INDEX

by a subsequent oral agreement,—that is an agreement merely by word of mouth,—between the parties."

Dated—December 30th, 1919.

BENJAMIN E. GORDON,
Attorney of Defendant-Appellant.

JOHN W. OCKFORD,
Of Counsel.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 30th day of December, 1919.

ISADOR HABER,
Attorney of Plffs.-Resp.

Complaint

HUDSON COUNTY.

ADOLPH GANZ & HENRIETTA GANZ, Plaintiffs, *vs.* SAMUEL ELFENBEIN, Defendant.	Action at Law Complaint.

The plaintiffs, residing at 37 Lincoln Street, in the City of Jersey City, Hudson County, New Jersey, say that:

FIRST COUNT:

1. On May 12th, 1919 they entered into a written contract with the defendant whereby they agreed to purchase from him the premises at 38 Sherman Place, Jersey City, N. J. for the sum of $11,000 and gave the defendant as part of the consideration of the said agreement and as a deposit on account of the purchase price the sum of $1,000.

2. On June 2d, 1919 the defendant rescinded the said agreement of sale and gave the plaintiff Adolph Ganz his the defendant's check for the sum of $1,000 as a return of the deposit aforesaid which rescission was acceptable to and accepted by the plaintiffs.

3. The defendant has stopped payment on the check aforesaid and refuses to pay the deposit hereinbefore mentioned, although the plaintiffs demanded the same from him.

SECOND COUNT:

1. On June 2d, 1919 the defendant made and delivered to the plaintiff, Adolph Ganz, his check in writing, dated on that day and directed to the

Irving National Bank of New York City and thereby required said bank to pay to the plaintiff or his order $1,000.

2. The same was duly presented by the plaintiff, Adolph Ganz, to the said bank for payment but payment thereon was stopped by the defendant.

3. Said check is still the property of the plaintiff, Adolph Ganz, and has not been paid.

4. The plaintiffs demand as damages $1,000 together with interest from May 12th, 1919, or in the alternative the plaintiff, Adolph Ganz, demands as damages $1,000 with interest from June 2d, 1919.

ISADOR HABER,
Attorney for Plaintiffs.

Answer

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

ADOLPH GANZ and HENRIETTA GANZ, Plaintiffs, *vs.* SAMUEL ELFENBEIN, Defendant.	Amended and Supplemental Answer.

The defendant Samuel Elfenbein, by leave of the Court first obtained, files this amended and supplemental answer and says that:

1. He admits paragraph one of the first count.

2. He denies paragraph two of the first count except he admits that he gave a check for $1000.00 to Adolph Ganz on or about June 2nd, 1919.

3. He denies the third paragraph of the first count except he admits that payment of the said check was stopped.

4. He admits paragraph one of the second count.

5. He denies having sufficient knowledge to form a belief as to paragraph two of the second count except he admits that payment of the check was stopped.

6. He denies paragraph three of the second count except as to the allegation of non-payment of the check which is admitted.

FIRST SEPARATE DEFENSE TO FIRST COUNT:

7. The check given was without consideration.

SECOND SEPARATE DEFENSE TO FIRST COUNT:

8. The alleged agreement of rescission was not in writing and was therefore void by reason of the Statute of Frauds, 2 N. J. Comp. St. 2609 &c.

THIRD SEPARATE DEFENSE TO FIRST COUNT:

9. The plaintiff, Henrietta Ganz, did not agree to nor was she a party to the alleged agreement of rescission and such agreement was therefore not binding upon any of the parties.

FOURTH SEPARATE DEFENSE TO FIRST COUNT:

10. The plaintiffs refused to perform the agreement of sale in that they refused to accept delivery of a deed and pay the purchase price.

FIRST SEPARATE DEFENSE TO SECOND COUNT:

11. The check given was without consideration.

SECOND SEPARATE DEFENSE TO SECOND COUNT:

12. The plaintiff, Adolph Ganz, had no authority to accept a valid delivery of said check for the account of the plaintiff, Henrietta Ganz, and there was therefore no valid acceptance of the check as would charge the defendant with any legal liability thereupon as maker, drawer or otherwise.

COUNTERCLAIM:

This defendant by way of counterclaim against plaintiffs, says:

1. On May 12th, 1919, defendant and plaintiffs entered into a written agreement under seal for the sale and purchase of certain real property known by the street number 38 Sherman Place, Jersey City, N. J., which was then the property of defendant, and for which plaintiffs agreed to pay $11,000.00.

2. On June 2nd, 1919, and at other subsequent times defendant duly tendered to plaintiffs a full covenant and warranty deed to said premises in accordance with the terms of the agreement.

3. Plaintiffs without legal cause refused to accept a delivery of the deed and pay the purchase price therefor.

4. Thereafter defendant made every effort to dispose of said property at the best price obtainable and did sell the same for $10,000.00.

5. Said sum of $10,000.00 was in excess of the fair market value of the property at the time and place which had been agreed upon for the delivery of the deed by defendant to plaintiffs.

6. Defendant was obliged to pay out the sum of $275.00 to one Isador Haber as and for a broker's commission for the sale of the property by defendant to plaintiffs.

7. Defendant suffered damage in the sum of $2,000.00.

8. Defendant counterclaims the sum of $2,000.00 damages against plaintiffs.

BENJAMIN E. GORDON,
Defendant's Attorney.

Service acknowledged Oct. 11th, 1919, with consent to filing same as of time without prejudice.

ISADOR HABER,
Atty. of Plaintiffs.

Reply to Amended and Supplemental Answer.

NEW JERSEY SUPREME COURT,

ADOLPH GANZ and HENRIETTA GANZ,
Plaintiffs,

vs.

SAMUEL ELFENBEIN,
Defendant.

The plaintiffs, residing at 37 Lincoln Street, Jersey City, N. J., replying to the amended and supplemental answer of the defendant, say that:

1. They deny paragraph seven.
2. They deny paragraph nine.
3. They deny paragraph ten.
4. They deny paragraph eleven.
5. They deny paragraph twelve.

The plaintiffs by way of answer to the Counterclaim of the defendant, say that:

1. They admit paragraph one of the Counterclaim.
2. They deny paragraph two.
3. They deny paragraph three.
4. They deny paragraph four.
5. They deny paragraph five.
6. They admit paragraph six, but say they are not liable therefore.
7. They deny paragraph seven.
8. They deny paragraph eight and ask for judgment on the Counterclaim.

ISADOR HABER,
Attorney of Plaintiffs.

Postea.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

ADOLPH GANZ and HENRIETTA GANZ,
Plaintiffs,
vs.
SAMUEL ELFENBEIN,
Defendant.

At Law.
Postea.

This case was tried before Judge William H. Speer, with a jury, at the Hudson Circuit of the New Jersey Supreme Court, on October 16, 1919.

The jury rendered a general verdict against the defendant and in favor of the plaintiffs for One Thousand ($1,000) Dollars without interest.

WILLIAM H. SPEER,
Judge.

Judgment.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

ADOLPH GANZ and HENRIETTA GANZ, *Plaintiffs,* *vs.* SAMUEL ELFENBEIN, *Defendant.*	At Law. Judgment.

It is ordered that judgment be and is hereby entered in favor of plaintiffs and against defendant for the sum of $1000.00.

Entered—October 17th, 1919.

On motion of

ISADOR HABER,
Attorney for Plaintiffs.

Testimony

NEW JERSEY SUPREME COURT.

ADOLPH GANZ *et als,*
vs.
SAMUEL ELFENBEIN.

Tried October 16, 1919, before SPEER, J., and a jury.

ISADOR HABER for the plaintiff.

B. E. GORDON and JOHN W. OCKFORD for the defendant.

(Counsel open to the jury.)

The Court: I will let the jury go until two o'clock and I will ask Counsel to stay.

Gentlemen, I have had a chance to look into this thing just a little more carefully than I had before (referring to a motion made by counsel for the plaintiff before trial to strike out the defense) and I am satisfied that I was wrong in my decision, so far as this State is concerned, that the rescission of the contract cannot be accomplished except by an instrument of equal dignity with the original document. The authorities seem to be in great conflict on it elsewhere than in New Jersey; the weight of the authorities elsewhere seems to be against the position that I decided in favor of a short time ago, and our own case, the one that has been suggested to me, of *Long* vs. *Hartwell*, seems by every implication of logic to be against the position also; so I think therefore that I shall hold quite the reverse of what I stated I would hold. When I come to charge the jury I will tell them that there can be a rescission of a contract for sale of lands by parol agreement between the parties, and I will charge them what will amount

to such a rescission, and I will tell them that it is not necessary that that rescission shall be in writing, and if they shall find that an actual rescission took place by the agreement of the parties I am going to tell the jury that the plaintiff is entitled to recover in this case the thousand dollars which was represented by the check, payment of which was stopped. That is what I am going to tell them, and that is what you may have your objection in the nature of an exception noted to and have a review of if you want it.

(Recess.)

The Court: During the noon recess I had a chance to look at this question, which was sprung entirely suddenly, and I find that there is a great deal of authority for the decision which I have made. Therefore I shall write on the record while we are waiting that in 39 Cyc. under the title Vendor and Purchaser, at page 1355 under sub-title Rescission by oral agreement, appears the following: A written contract for the sale of land while still executory may be rescinded by a subsequent oral agreement between the parties. Then there are cited cases from innumerable states. However, they say, proof of the rescission by parol of a contract for the sale of land should be clear and convincing and should satisfy the mind that a rescission was intended by the parties. And then are cited cases from states that do not appear in any of the other lists of citations that I have found, states of such splendid repute for the calibre of their benches as Massachusetts, in a case decided in 204 Mass. p. 246. I find also on looking into other authorities that several of the states that were in favor of the rule contended

for by the defendant in this suit have recanted, notably amongst them Kansas and Texas, and have held that the rescission of a contract required to be in writing by the statute of frauds may be accomplished by parol, and giving their reasons for it. I find also on looking into the case of Headley v. Cavileer, particularly the part referred to by counsel for the defendant in his argument, that by the punctuation the meaning and intent of the court is made perfectly manifest. The court says that parties who have contracted together have a right to cancel their contract or alter it in any way not prohibited by law (comma) or to supplement it by another and additional contract, and in cases of this kind may do so orally in the absence of any statute requiring such contracts to be in writing —that is in cases of supplementing it by another and additional contract. So that you see the meaning of the court was perfectly manifest that if you were going to make a new contract covering the same subject matter and the original contract was required to be in writing so must the additional and supplemental contract be in writing. That was the object the court had in mind in using language of that character.

ADOLPH GANZ, sworn.

Direct Examination by Mr. Haber:

Q. Where do you live? A. 37 Lincoln street, Jersey City.

Q. And what is your business? A. Drygoods merchant.

Q. You are the senior member of Ganz and Goodman? A. Yes, sir.

Q. Do you recall having a contract with Mr.

Elfenbein for the purchase of his property? A. A contract, yes.

Q. I show you a contract and ask you if that is the contract? A. Yes.

(Contract offered in evidence and marked P-1.)

Q. Now, did you give Mr. Efenbein any money at the time that this contract was executed? A. I gave him a thousand dollars.

Q. He accepted it? A. Yes, sir.

Q. Do you recall meeting Mr. Elfenbein to pass title to this same property? A. Yes.

Q. And when was that, do you recall? A. June the 2nd, in the evening.

Q. And where did you meet? A. In the office of our store, of our business.

Q. And in the day time or in the evening? A. In the evening.

Q. Who was present at that time? A. Mr. Elfenbein and myself and you, and Mr. Goodman was sitting outside the railing out in the office.

Q. And was Mr. Elfenbein there? A. Yes.

Q. Will you recite now to the court and jury the conversation that was had at that time? A. Mr. Elfenbein came in to settle the purchase of that certain property. When it came to handing me over the deed he called my attention that he going to take the stove out of the house. I said: Don't you think the stove belongs to the property, to the house? He said: It is a new stove, I paid so much money for it, I can't leave it to you. I said: Well, if you just insist you can have it. Well, next he said, I want the carpet stairs. I said I wouldn't dicker around about anything. If you want it you can have it. I said you might as well take the shingles too. So then when everything was finished he says: You know what our contract was; I may not be able to get out by the first.

Q. Had he told you at any time that he intended leaving?

Mr. Ockford: I object to counsel interrupting. He asked him to give the conversation and must have it all.

Mr. Haber: Withdraw the question.

Q. Proceed. A. He was to leave on the 20th of June. He wanted everything settled and he says: I may not be able to sail on the 20th of June, and if I should stay after the first—well, I said, Mr. Elfenbein, I may give you a few days to stay after the first; but he says, I want at least fifteen days. The contract calls on or about the first. I said, well, I would not speak about a couple of days, I said, but you cannot expect me that you should live in my house for fifteen days free of charge, it would not be fair. You stipulated the price yourself and I won't ask any more from you just what you stipulate yourself. So he got mad, he says, if I can't have my own way I might as well call this off, this sale. Well, I said, Mr. Elfenbein, if you take it so serious, if you mean it, and if it is not satisfactory to you, it will be satisfactory to me just the same, and he went and made out the check and handed to me, and I said, when will we fix that up in writing and everything? He said, never mind, and grabbed all the papers and run out and wouldn't give me a chance to speak no more.

Q. Have you a check here signed by Mr. Elfenbein? A. Yes, sir.

Q. Is this the check which I show you that he gave you that night? A. Yes, sir.

Q. And was the check prepared when he came there or—— A. No, sir, a check was not prepared. He made it out, when he said the deal is off, I can't have my own way, here is your money

back, and I says, if it is satisfactory to you, Mr. Elfenbein, it certainly is satisfactory to me. That is all I said.

Q. And where did he get this check? A. He took that out of his book, tore it out and made it out immediately.

Q. And do you recall what papers he grabbed up as you say and ran out? A. He took all the papers that were laying there, all the insurance and the deed and everything. There was nothing left to me.

Q. Was there any conversation at that time or shortly prior to that time that evening about your wife? A. Well, I—my wife, I said—he asked me whether my wife is here. I said my wife is not present but she consents to everything I do. In case it is necessary we can call her anyhow.

Q. Where does your wife live? A. Only about a block away.

Q. What did he say to that? A. Oh, never mind; it is all right.

Q. Had you known Mr. Elfenbein for some time before? A. Yes.

Q. For how many years, about? A. Several years.

Q. And has he known you and your wife? A. Yes, sir.

Q. When you received this check, what did you say to him?

Mr. Ockford: I object to that. We have had the conversation.

The Court: I will let him tell it again.

Mr. Ockford: All right.

A. I say to him whether he wants to have that given me in writing. You asked him whether he wants a release made.

Q. Who asked him, I or you? A. You asked

him, you must give a release to Mr. Ganz. He would not say nothing or listen to nothing. He simply grabbed everything and ran off.

Q. Before he made out this paper what did he say about the deal? A. He would call the deal off.

Q. And what did you say to that? A. I said if it is satisfactory to you Mr. Elfenbein, it is satisfactory to me.

Q. Did you try to cash this check? A. I deposited it and it came back not collected—stopped.

Q. Payment stopped? A. Yes.

Q. Have you ever received payment on this check from Mr. Elfenbein? A. No. How could I?

Q. Has Mr. Elfenbein ever paid you or offered to return to you or tender to you the thousand dollars which you deposited with him? A. No, sir; never offered anything; never seen the man.

Q. Has Mr. Elfenbein sailed from this country? A. He did.

Q. Do you know whether or not he has sold that same property? A. I do not know whether it was sold.

Mr. Haber: Well, it is in the pleadings.

I offer this check in evidence.

(Marked P-2.)

Cross Examination by Mr. Ockford:

Q. When you met in your store on the 2nd of June you say you were there and Mr. Elfenbein and Mr. Haber? A. And Mrs. Goodman was outside the rail, right close to it, there is no glass to it—a railing between.

Q. And that meeting at that time was for the purpose of carrying out this contract? A. Yes, sir.

Q. Had you previously to that time discussed with your wife the question of not taking a deed to the property or not buying it or not completing

the contract? A. Never; it never entered my mind to speak about this—such thing about this.

Q. You went to this meeting expecting everything would go through as agreed, is that right? A. Yes.

Q. Did you see a form of receipt drawn up for a month's rent that was presented to you to sign and be given to Mr. Elfenbein? A. Yes, sir.

Q. Have you got that receipt here with you or has your counsel got it?

Mr. Haber: I will give it to you.

Q. I show you a paper which your counsel produces and ask you if that paper was there at the time of this meeting. A. Yes; this is from June 1st to July 1st.

Q. And that is your signature? A. Yes, sir.

(Paper marked D-1 for identification.)

Q. You have told us what was said by you and by Mr. Elfenbein with respect to his giving up possession of the house on the 1st of July, haven't you? A. Yes, sir.

Q. You have told us everything that was said on that occasion? A. Yes, sir.

Q. Was this paper which you have just looked at handed over to Mr. Elfenbein, was it given to him? A. Which paper?

Q. The paper you just had before you, this receipt? A. He had it; it was in his possession.

Q. Did you or did Mr. Haber give it to Mr. Elfenbein? A. I signed it and Mr. Haber gave it over to Mr. Elfenbein.

Q. You handed it to him? A. Yes, sir.

Q. And how did it come back into your possession? How did you get it back? Did he give it to you; did he give it back to you? A. He left it—let me think——

The Court: Oh, if you gave it to him how did you get it back into your hands, that paper?

A. When I make all arrangements he leave it right there, you see, it was right with the other deed, it was right there with the deed.

Q. So that when Mr. Elfenbein left the room he did not take all the papers with him at all, did he, he left some of them there on the table, didn't he? A. I haven't seen any papers after he left. I didn't see any papers.

Q. Well, he left that receipt there, didn't he; it was left there; he did not take it with him? A. Well, I asked Mr. Haber, I said, how is it Mr. Elfenbein took all the papers? He said, well, he left you your deed and this here.

Q. Did he have a deed there to the property from himself to you and your wife? A. Yes, he brought everything there, yes.

Q. Did he take them away with him? A. He took them—well, the one deed——

The Court: Oh, did he take that deed away with him, just tell us that?

A. He took it himself.

Q. Did he have a contract there like yours? A. He had a contract there.

Q. Did he have it there with him? A. He had the contract there, all the papers.

Q. Did he have a contract like yours there with him? A. Yes.

Q. And he took that away with him? A. Yes.

Q. And you kept yours, this one? A. My attorney kept it.

Q. AAnd what time of day did you say this was? A. Seven o'clock in the evening.

Q. And did you see Mr. Elfenbein again after that? A. Mr. Elfenbein came the next morning about ten o'clock after this I deposit the check and tell me, Mr. Ganz I am going to stop the check. Well, I said, I can't stop you that, I can't do anything.

Q. What did he say about giving you the deed? A. He said, you know I was excited, but the contract stands yet. I says, the way you treated me, Mr. Elfenbein, I don't want to have anything to do anything more with this affair. I said, I think you treated me very unfair and I want to have nothing about this matter to do any more.

Q. You did not tell him in what respect you thought he had treated you unfairly; you did not tell him why? A. No; I did not tell him in any respect. I simply told him, you did not treat me right and I don't want to have anything to do with this matter any more.

Q. And did you see Mr. Gordon after that? A. I never met Mr. Gordon.

Q. Didn't you see him the next day? A. Not that I know of.

Q. Are you sure about that? A. I never remember Mr. Gordon.

Q. You say you do not remember. Didn't Mr. Gordon come to you on the same day or the following day and speak to you about this contract? A. No, sir.

Q. He did not? A. No, sir; I never see Mr. Gordon.

Q. Do you know Mr. Gordon? A. I never knew Mr. Gordon only from the time sitting here in court.

Q. I mean at the time of this transaction you knew—— A. I do not know Mr. Gordon. I did not even know Mr. Gordon's name before.

Q. Did you know him by sight? A. I never seen

him before; I did not know him by sight either.

Q. When was the first time you saw him? A. The last time I was in court here I seen Mr. Gordon. That was the first time I seen Mr. Gordon.

Q. The first time you ever saw him? A. Yes, that I know of.

By the Court:

Q. Had you and your wife talked at all about what you should do for her if anything in regard to this contract of sale? A. My wife told me she leaves everything to me.

Q. She told you that, did she? A. Yes.

Q. When? A. On the day of executing, she says if in case I need her I shall call her up, she leaves everything to me.

Q. All right.

By Mr. Ockford:

Q. At this time when you were ready to close the title did you have the money there to pay? A. I had it all ready.

Q. Cash or checks or how? A. Checks.

Q. Were they already made out? A. They was not made out, no, sir, but I had deposited just my money before and I was all ready to pay.

Q. You had your checkbook there; you did not make out the check? A. I had my checkbook; I did not make it out, no.

Q. Let me understand about Mrs. Ganz; you say she left everything to you? A. Yes, sir.

Q. Between the time this contract was signed and the 2nd of June did you have any occasion to talk with her about closing this transaction? A. No, sir; nothing at all.

Q. After this occurrence on the 2nd of June that you have told us about did you then talk to your wife about it? A. After the 2nd?

Q. Yes. A. Certainly I told her the deal is off, Mr. Elfenbein returned me the money and the deal is off; that is all I told her.

Q. That was on the same evening or the following morning? A. On the same evening; and she was satisfied.

By the Court:

Q. How do you know she was satisfied? A. Well, she told me.

Q. Tell us then. A. "Well, anything you do suits me."

By Mr. Ockford:

Q. Did she say that? A. Yes, sir.

Q. "Anything you would do suits me"?

The Stenographer: The answer was: "Well, anything you do suits me."

Q. Do you know whether she talked to Mr. Elfenbein? A. I do not know whether she spoke to Mr. Elfenbein.

Q. Did she tell you Mr. Elfenbein had been to see her and talked to her about this matter? A. No, sir; not that I know of.

Q. Did she tell you anyone had been to see her about this matter? A. No, sir.

Q. You had no further talk? A. No further talk.

Q. That is all that was said, what you have told us? A. That is all, sir.

By Mr. Haber:

Q. Did you tell Mr. Elfenbein that evening how you were to pay him the balance? A. I was to pay him $3,000 that same evening.

Q. Not how much, but how you were to pay it.

The Court: By check or cash or how?

A. By check.

Q. Did you tell him that? A. Sure.

Q. What did he say to that? A. He was satisfied.

HENRIETTA GANZ, sworn.

Direct Examination by Mr. Haber:

Q. You signed a contract for that property, didn't you? A. Yes, sir.

Q. Were you present when the contract was drawn? A. Yes, sir, the first time.

Q. When this contract was being written out you were there? A. Yes; I was present, yes.

Q. And you signed it? A. Yes, sir.

Q. Now, on June the 2nd were you in the store when Mr. Elfenbein was there and the title was to close? A. No, sir.

Q. Where were you at that time? A. At home.

Q. And did you have any conversation with your husband as to what he should do for you or—— A. Before he——

Mr. Ockford: Just a minute. Please fix the time—before or after?

Q. Before June the 2nd. A. What do you mean?

Q. Before June 2nd did you ever tell your husband that he—withdraw the question. Did you ever empower your husband to act for you before June 2nd?

Mr. Ockford: I object to the form of the question.

The Court: I will sustain the objection because that calls for a legal conclusion. Did you say anything to your husband about acting for you at any time in this transaction?

A. I always left everything to my husband.

The Court: Did you say anything to him before June 2nd about acting for you or not acting for you?

A. Yes; he could act for me.

The Court: What did you say to him? Just tell the jury that.

A. He told me that that evening we were supposed to take title. I said, Go ahead; you do just as you think right; that is all.

Q. Now, on June 2nd, that evening, did Mr. Ganz speak to you about that? A. No; he did not say anything—oh, after the—when he came home?

Q. Yes. A. Well, he said, he just told me what happened. I said, Well, if you done it I suppose that is the right thing.

Mr. Haber: That is all.

(No cross examination.)

PLAINTIFF RESTS.

Mr. Ockford: I move for a nonsuit upon the ground that no rescission of any kind has been shown either by parol or by writing, and upon the further ground that any rescission to be valid would have to be in writing, and as to such writing there is no proof of any or claim of any.

The Court: I think I must deny this motion. The matter with respect to the statute of frauds I have already discussed, but in order to have the question raised fairly and fully on the record I shall decide, as I have already decided, on this moti on that the rescission of a contract, a written contract for the sale of land while it is still executory may be accomplished by a subsequent oral agreement be-

tween the parties. The authorities for that position will be found, as I have said before, many of them cited in 39 Cyc. under the title Vendor and Purchaser, at page 1355 and the following pages. Of course so far as my decision on that point is concerned it would be in its way decisive of the case, and I therefore give you an objection to my ruling on that point in the nature of an exception so that you may have that objection embalmed upon the record and have whatever advantage you see fit from it.

Now, the contention is made that there is not any evidence—you have not stated it I think quite as accurately as it might be stated —your objection amounts to this: there is not any evidence from which the jury might as reasonable men conclude that a rescission of the contract has taken place between the parties because there is no evidence that there was a meeting of the minds of the parties on the subject of rescinding. Now, I think that there is evidence from which the jury may conclude that a rescission was intended by both parties to take place. Now the reason for that conclusion on my part is this: Your whole argument is based upon one fact, and its validity depends upon one fact, and that is that the parties retained the evidence of their contract. That is all—they retained the evidence of their contract. But what is argued here by the plaintiff in the suit is that whatever evidence they may have retained they did not retain the contract, the contract itself, the thing which the paper evidences. Now, in order to determine whether there is any evidence of a rescission we must ascertain first of all, what is a rescission? A rescission is

simply an agreement or meeting of the minds of the parties on the proposition that each of them desires to give up what he is entitled to under the contract and to have the contract considered as at an end. That is a rescission. Now, did these parties either of them give any evidence from which the jury might as reasonable men conclude that they mutually entertained and intended to put into contractual form that intention? Mr. Ganz says that Mr. Elfenbein said to him, If I can't have my own way—which it was perfectly manifest he could not have from the evidence, because he had been told that he could not stay in that house for the fifteen days that he desired to stay—he said, If I can't have my way—and construed in the light of the circumstances in which the assertion was made it means this: Since I can't have my own way, I will throw this whole thing up. Now, there was the evidence of his desire to have the contract considered as at an end—Since I can't have my way I'll throw it up. Well now, all it needed to make that a contract between him and Mr. Ganz was to have Mr. Ganz say: I take you at your word and accept your offer —for that is what his statement amounted to --and we will throw it up. Well, what did Ganz say? Ganz says, All right; if that's the way you feel about it that's the way I feel about it—or words to that effect—and I will do it. That is what his allegation, or statement here on the stand, amounts to. And he says that that was his intention at the time. He has sworn to that. He made up his mind to do that; and he went home and told his wife so. Now, was that Elfenbein's intention? There had been $1,000 paid on this

contract. That was a deposit, and if the contract was any longer to last then the thousand dollar deposit should have remained. But instead of that Elfenbein sits down in his fit of pique, draws up a check for a thousand dollars and returns the deposit. Now, why did he return it? What do you think the jury will conclude on a question like that as to why he returned a thousand dollars if he did not think the contract which the thousand dollars bound was at an end by what had occurred between him and Ganz. And that he did think it was at an end is evidenced by the fact that Mr. Ganz testifies that the next day he came around and said, What I did—admitting that he had done something that he was sorry for then—What I did, I did when I was excited, and now I am willing to give you a deed. And then Ganz said, No, I am not ready to take it now. You have done me a grievous wrong, or an injustice, and we won't restore previous relations. Now if a jury cannot conclude from those facts—I do not say they shall conclude; they may make up their minds that that was not what the parties intended. It would have been very much more persuasive, I grant you, if the evidence of the contract had been surrendered at the time and all trace of the existence of the contract obliterated; it would have been more persuasive—but I cannot as a judge say that there is not any evidence from which the jury can conclude that the minds of these men met on the rescission and that they met contractually. So for the reasons I have given I must deny the motion and let you have an objection on the record.

Mr. Ockford: I also move for a nonsuit on the ground that there is no evidence

of any rescission on the part of Mrs. Ganz; that her husband was authorized to carry out the contract but not to terminate it or change it; and there is no contention made to the contrary.

The Court: Well, really I am not obliged to entertain this motion now, because when a man makes his motion for a nonsuit he should state all his reasons at once; but that is a mere rule of technical procedure and it will not interfere with my deciding this branch of the case; but if you have anything more to spring let us have it now. On this phase of the case I have not any doubt whatever about the case. We will assume for the sake of the argument, and only for the sake of the argument, because I think that the position assumed is infirm, but we will assume for the sake of the argument that the statement that Mrs. Ganz made on the stand here that whatever her husband did would be all right, she left it all to him, or words to that effect, it may very well be that—at least the jury might assume that the largeness and universality of the language used by Mrs. Ganz to her husband would imply that whatever he did with respect to the contract, whether carrying it out or rescinding it, would be satisfactory to her; but let us assume it does not mean that; let us assume it means what you say it means, she had given him full authority to carry it out but none to rescind it: there is such a thing in the law as ratification. Ratification is equivalent to a prior command; and therefore when he assumed, as he did assume, to act for her and to say that it was all off, her part and his, and then went home and reported to her, and

she said, All right, there is your ratification, equivalent to a prior command, and the act is complete and she is bound by it and had a right to avail herself of the act assumed on her behalf even though previously unconsented to; and she did ratify it. Consequently there is nothing in that point, and I deny the motion on that ground also.

Mr. Ockford: May I have an exception?

The Court: Yes, I want you to have it.

Mr. Ockford: May I have it entered on the record that the defendant's counter claim is withdrawn?

The Court: All right.

BENJAMIN E. GORDON, sworn.

Direct Examination by Mr. Ockford:

Q. Where do you live? A. I live at 630 Palisade avenue, Jersey City.

Q. And what is your profession or occupation? A. I am an attorney at law.

Q. Of this State? A. Yes, sir.

Q. Do you know Mr. Samuel Elfenbein, the defendant in this case? A. I do.

Q. Do you know the plaintiffs in this case? A. I do.

Q. Did you have occasion to call upon the plaintiffs, or either of them, on or about the 2nd day of June of this year? A. No; not on the 2nd of June.

Q. When? A. On the 3rd of June I called.

Q. On the 3rd of June. Now, whom did you call upon, and where? A. On the 3rd of June I called at the store of Ganz and Goodman on Central avenue to see Mr. Ganz. The time was about 11 in the morning. I was told that was was not there, that he would be in about 5. I went there at 5 and I did not find him. The next day I called on him.

Q. What day was that? A. That was the 4th of June, on a Wednesday, I called on him and saw him and spoke with him.

Q. And where? A. At his store, Central avenue and Lincoln street.

Q. And what time of day? A. It was about five o'clock in the evening.

Q. Did you talk with him with regard to the contract involved in this case? A. I did.

Q. Just tell us what you said to him on that occasion and what he said to you. A. I told him that I was the attorney for Mr. Elfenbein and I had always represented him except when I was not in the city, and that at the time this contract was drawn up I had not been in the city; I told him that I advised Mr. Elfenbein that there was not a valid rescission of this contract, and I also told him that Mr. Elfenbein did not intend to rescind it, and he told me, We don't want this property; we won't take it. I said, Well, I have a deed here, and I am going to tender it to you, and I am going to tender it to your wife, conveying this property to you, and I will ask you to give us the money. He said, We don't want the property. I wanted to talk to him further about it, and he said, I won't talk any more about this to you; you see Mr. Haber.

Q. Was anything else said about the matter at that time? A. That was all that was said at that time.

Q. And did you at any time, on that day or any other day, see Mrs. Ganz about the matter? A. No, I did not.

Q. And did you call on Mr. Haber? A. On the 3rd of June, I saw Mr. Elfenbein. He came to my home to look for me.

Mr. Haber: I object. This is not responsive.

The Court: That objection cannot be pressed by you; it can only be pressed by the man who asks the question. So I will overrule the objection.

A. I called Mr. Haber up, and I told him that we did not rescind the contract, that the contract still stood, and I also asked him why he as attorney for both parties at the same time drew up a receipt which was not in accordance with the form of the contract, and he said, Well, I was told to do it by Ganz; the deal is off; we don't want the property; we won't take it. I asked him whether he wanted me to tender a deed and he said, no, we did not have to tender any deed, it would not be accepted.

Cross Examination by Mr. Haber:

Q. You have been representing Mr. Elfenbein for quite some time? A. I represented Mr. Elfenbein all the time that he was in Jersey, since I was admitted to the bar, with the exception of the period I was in France.

Q. And you still represent him today? A. I represent him today.

Q. And he is in Palestine? A. Yes; he is in Palestine.

Q. And you represented him when he sold the property, didn't you? A. I did.

Q. And you represented the buyer on that sale? A. Well, it—

Q. Yes or no. A. I did.

Q. Yes; and you drew the papers, didn't you? A. Yes; I drew the papers.

Q. And you recorded the papers, didn't you? A. I did that.

Q. And that was after June 2nd, wasn't it? A. That was after June 2nd.

Q. That was on July 28? A. That is right.

Q. And Mr. Elfenbein sailed after that, didn't he? A. That is right.

Q. And you never tendered a deed to Mrs. Ganz, did you? A. I tendered the deed to Mr. Ganz.

Q. I did not ask you that; I said you never tendered a deed to Mrs. Ganz, did you? A. Mr. Ganz told me not to.

Mr. Haber: I move the answer be stricken out.

The Court: I will strike it out.

A. I did not tender the deed to Mrs. Ganz.

Q. And when you did tender it, you say, to Mr. Ganz it was after June 2? A. It was on June 4.

Q. And you say that when you phoned to me I had told you over the phone that I was instructed to draw the receipt that way, is that it? A. That is it.

Q. You are positive of that, are you? A. I am certain, yes.

Q. I did not tell you then that I had agreed with Mr. Elfenbein to give him a few days and that the few days would be satisfactory to Mr. Ganz, but that Mr. Elfenbein wanted two weeks, did I? A. You did not say anything at that time about what you would do or what you would not do.

Q. Did I tell you at any time? A. Later you did, yes.

Q. How long later? A. We discussed this case many times since that time.

Q. When you spoke to Mr. Ganz you say it was on June 4 at his store? A. Yes.

Q. Who was present? A. Mr. Ganz was present.

Q. Anybody else? A. Well, there were a lot of sales girls around.

Q. Had you ever spoken to Mr. Ganz before? A. Certainly.

Q. Where? A. On the street, I know Mr. Ganz.

Q. Did you hear Mr. Ganz say he had never met you before, did not know who you were? A. Certainly I heard him say it.

Mr. Haber: That is all.

Redirect Examination by Mr. Ockford:

Q. How long have you known Mr. Ganz? A. I have known Mr. Ganz about four years. My office is right almost parallel, across the street from his store.

Q. You had spoken to him on other occasions prior to this? A. Certainly.

Q. There is no question that the man that you spoke to on the 4th of June about this contract and this deed was Mr. Ganz, the man who testified here? A. None at all; the same man.

Mr. Ockford: I offer D-1 for identification in evidence.

(Marked D-1 in evidence.)

TESTIMONY CLOSED

COURT'S CHARGE

Gentlemen of the Jury:

The plaintiffs in this suit, Adolph Ganz and Henrietta Ganz, bring suit against Samuel Elfenbein, and they claim that on the 12th of May, 1919, they entered into a written contract with Elfenbein whereby they agreed to purchase from him the premises at No. 38 Sherman Place in Jersey City for the sum of $11,000 and gave Elfenbein as a part of the consideration of the agreement and as a deposit on account of the purchase price the sum of a thousand dollars. They say further that on June 2, 1919, the defendant Elfenbein rescinded the contract and agreement of sale and gave the plaintiff Adolph Ganz his check for the sum of a thousand dollars as a return of the deposit, which

rescission was acceptable to and accepted by the plaintiffs. And they further say that the plaintiff has stopped the payment on the check aforesaid and refuses to pay the deposit heretofore mentioned, although the plaintiff demanded the same from him.

Now, there is not very much law that you need to know to enable you to decide this case. The law says that a written contract for the sale of lands while still executory—that is before it has been performed—may be rescinded by a subsequent oral agreement—that is an agreement merely by word of mouth—between the parties. In order to establish that such oral contract has been entered into rescinding the written contract of sale while it is still executory the burden rests upon the plaintiff in the suit to show by the greater weight of clear and convincing evidence that the contract for the sale of lands has been rescinded; and that evidence should be such as should satisfy the mind that a rescission was intended by the parties. It is essential that there be acts accompanying the supposed rescission which are positive, unequivocal and inconsistent with the contract and which leave no doubt of the intent.

If you are satisfied in this case by the greater weight of the evidence that there was a contract between these parties, that there was a thousand dollars deposited on that contract and that these persons, plaintiff and defendant, rescinded or revoked and put an end to that contract, by their oral agreement, then you would say that you find a verdict in favor of the plaintiff and assess the plaintiff's damages at the sum of one thousand dollars with interest thereon from the 2nd day of June, 1919. If you do not find that made out by the greater weight of the evidence you simply say you find for the defendant.

You will take the case under these rules and decide it.

Mr. Ockford: May I have an exception to that part of your honor's charge which in effect charges the jury that if they find a parol contract of rescission that will be sufficient to cancel the written contract in evidence in the case.

The Court: Yes; it is the same point that you raised in the other part of the case.

Exhibit P1.

ARTICLES OF AGREEMENT, made the twelfth day of May, in the year of Our Lord One Thousand Nine Hundred and nineteen.

BETWEEN Samuel Elfenbein, a widower, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the first part; AND Adolph Ganz and Henrietta Ganz, husband and wife, both of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Eleven Thousand ($11,000.00) Dollars 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 he 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 full covenant and warranty free from all encumbrance on or before the first day of June next ensuing the date hereof, all those lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey and which on a certain map entitled "Map of property belonging to Harriet Griffiths, Hudson City, N. J. Levy W. Post, C. E. and City Surveyor" are known and distinguished as lots number twenty-two (22) and twenty-three (23) fronting or facing on the northerly line or side of Sherman Place, and further described as follows, viz.—

Exhibit P-1

Commencing at a point on the said northerly line of Sherman Place two hundred and twelve (212) feet easterly from the easterly line or side of Summit Ave.: thence running in a northeasterly direction at right angles with said Sherman Place one hundred and ninety-eight (198) feet seven (7) inches to a point on the line of land now or formerly of James Montgomery, Jr.; thence in a southeasterly direction and nearly parallel with Sherman Place fifty (50) feet to a point; thence in a southwesterly direction and parallel with the line first run one hundred and ninety-seven (197) feet and fifty-six one hundredths (56) of a foot to said northerly line of Sherman Place; thence along the same in a northwesterly direction fifty (50) feet to the point or place of beginning; the said right angles being more or less all as shown on said map.

Being same premises conveyed to first party by William Pfeifer and wife by deed dated April 23, 1912, and recorded in Hudson County Register's Office in Liber 1127 of Deeds, pages 66 etc.

And the said Adolf Ganz and Henrietta Ganz for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators, and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satified, unto the said part yof the first part the said sum of

Eleven Thousand ($11,000.00) Dollars

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Exhibit P-1

By cash One Thousand Dollars the receipt whereof is hereby acknowledged	$ 1,000.—
By cash on delivery of deed and passing of title Three Thousand Dollars	$ 3,000.—
By taking said premises subject to a present mortgage of Seven Thousand Dollars with interest at 6% due May 1, 1920	$ 7,000.—
Total.....	$11,000.—

The taxes, interest on present mortgages, water and insurance premiums to be adjusted and apportioned as of the date of passing title.

It is agreed that the party of the first part shall have the privilege of remaining in occupation of the within described premises until on or about July 1, 1919 upon the payment of Seventy ($70.00) Dollars; it being understood, however, that no tenancy is created and none continued and the party of the first part to deliver up possession at that time.

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 first day of July next ensuing the date hereof, and from thence take the rents, issues and profits to themselves and their use.

And it is Further Agreed, by the parties hereto, that the said Deed of Full Covenant and Warranty shall be delivered and received at the office of Isador Haber, 17 Bergenline Ave., Town of Union, N. J., between the hours of ten in the fore-

noon and three o'clock in the afternoon on the said first day of June next ensuing the date hereof.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

SAMUEL ELFENBEIN [L. S.]

Signed, Sealed and Delivered in the presence of
Isador Haber.

ADOLF GANZ [L. S.]

HENRIETTA GANZ [L. S.]

State of New Jersey, County of Hudson, ss.:

Be it Remembered, That on this twelfth day of May, in the year of our Lord One Thousand Nine Hundred and Nineteen, before me the subscriber, A Master in Chancery of New Jersey, personally appeared Samuel Elfenbein, Adolf Ganz and Henrietta Ganz, who, I am satisfied, are the persons mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act.

ISADOR HABER,
Master in Chancery of New Jersey.

CONTRACT FOR PROPERTY.
Samuel Elfenbein
to
Adolf Ganz and Wife.
Dated, May 12th, 1919.
Isador Haber,
17 Bergenline Ave.,
Town of Union, N. J.

Exhibit P2.

SAMUEL ELFENBEIN
Machinery
13-21 Park Row

No. 1895

New York, June 2, 1919.

PAY TO THE ORDER OF Adolf Ganz....$1000 00/100
One Thousand 00/100.....Dollars
Through New York Clearing House
To Irving National Bank,
New York.

S. ELFENBEIN

[Stamped across the face]—Payment Stopped.
[Endorsed]—ADOLF GANZ

Exhibit D-1.

June 2, 1919.

RECEIVED OF Samuel Elfenbein the sum of Seventy ($70.00) Dollars as payment for use and occupation of premises known as 38 Sherman Place, Jersey City, N. J. up to July 1, 1919 at which time the said occupation shall terminate.

ADOLF GANZ.

New Jersey Court of Errors and Appeals

ADOLPH GANZ and HENRIETTA GANZ, *Plaintiffs-Respondents,* *vs.* SAMUEL ELFENBEIN, *Defendant-Appellant.*	At Law. On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFFS-RESPONDENTS.

This action was brought in the Supreme Court of New Jersey, Hudson Circuit, to recover $1000. for the return of the deposit given by the plaintiffs to the defendant on account of the purchase price mentioned in the written contract for sale of real property belonging to the defendant.

The second count is based upon a check for said sum of $1000. given by the defendant to the plaintiff, Adolph Ganz, as a return of the said deposit, payment of which check was stopped by the said defendant. The defendant withdrew his counterclaim. The trial before Judge William H. Speer and a jury resulted in a verdict in favor of the plaintiffs and against the defendant for $1000.

Facts.

The defendant agreed to sell certain real property by a written contract of sale to the plaintiffs under the terms of which the plaintiffs gave the

defendant a deposit of $1000. When the parties met to close the title a dispute arose over some minor details and the defendant stated to the plaintiff, Adolph Ganz, that if he could not have his way the deal was off to which the plaintiff replied that such was satisfactory to him. The defendant thereupon made out his check to the order of the plaintiff for $1000. as a return of the said deposit, grabbed his papers and rushed out in haste. He later stopped payment on the check (Case, pp. 13-17) and later sold the said property to another and sailed from this country to Palestine (Case, p. 31).

Argument.

POINT I.

The contract was mutually rescinded and not void under the Statute of Frauds.

The Statute of Frauds provides that no estate or interest in real estate shall be surrendered unless it be by deed or note in writing, signed by the party surrendering the same or by act and operation of law (2 Comp. Stat., p. 2610).

Although the authorities seem to be in conflict on the question, the great weight of authority is that a parol rescission or surrender is valid and that such need not be in writing.

> "An executory contract for the sale of land, while still executory, may be rescinded by a subsequent oral agreement between the parties. However, proof of the rescission by parol, of a contract for the sale of land, should be clear and convincing; and should satisfy the mind that a rescission was intended by

the parties. It is essential that there be acts accompanying the rescission which are positive, unequivocal and inconsistent with the contract; and which leave no doubt of the intent, such as cancelling the agreement or removing from the possession.

"An executory contract for the sale of land, may be rescinded by mutual consent of the parties, either by novation or by simple agreement where they continue to occupy their original relations. And the agreement may be by parol as well as in writing and may be implied as well as express."

39 Cyc. 1355, 1356 and cases cited.

The defendant contends that *Long* vs. *Hartwell*, 34 N. J. L. 116 and *Headley* vs. *Cavileer*, 82 N. J. L. 635, hold that such rescission must be in writing. On the contrary, it seems that a careful reading of *Long* vs. *Hartwell* will disclose the fact that this case by every implication of logic holds contrary. On this precise question, the court says:

"Whether parol evidence is admissible to prove the discharge or abandonment of such contract is a question upon which there is a great conflict of authority, and as a discussion of this case can be confined within narrower limits no opinion will be expressed upon this point."

However, the Court enunciates the general rule that the substituted performance agreed upon by parol, actually and fully executed by the vendor and accepted by the vendee, may be set up in defense at law in a suit on the written contract within the Statute of Frauds.

"A contract under the dominion of the Statute of Frauds can be no more secure against invasion by parol than a sealed instrument."

Long vs. *Hartwell,* 34 N. J. L. 116 and cases cited.

In the other case of *Headley* vs. *Cavileer,* cited by the defendant, the Court says:

> "The fundamental difficulty, however, with which owners and courts had to contend and which in the absence of legislation is insuperable, was and is that there is no statute requiring such contracts to be in writing, that parties who have contracted together have a right to cancel their contract or alter it in any way not prohibited by law, or to supplement it by another or additional contract, and, in cases of this kind, may do so orally in the absence of any statute requiring such contract to be in writing."

By the punctuation the meaning and intent of the Court is perfectly manifest. The Court means to say that parties who have contracted together have a right to cancel their contract or alter it in any way not prohibited by law (comma) or to supplement it by another and additional contract, and in cases of this kind, that is, in cases of this latter class, may do so orally in the absence of any statute requiring such contracts to be in writing, that is, in cases of supplementing it by another and additional contract. The great weight of authority seems to be in harmony with this intention.

The defendant's brief cites cases in Kansas, Michigan, and Pennsylvania, for the proposition that such a contract cannot be rescinded by parol. The Courts in these states have held quite the reverse. *Sullivan* vs. *Dunham,* 42 Mich. 518; *Raffensberger* vs. *Cullison,* 28 Pa. St. 426, and the later Kansas cases hold, "A written agreement

to convey may be rescinded by a voluntary surrender or cancellation of the articles with the purpose to rescind."

In fact, with few exceptions, this will be found to be the law is most every state.

In 9 Cyc. 599 will be found the following statement of law:

> "When the original contract was required by the Statute of Frauds or any other statute to be in writing, the new contract must also be in writing. Where the parol discharge is in full and is executed, it is valid and conclusive even as to an agreement within the Statute of Frauds or any other statute requiring writing," and cites *Long* vs. *Hartwell,* in 34 N. J. L. 116, and *Thompson* vs. *Poor,* 147 N. Y. 402 at 409.
>
> "This being so, he strenuously contends that the plaintiff could not surrender the same except by deed or conveyance in writing subscribed by him and that, as such surrender was a part of the consideration of the promise sued upon, he improperly recovered. The power to surrender such interest, however, is not thus limited by that section. As applied to this case, it reads: 'No estate or interest in lands . . . shall be . . . surrendered . . . unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party . . . surrendering . . . the same.'"

Thus the section provides two ways of surrendering such estate or interest without any deed or contract in writing. One is by acts of the parties concerned. The other is by "operation of law." These two methods are frequently and perhaps generally, present and coalesce in the same transaction. Such surrendering is nothing more than

the effect of yielding up of such estate or interest to one having the immediate reversion or remainder wherein such particular estate or interest may merge. To be effectual, however, such act or acts must be inconsistent with the continuation of such former estate or interest, and must, moreover, be actually accepted and acted upon by the other and, in fact, all the parties concerned.

When such acts and acceptances so occur, under such circumstances, the party thus surrendering is estopped from subsequently disclaiming the effectiveness of such surrender. These views are in harmony with numberous English, and cites cases from other states.

Telford vs. *Frost,* 76 Wis. 174, 44 N. W. 835.

In the case of *Hutchins* vs. *DuCosta,* 88 Wis. 371, 60 N. W. 427, a suit was brought upon a check dated October 28, 1891, for $2500.00, made by the defendant to the order of Frank Ostrander. The defense was that on that day the defendant had entered into a written contract with the said Ostrander, for the sale by Ostrander to the defendant, of real estate, and on which the said check of $2500.00 was given as a deposit. That on November 6th, the defendant and Ostrander met, and mutually agreed that the deal should be declared off and cancelled, and the papers returned to the defendant. He, on the same day, telegraphed his bank to stop payment on the check. The check was turned over to the plaintiff by Ostrander, one month after, without consideration, and suit was started on it. The Court says:

> "The Statute expressly authorized, 'an interest in lands,' to be 'surrendered or declared by act or operation of law,' as well as by deed

or conveyance in writing.
Rev. St. Sec. 2302.

"The surrender to the defendant of the contract and written instructions, and the consent of Ostrander, to the payment of the check being stopped by the defendant, and the taking up of the check from the bank by Ostrander, were acts which operate in law as a surrender and cancellation of all the interest which the defendant had acquired in the land, and also a surrender and cancellation of the check. This principal has been repeatedly confirmed and sanctioned by this court."

Telford vs. *Frost,* 76 Wis. 174, 44 N. W. 835;

Kneeland vs. *Schmidt,* 76 Wis. 384, 47 N. W. 438;

O'Donnell vs. *Brand,* 85 Wis. 101, 55 N. W. 154.

A written contract for the sale of land may be rescinded by a subsequent parol agreement of the parties.

Boyce vs. *McCulloch,* 3 Watts & S. 429 (Pa.).

Written articles of agreement for sale of land may be waived or surrendered by parol.

Raffensberger vs. *Cullison,* 28 Pa. St. 426.

A written contract for the sale of real estate may be annulled by parol or abandoned by the parties hereto.

Hougen vs. *Skjervhein,* 102 N. W. 311, 13 N. D. 616.

If no possession has been taken under an execu-

tory contract for the sale of land, and the parties agree to rescind, and in execution of the agreement, the vendee surrenders the writing to the vendor, the rescission is complete.

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The act of the defendant, Elfenbein, in declaring the deal off, his taking his check book from his pocket and deliberately writing out a check to the order of the plaintiff, Ganz, for $1000. as a return of the deposit under the contract, his delivery of the same to the plaintiff, Ganz, and the acceptance of the same by Ganz, who said it was satisfactory to him, and the rushing out of Elfenbein after grabbing his papers, were facts which are definitely established beyond any question of a doubt. They are acts showing that "the minds of the parties had concurred in a common intent of relinquishing the relation of vendor and vendee" and the execution of this intent by making and delivering a check for the return of the deposit and the grabbing of his papers by Elfenbein, are facts which "are tantamount to a stipulation to put an end to such relationship of vendor and vendee" and as the Court held in *Dennis* vs. *Miller* aforesaid, "there at once arises a surrender by act and operation of law."

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The defendant, Elfenbein, although he had given his check for the return of the deposit to the plaintiff, and although he had subsequently sold the same property and then sailed from this country after having stopped payment on the check, seeks now to retain the $1,000. and be unjustly enriched thereby. Defendant contends that he did not have both the money and the property and that he could not dispose of the property because of the contract. The fact that he did dispose of the property shows that he could dispose of it. Had the check been honored by the defendant it would have been a defense to any claim the plaintiffs may have made later in attempting to enforce the contract. Their acceptance of payment of the check as a return of their deposit would have prevented them from still seeking to enforce the contract.

POINT FIVE.

The plaintiff, Henrietta Ganz, was bound by the rescission because she ratified her husband's acts in accepting the same.

The defendant cannot be serious in his contention that the plaintiff Adolph Ganz had no authority to cancel the contract for his wife. This objection was raised in the court below and there disposed of because the evidence is abundant that the plaintiff Henrietta Ganz ratified the act of her husband in accepting a cancellation or rescission. (Case p. 24).

It is respectfully urged that the judgment appealed from should be affirmed.

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Attorney for and of Counsel with Plaintiffs-Respondents.

54

New Jersey Court of Errors and Appeals

ADOLPH GANZ and HENRIETTA GANZ, *Plaintiffs-Respondents,* *vs.* SAMUEL ELFENBEIN, *Defendant-Appellant.*	At Law. On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFFS-RESPONDENTS.

This action was brought in the Supreme Court of New Jersey, Hudson Circuit, to recover $1000. for the return of the deposit given by the plaintiffs to the defendant on account of the purchase price mentioned in the written contract for sale of real property belonging to the defendant.

The second count is based upon a check for said sum of $1000. given by the defendant to the plaintiff, Adolph Ganz, as a return of the said deposit, payment of which check was stopped by the said defendant. The defendant withdrew his counterclaim. The trial before Judge William H. Speer and a jury resulted in a verdict in favor of the plaintiffs and against the defendant for $1000.

Facts.

The defendant agreed to sell certain real property by a written contract of sale to the plaintiffs under the terms of which the plaintiffs gave the

defendant a deposit of $1000. When the parties met to close the title a dispute arose over some minor details and the defendant stated to the plaintiff, Adolph Ganz, that if he could not have his way the deal was off to which the plaintiff replied that such was satisfactory to him. The defendant thereupon made out his check to the order of the plaintiff for $1000. as a return of the said deposit, grabbed his papers and rushed out in haste. He later stopped payment on the check (Case, pp. 13-17) and later sold the said property to another and sailed from this country to Palestine (Case, p. 31).

Argument.

POINT I.

The contract was mutually rescinded and not void under the Statute of Frauds.

The Statute of Frauds provides that no estate or interest in real estate shall be surrendered unless it be by deed or note in writing, signed by the party surrendering the same or by act and operation of law (2 Comp. Stat., p. 2610).

Although the authorities seem to be in conflict on the question, the great weight of authority is that a parol rescission or surrender is valid and that such need not be in writing.

> "An executory contract for the sale of land, while still executory, may be rescinded by a subsequent oral agreement between the parties. However, proof of the rescission by parol, of a contract for the sale of land, should be clear and convincing; and should satisfy the mind that a rescission was intended by

the parties. It is essential that there be acts accompanying the rescission which are positive, unequivocal and inconsistent with the contract; and which leave no doubt of the intent, such as cancelling the agreement or removing from the possession.

"An executory contract for the sale of land, may be rescinded by mutual consent of the parties, either by novation or by simple agreement where they continue to occupy their original relations. And the agreement may be by parol as well as in writing and may be implied as well as express."

39 Cyc. 1355, 1356 and cases cited.

The defendant contends that *Long* vs. *Hartwell*, 34 N. J. L. 116 and *Headley* vs. *Cavileer*, 82 N. J. L. 635, hold that such rescission must be in writing. On the contrary, it seems that a careful reading of *Long* vs. *Hartwell* will disclose the fact that this case by every implication of logic holds contrary. On this precise question, the court says:

"Whether parol evidence is admissible to prove the discharge or abandonment of such contract is a question upon which there is a great conflict of authority, and as a discussion of this case can be confined within narrower limits no opinion will be expressed upon this point."

However, the Court enunciates the general rule that the substituted performance agreed upon by parol, actually and fully executed by the vendor and accepted by the vendee, may be set up in defense at law in a suit on the written contract within the Statute of Frauds.

"A contract under the dominion of the Statute of Frauds can be no more secure against invasion by parol than a sealed instrument."

Long vs. *Hartwell,* 34 N. J. L. 116 and cases cited.

In the other case of *Headley* vs. *Cavileer,* cited by the defendant, the Court says:

> "The fundamental difficulty, however, with which owners and courts had to contend and which in the absence of legislation is insuperable, was and is that there is no statute requiring such contracts to be in writing, that parties who have contracted together have a right to cancel their contract or alter it in any way not prohibited by law, or to supplement it by another or additional contract, and, in cases of this kind, may do so orally in the absence of any statute requiring such contract to be in writing."

By the punctuation the meaning and intent of the Court is perfectly manifest. The Court means to say that parties who have contracted together have a right to cancel their contract or alter it in any way not prohibited by law (comma) or to supplement it by another and additional contract, and in cases of this kind, that is, in cases of this latter class, may do so orally in the absence of any statute requiring such contracts to be in writing, that is, in cases of supplementing it by another and additional contract. The great weight of authority seems to be in harmony with this intention.

The defendant's brief cites cases in Kansas, Michigan, and Pennsylvania, for the proposition that such a contract cannot be rescinded by parol. The Courts in these states have held quite the reverse. *Sullivan* vs. *Dunham,* 42 Mich. 518; *Raffensberger* vs. *Cullison,* 28 Pa. St. 426, and the later Kansas cases hold, "A written agreement

to convey may be rescinded by a voluntary surrender or cancellation of the articles with the purpose to rescind."

In fact, with few exceptions, this will be found to be the law is most every state.

In 9 Cyc. 599 will be found the following statement of law:

> "When the original contract was required by the Statute of Frauds or any other statute to be in writing, the new contract must also be in writing. Where the parol discharge is in full and is executed, it is valid and conclusive even as to an agreement within the Statute of Frauds or any other statute requiring writing," and cites *Long* vs. *Hartwell,* in 34 N. J. L. 116, and *Thompson* vs. *Poor,* 147 N. Y. 402 at 409.
>
> "This being so, he strenuously contends that the plaintiff could not surrender the same except by deed or conveyance in writing subscribed by him and that, as such surrender was a part of the consideration of the promise sued upon, he improperly recovered. The power to surrender such interest, however, is not thus limited by that section. As applied to this case, it reads: 'No estate or interest in lands . . . shall be . . . surrendered . . . unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party . . . surrendering . . . the same.'"

Thus the section provides two ways of surrendering such estate or interest without any deed or contract in writing. One is by acts of the parties concerned. The other is by "operation of law." These two methods are frequently and perhaps generally, present and coalesce in the same transaction. Such surrendering is nothing more than

the effect of yielding up of such estate or interest to one having the immediate reversion or remainder wherein such particular estate or interest may merge. To be effectual, however, such act or acts must be inconsistent with the continuation of such former estate or interest, and must, moreover, be actually accepted and acted upon by the other and, in fact, all the parties concerned.

When such acts and acceptances so occur, under such circumstances, the party thus surrendering is estopped from subsequently disclaiming the effectiveness of such surrender. These views are in harmony with numberous English, and cites cases from other states.

Telford vs. *Frost,* 76 Wis. 174, 44 N. W. 835.

In the case of *Hutchins* vs. *DuCosta,* 88 Wis. 371, 60 N. W. 427, a suit was brought upon a check dated October 28, 1891, for $2500.00, made by the defendant to the order of Frank Ostrander. The defense was that on that day the defendant had entered into a written contract with the said Ostrander, for the sale by Ostrander to the defendant, of real estate, and on which the said check of $2500.00 was given as a deposit. That on November 6th, the defendant and Ostrander met, and mutually agreed that the deal should be declared off and cancelled, and the papers returned to the defendant. He, on the same day, telegraphed his bank to stop payment on the check. The check was turned over to the plaintiff by Ostrander, one month after, without consideration, and suit was started on it. The Court says:

> "The Statute expressly authorized, 'an interest in lands,' to be 'surrendered or declared by act or operation of law,' as well as by deed

or conveyance in writing.

Rev. St. Sec. 2302.

"The surrender to the defendant of the contract and written instructions, and the consent of Ostrander, to the payment of the check being stopped by the defendant, and the taking up of the check from the bank by Ostrander, were acts which operate in law as a surrender and cancellation of all the interest which the defendant had acquired in the land, and also a surrender and cancellation of the check. This principal has been repeatedly confirmed and sanctioned by this court."

Telford vs. *Frost,* 76 Wis. 174, 44 N. W. 835;

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A written contract for the sale of land may be rescinded by a subsequent parol agreement of the parties.

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Written articles of agreement for sale of land may be waived or surrendered by parol.

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