

1884 WILLIAM PUNTON MUNN *et al.*.....APPELLANTS ;

*March 14.

*June 23.

AND

LEWIS BERGER & SONS (LIMITED)...RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
LOWER CANADA (APPEAL SIDE).

*Sale of Goods—Acceptance, evidence of—Parol admissible—Art.
1235 C. C. (P. Q.)*

Held (reversing the judgment of the court below)—That in an action upon an unwritten commercial contract for the sale of goods exceeding the sum of \$50, oral evidence of acceptance or receipt of the whole or any part of the goods, is admissible, under Art. 1235 C. C.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) rendered on the 31st day of October last, confirming a judgment of the Superior Court at *Montreal*, rendered on the 9th of February, 1882, by the Honorable Mr. Justice *Papineau*, dismissing appellants' action for want of proof.

The action was brought by *William Punton Munn* and *Robert Stewart Munn*, doing business in *Newfoundland* under the name and style of *John Munn & Co.* The declaration sets forth the transaction as being carried out by *Lord & Munn*, as agents of *John Munn & Co.*, with the defendants acting by their agent *William Johnson*; that *Johnson* knew that *Lord, Munn & Co.*, were acting as agents of *John Munn & Co.*, and that *Johnson* purchased the goods in question, barrels of steamed oil. The declaration sets forth further that *Johnson* wrote to *Lord, Munn & Co.* withdrawing his offer, as though it

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

had not been accepted; that *Lord, Munn & Co.* demurred to this, and that then *Johnson* authorized *Lord, Munn & Co.* to sell the oil for account of defendants. The defendants denied that they ever purchased the oil, or had any negotiation with the plaintiffs concerning the oil, or that they had contracted with plaintiffs as alleged in plaintiffs' declaration. By a second plea defendants specially denied that *Johnson* was ever authorized by them, or that he had any authority to enter into the alleged contract on their behalf.

On the issues so raised the parties went to proof, and plaintiffs produced *James Lord*, a partner of *Lord, Munn & Co.*, as a witness. Without objection, *Lord* proved that *Johnson* was the agent of the defendants. He was then asked to state "What occurred on the occasion of the visit of Mr. *Johnson* to your office (*i e.*, office of witness), the 26th of May, 1878." Witness then related the propositions of *Johnson*, that *Lord, Munn Co.* telegraphed to plaintiffs their answer accepting, and that *Lord, Munn & Co.* then offered the oil as stated. Here defendants' counsel interposed an objection "to the witness proceeding to detail the conversation, if any, which occurred between him and Mr. *Johnson* on this occasion, inasmuch as it is an attempt to prove by mere verbal conversation a contract for the sale of goods exceeding in value the sum of \$50, without having first produced any memorandum in writing, or made any proof within the requirements of Article 1235, C. C." This objection was maintained and the ruling was excepted to.

On behalf of plaintiffs, witness was then asked: "Had you in store, on account of *Lewis Berger & Sons*, a quantity of seal oil during the course of the summer of 1880?" Objection was taken to this on similar grounds; the objection was maintained.

1884
 MUNN
 v.
 BERGER.

1884
 MUNN
 v.
 BERGER.

Witness was then asked: "Did you or did the plaintiffs in this case deliver any oil that you had in your possession for themselves; did they employ you to act as agent for them to sell it?" The defendants also objected to this question. They contended it was irrelevant unless it was intended to get witness to say that his firm held the oil for defendants. Other questions, all seeking to elicit from witness answers to show that he had received verbal instructions to deal with the oil as if it were the property of defendants, stored with *Lord, Munn & Co.*, were put; but they were all objected to, and the objections maintained by the court unless some writing could be produced. The witness said there was no such writing. The plaintiffs then asked the following question: "Did the defendants, by their agent, Mr. *Johnson*, exercise any acts of ownership over the said oil so in store during the months of July and August and September of the year 1880, and if so, state what the said acts of ownership were?" Objection was taken to this question, and the court instructed the witness that "if there is any writing to establish the said acts of ownership, he may answer." The witness says "there is no exercise of acts of ownership in writing." The court thereupon maintained the objection.

Thereupon the appellants asked that the case might be suspended in order to allow them to appeal from the rulings so made by the learned judge, declaring that it was impossible for them to proceed with the further examination of the witnesses, the evidence being virtually stopped.

The appellants applied to the Court of Queen's Bench on its appeal side, for leave to appeal from the said orders, but was refused such leave.

Thereupon the appellants had again to proceed, and being shut out from all evidence either of the contract,

or acceptance, or delivery, judgment was pronounced dismissing their action.

An appeal was taken from the final judgment of the Superior Court to the Court of Queen's Bench, appeal side, and by judgment rendered on 31st October, 1883, the said appeal was dismissed with costs.

1884
 MUNN
 v.
 BERGER.

Mr. *Kerr*, Q. C., for appellants :

The only question to be decided in this case is the following :

Can a plaintiff who seeks to recover damages, to the amount of \$3,094.71 for breach of contract for the sale of goods exceeding in value \$50, from the defendant (there being no writing signed by the defendant) establish by parol evidence that the defendant accepted or received part of the goods, or gave something in earnest to bind the bargain ?

The provisions of the Civil Code of *Lower Canada* governing this question are to be found in Arts. 1233 and 1235.

Previous to the Civil Code, the same proof that was admissible in *England* under the 17th section of the Statute of Frauds in all suits founded upon sales of goods was admissible in like suits in *Lower Canada*.

It remains, then, for the elucidation of the present question to enquire whether under the English Statute of Frauds parol testimony (there being no memorandum in writing) could have been admitted in any such suit to establish acceptance and receipt, part payment or earnest.

Under that section there can be no doubt that partial delivery and acceptance, payment, either in part or in whole, and earnest could and can be proved in *England* by parol testimony on a sale of goods, where no memorandum in writing had been signed by the party

1884

MUNN

v.

BERGER.

charged. And that such proof was and is sufficient to cause the contract to be held good (1).

In *England* and elsewhere a different meaning was and is attached to the words "accept" and "receive." In the 17th section of the Statute of Frauds they evidently did not mean the same thing, for as laid down by Lord *Blackburn* in his work on Sales (2): "As there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt—an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract and as so far satisfying the contract; the receipt of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them." *Campbell* on Sales and Com. Agents (3).

In Art. 1235 C. C., L. C., the words being "accepted or received," evidently mean that "accept" differs from "receive," and that the same act or process is not intended to be required by the use of the words in the alternative.

It is quite settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the court." *Benjamin* on Sales (4).

The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as owner, when he does an act which he would have authority to do as owner, but not otherwise.

(1) Browne, Statute of Frauds, 315, 322 and 337, and cases there cited.

(2) Pp. 22 & 23.

(3) P. 169.

(4) 3rd ed., 130, 148, 149, and cases there cited.

It is also now finally determined that the goods may remain in the possession of the vendor, if he assume a changed character, and yet be actually received by the vendee. *Chaplin v. Rogers* (1); *Elmore v. Stone* (2).

By Art. 1235, C.C., L. C., it is provided that to maintain an action or exception founded on a sale of goods exceeding \$50, a memorandum in writing is not required if the buyer "has accepted or received part of the goods."

Whilst thus under the Statute of Frauds acceptance and actual receipt of part of the goods sold by the buyer causes the agreement to be a binding contract, under Art. 1235 C.C., L. C., either acceptance or receipt produces the same effect.

It certainly is very extraordinary that the codifiers should have changed the wording of the 17th section of the Statute of Frauds when they incorporated it into Art. 1235, and yet that they should not, if any change in the law was intended to be effected, have distinguished the new provision in the usual manner.

Moreover, certain specific meanings had, by a long series of judgments, been attached to the words "accept" and "receive," and it would seem to be rash in the extreme to run the risk of unsettling the jurisprudence established for many years by changing the phraseology used in any portion of the provisions of the Statute of Frauds intended to be incorporated into Art. 1235.

The use of the word "or," however, between the words "accepted" and "received," in Art. 1235, in lieu of the conjunction "and" in s. 17 of the Statute of Frauds, cannot have changed the meaning of those words as settled by the courts. Nor can such use of the alteration be held to have prohibited the old mode of proof of either acceptance or receipt by parol testimony, and to have required proof in writing to establish such facts.

(1) 1 East 195.

(2) 1 Taunt. 458.

1884
MUNN
v.
BERGER.

In conclusion I contend that the article in question, therefore, is productive of this effect, that the action or exception in such case cannot be maintained unless a writing, signed by the party, is proved, or part acceptance, part receipt, or earnest, given by the vendee is established by testimony; but any one of the requirements being fulfilled satisfies the article.

Such being the case, it is clear that, under the circumstances, where in the declaration there is an allegation of acceptance or receipt of the whole or any part of the goods, or earnest, the vendor cannot be prohibited from proving by testimony the agreement, the acceptance or receipt of the goods, or earnest, according to the allegations of his declaration. If he fails in establishing by such testimony one of such requisites, his action must be dismissed on the ground that the agreement was non-productive of an obligation; if, on the contrary, he establishes by such testimony either acceptance, receipt or earnest the agreement thereby was transformed into a contract productive of all the obligations arising from a contract of sale.

As, in old Roman law, the verbal, literal and real contracts required certain formalities over and above the mere agreement of the contracting parties; in the verbal, a form of words in the shape of a question and answer between the contracting parties; in the literal, an entry in a ledger or table-book; and, in the real, the delivery of the thing, ere the agreement was clothed with the obligation, so under the 17th section of the Statute of Frauds are partial acceptance and receipt, part payment, earnest, or a memorandum in writing, required to make the agreement good. And under Art. 1235 in like manner a memorandum in writing, partial acceptance, or delivery, or earnest, ripens the agreement into a contract.

Mr. *Tait*, Q.C., for respondents:

The appellants made no attempt to prove any tender of the goods to the respondents, or any sale of them, or that they sustained any loss or damage by the non-reception of the goods by the respondents.

The decisions of the courts below as to reception of the evidence should not be disturbed, because the appellants have not made out a case in which it is permitted to prove a contract of sale by verbal testimony under Art. 1235 C. C., P. Q.

The learned counsel also referred to *Campbell* on Sales (1).

RITCHIE, C. J. :

The appellants in this case offered to prove by verbal evidence the fact of the acceptance or partial acceptance by, and of delivery to, and the exercise of acts of ownership by the respondents over the oil sold, also to prove verbally the contract by witnesses, but the learned judge was of opinion that such acts could only be proved by writing, and the appellant being prevented from making such verbal proof, judgment was pronounced dismissing the action.

This being a commercial transaction, I think the judge should have allowed the questions proposed to the witnesses to be put and answered. I think the learned judge was in error in thinking that acceptance, or partial acceptance, or delivery, or the exercise of acts of ownership over the oil sold, could only be proved by writing. In *England* to make the sale good, the requisites of the statute of frauds not having been complied with, the buyer should "accept part of the goods so sold and actually receive the same." By article 1235 C. C. L. C. in sale of goods over \$50 a memo. in writing is not required if the buyer "has accepted or received part of the goods, or given some-

1884
 Munn
 v.
 Berger.

1884
 MUNN
 v.
 BERGER.
 Ritchie, C.J.

thing in earnest to bind the bargain." It is quite clear to me that proof of acceptance, or receipt, or earnest given, may be by parol testimony, and proof in writing to establish such facts is not necessary. The witness should have been allowed to answer the questions proposed—we cannot anticipate what the answers would have been, or whether they would have sustained plaintiff's contention.

STRONG, J, concurred.

FOURNIER, J. :

Les faits de cette cause ont donné lieu à la question suivante : Dans un contrat de vente commerciale excédant \$50, le demandeur, poursuivant en dommages pour refus d'exécuter le contrat, peut-il faire la preuve testimoniale que le défendeur a accepté ou reçu une partie des effets vendus, ou qu'il a donné des arrhes pour rendre le marché obligatoire, lorsqu'il n'y a pas eu d'écrit signé par le défendeur ?

En matière de commerce, le principe général est, article 1233, que la preuve testimoniale est admise "de tout fait relatif à des matières commerciales," mais à ce principe il y a des exceptions, et entre autres celles de l'article 1235 : "Dans toutes les matières commerciales où la somme des deniers ou la valeur dont il s'agit excède cinquante piastres, aucune action ou exception ne peut être maintenue contre une personne ou ses représentants, sans un écrit signé par elle," dans les cas suivants entre autres : De tout contrat pour la vente d'effets, à moins que l'acheteur n'ait accepté ou reçu une partie ou n'ait donné des arrhes.

La règle qui précède a lieu lors même que les effets ne doivent être livrés qu'à une époque future, ou ne sont pas, au temps du contrat, prêts à être livrés.

Cet article est en substance la clause 17 du *Statute of*

Frauds, en force dans la province de Québec longtemps avant l'adoption du Code Civil. Dans l'application de ce statut on se conformait à la jurisprudence créée en Angleterre par de nombreuses décisions rendues sur son interprétation.

1884
 MUNN
 v.
 BERGER.
 Fournier, J.

Cette clause 17, d'où est tiré notre article 1235, en diffère dans un point important; le statut impérial dit :

No contract for the sale of any goods, wares and merchandises for the price (value) of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall *accept* part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereto, lawfully authorized.

On voit par le texte de cette clause que l'acceptation et la réception de fait (*actual receipt*) sont toutes deux nécessaires pour faire admettre la preuve testimoniale, lorsqu'il n'y a point de memorandum signé par la partie que l'on veut rendre responsable. Telle a été la jurisprudence constante en Angleterre. En vertu de l'art. 1235 il n'en est pas de même, l'acceptation ou la réception d'une partie des effets suffit pour dispenser de la nécessité de produire un écrit. Cet article s'exprime dans l'alternative, en se servant de la disjonctive *ou*, au lieu d'employer la conjonction *et* comme dans le statut impérial. Il y a certainement là une grande différence, et ce langage est si clair qu'il est impossible de prétendre que le texte de l'article 1235 doit être lu comme le statut impérial qui emploie la conjonction entre les mots acceptation et réception.

Les mots acceptation (*acceptance*) et réception n'ont pas dans le *Statute of Frauds* la même signification; ils signifiaient évidemment dans l'intention du législateur deux choses différentes dont il exigeait le concours pour dispenser de la production d'un écrit. C'est l'opinion de Lord *Blackburn* dans son traité "*On Sales*" où il

1884

MUNN

v.

BERGER.

Fournier, J.

s'exprime comme suit sur la signification de ces deux mots (1) :

As there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt. An acceptance of part of the goods is an *assent* by the buyer meant to be fixed, that this part of the goods is to be taken by him as his property under the contract and as so far satisfying the contract—the receipt of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them.

Les codificateurs ont sans doute trouvé dans cette différence entre l'acceptation et la réception un motif suffisant pour admettre que l'existence de l'une ou de l'autre aurait le même effet que la réunion des deux en vertu de la clause 17 du *Statute of Frauds*. On ne peut en conséquence refuser de donner effet au changement introduit par l'article 1235. Toutefois le code en n'exigeant que l'acceptation ou la réception, et en donnant un même effet légal à l'un ou à l'autre, n'en a pas changé la signification établie par la jurisprudence, ni modifié le mode d'en faire la preuve, suivi par cette jurisprudence, qui admettait la preuve testimoniale de l'*acceptance and actual receipt*. Le code sous ce rapport n'a point modifié cette jurisprudence, il n'y est dit nulle part dans l'article 1235 que la preuve de l'acceptation ou de la réception de partie des effets devra être faite par écrit—au contraire, lorsque l'une ou l'autre de ces deux conditions existe, il dispense de l'obligation de produire un écrit, comme dans le cas où des arrhes ont été donnée. Si, comme je le crois, cette interprétation est correcte, la preuve testimoniale de l'acceptation ou réception de partie des effets vendus, tel que allégué dans la déclaration, peut être reçue.

HENRY, J. :

This is an action to recover the price of a quantity of

(1) Pp. 22-23.

oil alleged to have been sold and delivered by the appellants to the respondents. The contract set out in the declaration was not in writing, and the respondents refused to complete the purchase. The declaration alleges an acceptance of a portion of the oil, the storing of it by the agents of the appellants at the request of the agent of the respondents, and the sale of a part of it by the same direction. At the trial the appellants, having proved the contract for the sale, were proceeding to adduce oral evidence, when the learned judge before whom the cause was tried, on objection raised on the part of the respondents, decided that, under the terms of the Civil Code, the evidence of acceptance or delivery must be proved by a writing signed by the party to be affected by it; and, rejecting the oral evidence tendered, dismissed the action with costs. On appeal to the Court of Queen's Bench, the judgment of the court of first instance was affirmed, with costs, and from the latter judgment the case came by another appeal to this court; and having been argued it awaits our judgment. The only question before us is as to the ruling of the learned judge in rejecting the evidence in question.

By the article of the Civil Code applicable to this case (1235), it is provided as follows:

In commercial matters in which the sum of money or value in question exceeds fifty dollars no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former in the following cases. 4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;—the foregoing rule applies, although the goods be intended to be delivered at some future time, or be not at the time of the contract ready for delivery.

What then, is the meaning of the second proviso? The first part of the article provides that no action or exception can be maintained on a contract, the amount of which exceeds fifty dollars, unless it is in writing

1884
 Munn
 v.
 BERGER.
 Henry, J.

1884
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 MUNN  
 v.  
 BERGER.  
 ———  
 Henry, J  
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and signed by the proper party, and the effect of the second proviso is to except from the operation of the first provision of the article cases where the buyer has accepted or received part of the goods, or given something to bind the bargain. The articles were adopted from sec. 17 of the English statute of frauds ; but in one important respect they differ. Under the latter there must be a delivery out of the possession and control of the vendor, so as to destroy his (vendor's) lien ; for the continuance of such lien necessarily implies that he retains the possession. By a proper and legitimate construction of the provision in the code the "acceptance" or "delivery" of part of the goods is sufficient. The words admit, I think, of no other construction.

It is not necessary to constitute an acceptance and delivery under the statute of frauds that the position or location of the goods should be changed. In *Kershaw v. Ogden* (1), it was decided that, though the goods remain in the personal possession of the vendor, yet, if it is agreed between the vendor and vendee, that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute. Numerous cases have been decided in *England* on the same principle.

*Roscoe*, in his work on *Nisi Prius Evidence* (2), says :

There need not be an actual delivery, but there may be something tantamount. Such as the delivery to the buyer of a key of the warehouse in which the goods are lodged or the delivery of other *indicia* of property.

Lord *Kenyon*, C. J., in *Chaplin v. Rogers*, says (3) :

And this is evidence of acceptance as well as delivery.

A written order given by the seller of goods to the buyer, directing the person in whose care the goods are

(1) 3 H. & C. 717, and 34 L. J. (2) P. 478.  
 Ex. 159. (3) 1 East 192, 195.

to deliver them, is a sufficient receipt within the statute, provided the person to whom it is directed accept the order for delivery and assent to hold the goods as the agent of the buyer. See *Searle v. Keeves* (1); *Bentall v. Burn* (2); and *Salter v. Woollams* (3).

1884  
 MUNN  
 v.  
 BERGER.  
 Henry J.

The declaration contains allegations that the oil in question on arrival at *Montreal* was taken out of the ship and stored by the directions of the agent of the respondent, who told the latter that he would be satisfied to receive the same on the then present gauge and inspection, and would not require it to be re-gauged on delivery. Shortly after the storage of the oil, the agent of the appellants at *Montreal* was requested by the agent of the respondent to sell it at a certain named price, and he, acting on such instructions, sold a portion of it at the price so fixed by the agent of the respondents. The appellants should have been permitted to give oral evidence of these facts as showing an acceptance of the oil and a delivery also. I think that such evidence was admissible under the article of the code to which I have referred, and, that as such evidence was improperly rejected on the trial, I think the judgment of the Superior Court dismissing the appellants action and that of the Court of Queen's Bench affirming it should be set aside and a new trial granted with all costs.

GWYNNE, J.:—

I also am of opinion that this appeal must be allowed. In an action upon a contract for the sale of goods exceeding the sum of \$50, where there is no written contract, oral evidence of the acceptance of the goods by the defendants, is as admissible under article 1235 of the C. C. of the Province of *Quebec* as it is under the provisions of the Statute of Frauds in *England*. The

(1) 2 Esp. 598.

(2) 3 B. & C. 426.

(3) 2 M. & Gr. 650.

1884  
MUNN  
v.  
BERGER.  
Gwynne, J.

evidence, therefore, which was tendered by the plaintiffs for the purpose of proving acceptance by the defendants in this case should have been received.

Whether the evidence, when received, shall prove to be sufficient to entitle the plaintiffs to recover in this action, is a question with which we cannot be in a position to deal until we shall see what the extent of the evidence is.

*Appeal allowed with costs.*

Solicitors for appellants: *Kerr & Carter.*

Solicitors for respondents: *Abbott, Tait & Abbott.*