. Halperin, both he and Blacher admitted that the said Halperin was holding title to the premises described in the agreement in trust for the said Blacher and his wife. The plaintiff's said attorney then claimed that Blacher's wife had a right of dower in the lands and it would be necessary for her to release the same. It being disclosed that the said wife was then in Europe and that it would be several weeks before such a release could be obtained plaintiffs refused to take title and demanded the return of their deposit and costs of search, etc. It also appeared that before, or at the time the agreement for sale was executed, the plaintiffs had informed defendants that they desired to take actual possession of the property upon closing of title, and to occupy the same for their own use, and that they were obliged to move from the place they then occupied. Blacher and wife were on February 14th in possession of the premises and refused to vacate immediately, or to definitely fix any time when they would remove therefrom. On that ground also plaintiffs refused to accept the title.

Mr. Lowenstein testified that shortly after February 14th, 1912 the said Solomon M. Halperin called upon him again. Thereupon Mr. Lowenstein was asked what Halperin told him at that time.

Defendant's attorney objected to his answering on the ground that he, (Lowenstein) was Halperin's attorney, and the conversation, if any, was privileged. Mr. Lowenstein then testified that the only service he had performed for Halperin was the drawing of the deed mentioned, that he had not been engaged by Halperin to draw that deed but had prepared it without any express instructions. The objection to the question was then overruled and an exception allowed. Mr. Lowenstien answered that Halperin had told him that Blacher owed Halperin a sum of money, that he had taken title to the premises in question from Blacher as security, and that he was to return the surplus, after the payment of the amount due him, to Mr. Blacher. On February 26, 1912, Messrs. Lowy, Lowenstein & Leber, as attorneys for the plaintiffs wrote, and defendant Halperin received, a letter, marked in evidence on the part of the plaintiffs, as Exhibit P-3. No deed for the premises was tendered to plaintiffs after the 14th of February, 1912. The agreement for sale was never consummated and no part of the said deposit of two hundred dollars was ever returned.

Defendant then moved for nonsuit on the grounds:

1. That Halperin was dealt with as the agent of Blacher and received the deposit as such.

2. That plaintiffs were not justified in rejecting the title, there being no evidence that Mrs. Blacher had any claim or interest in the lands, she having joined her husband in the conveyance to Halperin.

This motion was denied and exception allowed.

Witnesses were sworn on behalf of the defendant and it appeared that the deed from Blacher and wife to marked Exhibit D-1 had been offered to plaintiffs' attorneys at the meeting February 14th, and that the

same was rejected as not making title. It further appeared that Blacher cabled for his wife to return and that she did return to this country some time in the month of May, 1912, and that thereafter there were some conversations as to her executing a release of dower, but no deed from Blacher and no such release of dower was ever executed or tendered to plaintiffs or their attorneys.

The case being closed the defendants' attorney moved that all evidence as to the trusteeship be stricken from the records because it contravened the Statute of Frauds.

This motion was denied and exception allowed.

Defendant thereupon moved for judgment on the grounds:

1. That the District Court has no jurisdiction to try title to lands.

2. That the inchoate dower right of Blacher's wife was extinguished by the deed to Halperin and that after the delivery of the deed by Halperin to plaintiffs she would have no further interest in the premises.

3. That time was not of the essence of the contract and that the defendants offered to procure and deliver a deed to plaintiffs after Mrs. Blacher returned.

The Court found that the title was a doubtful one as offered. That a perfect title was not offered in a reasonable time and that defendants were unable to deliver immediate possession upon passing of title.

Wherefore there was judgment for the plaintiffs against the defendants as aforesaid.

THOMAS J. LINTOTT,
Judge.

Filed December 31st, 1912, by consent.

Notice of Appeal

(Filed October 31, 1912)

SECOND DISTRICT COURT OF THE CITY OF NEWARK

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants.	On Contract

To:

Lowy, Lowenstein & Leber,
Attorneys of Abraham Eisler and Esther Eisler:

Sirs:

Take notice that the defendants Solomon M. Halperin and Rachael Halperin, hereby appeals to the New Jersey Supreme Court from the judgment of the second District Court rendered in the above stated action on the twenty-first day of October, nineteen hundred and twelve.

BENJAMIN M. WEINBERG,
Attorney for Defendants.

Reasons on Appeal

(Filed December 31, 1912)

NEW JERSEY SUPREME COURT

ABRAHAM EISLER and ESTHER EISLER, Plaintiffs and Appellees, vs. SOLMON M. HALPERIN and RACHAEL HALPERIN, Defendants and Appellants.	On Contract

Solomon M. Halperin and Rachael Halperin, the defendants, in the above stated cause, hereby specify the following determinations or directions of the Second District Court of the City of Newark with respect to which they are dissatisfied in point of law.

Emanuel Lowenstein to state a conversation had with the defendant Solomon M. Halperin, over the objection of the said defendants.

2. The Court erred in refusing to comply with the defendants' motion to strike from the record all parol evidence as to the trusteeship of the defendant Solomon M. Halperin.

3. The Court erred in denying defendants' motion for judgment for defendants on the following grounds:

(*a*) That title to lands was involved in this case and that the District Court therefore had no jurisdiction over the matter.

(*b*) That the inchoate right of dower of the wife of Harry Blacher was extinguished by the deed from said Blacher and wife to the defendant Solomon M. Halperin, and that after the delivery of

the deed by the defendants, Solomon M. Halperin and wife to the above named plaintiffs, the said Blacher's wife would have no further interest in the premises and that therefore a good title was tendered the said plaintiffs.

(*c*) That time was not of the essence of the contract and that the defendants offered to procure and deliver a deed to plaintiffs after Mrs. Blacher returned from a sojourn in Europe, which was not an unreasonable time to wait.

Respectfully submitted,
BENJAMIN M. WEINBERG,
Attorney for Defendants and Appellants.

Filed December 31, 1912, by consent.

Exhibit P-I

ARTICLES OF AGREEMENT, made the nineteenth day of December in the year of our Lord one thousand Nine hundred and eleven BETWEEN

Solomon M. Halperin and Rachael Halperin, his wife, of the City of Newark in the County of Essex and State of New Jersey of the first part; AND

Abraham Eisler and Esther Eisler, his wife of the City of Newark in the County of Essex and State of New Jersey of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of five thousand three hundred and twenty-five dollars ($5,325) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made

and entered into by the said party of the second part, doth agree to and with the said party of the second part, that, they the said party of the first part will well and sufficiently convey to the said party of the second part, their heirs and assigns, by deed of Warranty free from all encumbrance all City taxes, water rents, rents and Fire Insurance to be apportioned on day of passing title, on or before the fifteenth (15) day of February next ensuing the date hereof, all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark the county of Essex and State of New Jersey. Said property being known and designated as #132 West street in the said City. Lot being 25 x 100 more or less. And the said Abraham Eisler & utx, for themselves their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of five thousand three hundred and twenty-five dollars ($5,325) as for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

($200) Two hundred dollars by check upon signing this agreement for which receipt is hereby acknowledged.

$600 Six hundred dollars by a second mortgage for 2 years with 6% interest and the remaining balance in cash on day of passing title.

And it is further agreed, by the parties to these presents that the said party of the second part, their heirs and assigns, may enter into and upon

the said land and premises on the 15th day of February next ensuing the date hereof and from thence take the rents, issues and profits to their and their use.

And it is further agreed, by the parties, that the said Deed shall be delivered and received at between the hours of 10 in the forenoon and 5 o'clock in the afternoon on the said 15th day of February next ensuing the date hereof.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

(signed) SOLOMON M. HALPERIN (L. S.)
RACHAEL HALPERIN "
In Hebrew.
his
ABRAHAM X EISLER "
mark
ESTER EISLER "

Signed, Sealed and Delivered
in the presence of
Alfred Popik
Harry Blacher.

Opinion of Supreme Court.

Filed November 5th, 1913.

New Jersey Supreme Court.

EILSER, *et al.*, *vs.* HALPERN, *et al.*	*Appeal from District Court of Newark.*

MINTURN, *J.*

The parties to this suit agreed, one to convey, and the other to take, title to certain premises in the City of Newark, and upon the execution of the agreement the vendee paid to the vendor the sum of $200 on account of the purchase price. When pursuant to the terms of the agreement, the parties met to pass the title, it was insisted that the defendants held the title for one Blacher and wife, who at that time were in Europe, and the attorney for the vendee insisted that Blacher's wife possessed a right of dower in the property which would require her release, and since she could not execute the release within the time required, a demand was then and there made for the $200 deposit, which, being refused, this suit was instituted to recover. The district court awarded judgment in favor of the plaintiff upon the ground that the title being doubtful, the vendees were not obliged to accept it.

The main question before us, therefore, is, was the title doubtful? The testimony shows that the record title was undeniably in the defendants, that Blacher was indebted to Halpern, one of the defendants, for

a sum of money, and that the latter had taken title to the property in question as security for the payment of the indebtedness, both Blacher and his wife having executed the conveyance, which was offered and admitted in evidence, thus vesting the title in the defendants free of any trust. The only trust put in evidence was one of an oral character. Lowenstein, an agent of the defendants, testified to a conversation he had with Halpern, one of the defendants, in which the latter admitted that he took title to the property from Blacher in the manner referred to, with the understanding that any surplus which might be in his hands after a sale of the premises above the indebtedness to Halpern should be returned to Blacher. It was the existence of this alleged oral trust which led to the plaintiffs' refusal to accept title. Quite manifestly such a condition did not constitute a legal objection to the title. As a declaration of trust it was absolutely void under the statute of frauds (2 Comp. Stat. 1910, p. 2611); and the testimony concerning it was, under the circumstances, irrelevant and immaterial. Without the introduction of this testimony, the defendants, so far as the record title was concerned, occupied the status of owners in fee, under a valid deed of conveyance from Blacher and wife. Mrs. Blacher had parted with her dower interest by executing jointly with her husband the conveyances to the defendants, and the rule is a familiar one that purchasers may lawfully assume that the title disclosed on the record is complete, in the absence of notice that the records are defective. *Roll* vs. *Rea*, 50 N. J. Law, 264; 12 Atl., 905.

The only other question involved in the controversy is whether the district court had jurisdiction to try the question of title thus presented. That question was determined by this court affirmatively in *Tapscott* vs. *McVey*, 82 N. J. Law, 35; 81 Atl., 348.

The judgement will be reversed with costs.

Judgment on Reversal.

Filed November 14th, 1913.

NEW JERSEY SUPREME COURT.

ABRAHAM EISLER and ESTHER EISLER,
Plaintiffs-Appellees,
vs.
SOLOMON M. HALPERIN,
Defendant-Appellant.

On Appeal.
Reversal.

This cause having been argued at the June term of this court on the reasons filed for a reversal of the judgment below, and the court having duly considered the same, and being of opinion that there is error in the judgment and proceedings of the court below, and that the said judgment should be reversed;

It is hereby ORDERED that the said judgment of the court below be, and hereby is, in all things, reversed, set aside and for nothing holden, with costs to be taxed.

Entered Nov. 14, 1913.
On motion of

BENJAMIN M. WEINBERG,
Attorney for Defendant-Appellant.

Notice of Appeal.

Filed December 3d, 1913.

NEW JERSEY SUPREME COURT.

ABRAHAM EISLER, *et al.*, *Plaintiffs,* *vs.* SOLOMON M. HALPERIN, *et al.*, *Defendants.*	*On Appeal. Notice.*

TAKE NOTICE that the plaintiffs' appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause, by our Supreme Court, on the following grounds:

1. The court erred in reversing the judgment of the district court.

2. The court erred in holding that where the record title to real estate is otherwise clear, the vendee in a contract to sell cannot legally reject the title upon the ground of an alleged oral declaration of trust by one of the vendors, since such a declaration, if made, is invalid under the Statute of Frauds.

3. The court erred in deciding that the district court erroneously admitted testimony of declarations made by the defendants, showing that they held the record title to the property in question in trust for one, Blacher.

4. The court erred in holding that the defendants had a title free from doubt, which the plaintiffs were bound to accept.

5. The court erred in holding that the plaintiffs had no legal right of objection to the title of the defendants in the land in question.

LOWY, LOWENSTEIN & LEBER,
Attorneys for Appellants.

TO BENJAMIN M. WEINBERG,
Attorney of Defendants.