fining myself to the decision of this demurrer, on which I am satisfied the plaintiff is entitled to judgment.

Morrison, J., concurred.

Judgment for plaintiff on demurrer.

Robinson v. Gordon and McKay.

Sale of goods—Statute of Frauds—Acceptance and receipt.

Defendants, wholesale merchants, in December, verbally ordered certain cloth goods from the plaintiff, a manufacturer, by sample, at a stipulated price per yard, to be delivered by the 1st April next. Three cases were received by defendants, at different times, before the 10th of March, and on that day they wrote to the plaintiff that they would not keep them except at a less price, because he had disregarded an alleged condition of the bargain, not to sell to retail merchants. The plaintiff in reply denied this condition, and refused to lower the price; and on the 12th the defendants again wrote, that the goods were in their hands subject to the plaintiff's order. On the 26th, having received the last case, defendants wrote declining to take it in stock, "for other reasons as well as those already mentioned," and stating that the goods were stored at the plaintiff's risk

Defendants sold part of the first two cases, whether before or after the 26th of March was not clear, and soon after, as they alleged, discovered defects in quality, and did not open the other cases till the end of October, about ten days before the trial. The objections as to selling to retail dealers and as to quality having been left to the jury, they found for the plaintiff

Held, that there was an acceptance and receipt of the goods by defendants, within the Statute of Frauds.

[M T., 27 Vic.]

Declaration for goods bargained and sold, goods sold and delivered, work and materials, and account stated.

Plea, as to $187 53, payment of that sum into court; as to the residue, never indebted.

The plaintiff took the money out of court on the first plea, and joined issue on the second. The trial took place at Berlin, in November, 1863, before Hagarty, J.

The plaintiff proved a verbal order given by one of the defendants, wholesale merchants in Toronto, for certain goods, of which the plaintiff was a manufacturer. The goods were sold by sample at 75 cents per yard, and were to be forwarded by the plaintiff to defendants. The contract was made in the end of December or beginning of January next before the trial. On the 11th of February, 1863, the defendants wrote to the plaintiff that it was time for the plaintiff to be sending a portion of the two samples of tweeds ordered. On the 10th of March, 1863, the defendants wrote to the plaintiff the following letter:

"We have invoice of three cases of goods from you—last case just in, but unopened. We beg to say that circumstances have come under our knowledge, viz, that at prices sold to us these goods were to be exclusively sold to wholesale houses. Such not being the case, we beg to advise that we shall not take them into account except at 70 cents. This will refer to all received." To which, on the 12th of March, the plaintiff replied, "that the goods have been sent as per agreement; consequently there can be no abatement on the price invoiced to you at."

To this on the same day the defendants answered: "We have your favour of this date. In reply we beg to state that goods alluded to in ours of 10th instant are here subject to your order. We fully comprehend our position, and will abide the result." On the 26th of March, 1863, the defendants wrote to the plaintiff as follows: "Since writing you 12th instant, advising you that your goods were held here subject to your orders, we have received another case, which, for other reasons as well as those already mentioned, we decline taking in the stock. They are stored at your expense, and in every other way at your risk. We think your better plan would be to do something with them in season."

The only other letter put in evidence was dated 19th of October, 1863, this action having been commenced on the 23rd of September preceding. It was written to the plaintiff by the defendant Gordon, as follows: "I learn that you were looking at your goods one day that I was absent. I regret I was not in, as I could have shewn you the lot—Mr. Spence or Mr. McKay not knowing their whereabouts. Last spring, upon their imperfections being pointed out, and some of them being returned, I stopped their sale, and they are all here, except what has been paid into court. I advised you 26th March. You did not choose to reply. I yet believe had you been aware of their condition you would have acted differently. Law in any case is unpleasant; and as a manufacturer I can't see what you can gain by present course. There is not a merchant in Upper Canada but will bear us out as to condemning them. I would still say, best course to accept of amount paid in and take the goods. 'Tis the first thing of the kind we ever had. I may add that a number of the pieces are short measure as well."

It appeared that all the goods bargained for were delivered before the 1st of April, 1863 The plaintiff's general manager proved the bargain and delivery, and that he took samples to the defendants when he sold the goods to them. He swore it was no condition of the sale that the plaintiff should not sell such goods at such prices to retail merchants: that they (meaning the plaintiff) did not make a business of selling to retail houses, but did not promise not to do so. This order was given in the plaintiff's cloth room at Galt—no one present but the witness and McKay, one of the defendants. He had shown defendants samples in Toronto. McKay in Galt selected from pieces which he looked at, fifty pieces of one and fifty pieces of another quality. He and other witnesses gave evidence of their being properly manufactured and saleable goods, but cheap—made from coarse wool.

It further appeared that the defendants had actually sold 275¼ yards of the goods first received, but that they had not opened the two last cases received until about ten days before the trial. And on their part evidence was gone into to show that when the plaintiff's manager came to Toronto with patterns, to get orders, Mr. Spence, who was in defendants' employ, told him it would be an objection to defendants ordering these goods if the plaintiff sold such goods to retail merchants, and the plaintiff's manager said there would be no cause of complaint on that head. Spence understood him to say that if defendants gave an order the plaintiff would not sell to retail merchants.

A good deal of evidence to shew that the goods were not as good as the patterns produced in Toronto, nor merchantable, was gone into; and the plaintiff gave additional evidence in reply on this head. There was no proof that the plaintiff had sold to retail dealers. The amount paid into court was admitted to be $19 too little.

It was objected, at the close of the plaintiff's case, that there was no contract in writing, and that, so far from there being evidence of acceptance of the goods, there was express evidence of their being rejected. The learned judge overruled the objection, and at the close of the plaintiff's case told the jury that when persons purchase goods to be delivered according to sample the vendees are entitled to a reasonable time to examine them, and if they do not answer the sample the vendees may refuse acceptance, giving notice to the vendors; and he left to them to say whether the goods delivered answered the samples or not. He remarked on the fact that when the defendants in March gave notice to the plaintiff, it was not apparently from any defect in quality, but on an alleged breach of contract in selling such goods to retail dealers—nothing being said of defects, and two cases, in fact, not having been opened at all until ten days before the trial: that vendors are entitled to know in a reasonable time on what grounds the goods sent are objected to: that if there was an inferiority in the goods delivered to the sample, they might (if defendants were bound by their conduct to keep them) make some allowance.

The jury gave the plaintiff the full amount claimed.

Read, Q. C., obtained a rule *nisi* for a new trial, or to reduce the verdict to $19, or to $335, that being the price of the first case of goods in question in this suit, less the sum paid into Court; or to reduce the verdict to such sum as the court might direct; the verdict being contrary to law and evidence, and for misdirection, because, except as to the goods sold by the defendants, there was no acceptance, and defendants refused to accept the same, and therefore the plaintiff's cause of action so far was not for accepting, and for the goods not accepted the plaintiff could not recover in this action: that the plaintiff did not prove a contract within the Statute of Frauds, and within the statute 13 & 14 Vic., ch. 61.

John Read shewed cause, and cited *Scott* v. *The Eastern Counties R. W. Co*, 12 M. & W. 33; *Lillywhite* v. *Devereux*, 15 M. & W. 291; *Elliott* v. *Thomas*, 3 M. & W. 176; *Fragano* v. *Long*, 4 B. & C. 219; *Rohde* v. *Thwaites*, 6 B. & C. 388; *Morse* v. *Chisholm et al*, 7 C P. 131; *Hunt* v. *Silk*, 5 East 449.

Read, Q. C., contra, cited *Kent* v. *Huskinson*, 3 B. & P. 233; *Thompson* v. *Maceroni*, 3 B. & C. 1; *Howe* v. *Palmer*, 3 B.