& Al. 321, 326; *Tempest* v. *Fitzgerald*, 3 B. & Al. 680; *Atkinson* v. *Bell*, 8 B. & C. 277; *Astey* v. *Emery*, 4 M. & S. 262; *Walker* v. *Boulton*, 3 U. C. O. S. 252; *Norman* v. *Phillips*, 14 M. & W. 277; *Mucklow* v. *Mangles*, 1 Taunt. 318; *Bushell* v. *Wheeler*, 15 Q. B. 442; *Meredith* v. *Meigh*, 2 E. & B. 364; *Acraman* v. *Morrice*, 8 C. B. 459; *Smith* v. *Surman*, 9 B. & C. 561; *Bill* v. *Bament*, 9 M. & W. 36; *Boldey* v. *Parker*, 2 B. & C. 37; *Curtis* v. *Pugh*, 10 Q. B. 111; *Wilkins* v. *Bromhead*, 7 Scott N. R. 921.

DRAPER, C. J., delivered the judgment of the court.

In this case the original bargain was verbal, and was for goods of a value exceeding £10 sterling in amount, at a stipulated price (75 cents per yard), and at the making of the bargain part of the goods were not manufactured. All were to be delivered by the 1st of April, 1863. Before the 10th of March, 1863, three cases of these goods came (not all together) into defendants' hands, and on that day they wrote that they would not keep them except at a less price, (70 cents per yard,) because the plaintiff had disregarded an alleged condition of the bargain. The plaintiff replied in effect denying there was such a condition, and refusing to lower the price. On the 12th of March defendants write that the goods alluded to in their former letter are in their hands, subject to the plaintiff's order. And on the 26th of March they write stating they had received another case, which they declined taking in stock, for other reasons as well as those already mentioned; and they inform the plaintiff the goods are stored at his risk. All the goods agreed for were forwarded by the plaintiff within the time stipulated.

At some time the defendants sold part of the contents of the first two cases, and soon after, as their witness Mr. Spence states, they discovered defects in the quality of the goods, and did not open the other two cases until about ten days before the trial. They made no other communication to the plaintiff until the 19th of October, 1863, upwards of three weeks after this action was brought.

It was not shewn when the defendants sold a part of these goods, but by the language of their letters of the 10th, 12th, and 26th of March, they represent the goods to be in their hands as the plaintiff's goods, the last letter stating they were stored at his risk. Against this, however, Mr. Spence's evidence is, that the sale was before the receipt of the last case, and within a week or so of the first two cases being opened; but he qualifies the statement by adding, "this is only conjecture." It appears to us more reasonable to rely on the defendants' own representations up to the 26th of March. In the letter of the 19th of October, one of the defendants writes, "Last spring, upon their imperfections being pointed out, and some of them returned, I stopped the sale, and they are all here, except what has been paid into court;" and this passage confirms rather than weakens the conclusion that sales of part of these goods were made by defendants after the 26th of March.

The two objections raised on the defence, 1st, as to selling to retail dealers, and 2nd, as to the quality of the goods, which might possibly have justified the defendants in repudiating the goods, have been submitted to the jury, and their verdict must be taken to negative both.

Under these circumstances, the question raised is whether the contract is binding on the defendants under the Statute of Frauds, which enacts "that no contract for the sale of any goods, wares, and merchandize, for the price 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 thereunto lawfully authorised."

We are of opinion the defendants, the buyers, did accept part of the goods so sold, and did actually receive the same.

We have not felt it necessary to enter upon an examination of the authorities cited by Mr. Read for the defendants, because some of them are not in our view of the facts applicable—we allude to those relative to goods not in *esse* when the bargain was made; and because there are later authorities, to which we shall make a brief reference, in which the more important cases cited are reviewed.

If *Morton* v. *Tibbett* (15 Q. B. 428) had been entirely supported by later authorities, it would be decisive of this case. It is there stated by Lord Campbell that, "as part payment, however minute the sum may be, is sufficient, so part delivery," (and acceptance) "however minute the portion may be, is sufficient:" that such delivery and acceptance is only a waiver of the note or memorandum in writing, and that there may be an acceptance and receipt within the meaning of the statute, without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract.

In *Hunt* v. *Hecht* (8 Ex. 818), however, Martin, B., remarks upon this: "Acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection." And he says that *Morton* v. *Tibbett* decides no more than this, "that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same."

Lord Campbell's judgment is again observed upon in *Coombs* v. *The Bristol and Exeter Railway Co.* (3 H. & N. 510), the determination of *Morton* v. *Tibbett* being approved, though afterwards, in *Castle* v. *Sworder* (6 H. & N. 828), during the argument in the Exchequer Chamber, Cockburn, C. J., says, "It must not be assumed that I assent to the decision in *Morton* v. *Tibbett*." Within a few days after *Castle* v. *Sworder* was decided in the Exchequer Chamber, Blackburn, J., delivered the judgment of the Court of Queen's Bench in *Cusack* v. *Robinson* (1 B. & C. 299), and he quotes the following passage from *Morton* v. *Tibbett* with approval: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." Which is not altogether in accordance with the observation of Crompton, J., in *Castle* v. *Sworder* (p. 832), "Perhaps the true rule is, that there can be no acceptance while the purchaser continues at liberty *to reject* the goods as not being according to sample or contract."

There is, however, no inconsistency between the decisions in *Castle* v. *Sworder* and *Cusack* v. *Robinson*; and the whole current of unshaken authority in our opinion warrants us in holding that the defendants' conduct, in selling part of the goods purchased by them under one entire contract, after the receipt of the greater part, and not improbably of the whole of such goods, was an act of acceptance sufficient to make the contract a binding contract, though made originally without any note or memorandum in writing. We are fortified in this conclusion by the verdict, which, as the case was left to the jury, involves a finding either that there was no condition in the contract as to sales to retail dealers, or if such condition that it was not broken; and that the goods delivered corresponded with the sample, or that the defendants, by unreasonable delay in giving the plaintiff notice of this objection, waived it.

We have not overlooked the case of *Nicholson* v. *Bower* (1 E. & E. 172), but it does not appear to us to affect our conclusion. We refer also to *Meredith* v. *Meigh* (2 E. & B. 364) and to *Currie* v. *Anderson* (6 Jur. N. S. 442), in which Crompton, J., observes, "I must say, to day, I think the case of *Morton* v. *Tibbett* is more satisfactory than I ever thought it before;" and to the remarks of Erle, J., in *Parker* v. *Wallis* (5 E. & B. 21).

Rule discharged.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE THE TRUSTEES OF THE WESTON GRAMMAR SCHOOL AND THE CORPORATION OF THE UNITED COUNTIES OF YORK AND PEEL.

School trustees—County council—Con. Stat. U.C, ch. 63.

Held, that a county council is not bound under Con. Stat. U. C., ch. 63, to raise a sum of money upon the application of grammar school trustees for the purposes connected with the grammar school, but that the statute is permissive not obligatory.

[T. T., 27 Vic.]