Munn's steam refined pale seal oil, to arrive, at 57½ cents per gallon cash, less 3 per cent, with the provision that the appellant should have the right to ship 100 to 200 barrels additional to suit the vessel, the respondents to have the option of taking the same. The delivery of the oil was not to be made till 1st August. The appellants alleged that, in accordance with the contract, they shipped 778 casks of oil, which arrived in Montreal 1st July, 1880; that notice was given to the respondents of its arrival, and that Lord & Munn were instructed by respondents through their agents, to store the same, as it was not then required; that shortly after arrival and storage of the oil, the respondents, by their manager, ordered Lord & Munn to sell the oil at 60 cents per gallon; that five barrels were sold at this rate; that respondents then advanced the price to 62¼ cents, but finally they refused to take the oil, and upon such refusal the oil was sold at the current market price, and a loss of $3,094.71 was made.

The difficulty in the case was as to the proof of the sale to the respondents. There being no memorandum in writing in existence, the appellants endeavored to prove by verbal evidence the fact of the acceptance or partial acceptance, and the exercise of acts of ownership by the respondents over the oil so alleged to have been sold. They also endeavored to prove the contract by witnesses, but the presiding Judge was of opinion that the appellants could not prove the contract or the acceptance of the oil without a writing. The action was, therefore, dismissed for want of proof. The present appeal was from that judgment.

The plaintiffs had previously moved unsuccessfully for leave to appeal from the interlocutory rulings excluding verbal evidence; (see 4 Legal News, p. 218, for the report of the judgment on the motion for leave to appeal).

Ramsay, J. On the interlocutory judgment rendered rejecting the evidence in this case, an appeal was asked for, and the questions now raised were then fully argued. The learned counsel for the appellants has put the case very clearly before us, but we see no reason to change our opinion. As the case is fully reported, it is unnecessary for me to repeat what was said in that case. Shortly, however, I may say that if a constructive acceptance or an acceptance by words, takes the case out of the operation of article 1235 (not the Statute of Frauds) then the article is valueless. As was said when the case was before us on the former appeal, one of the questions might be admissible as an introductory question, but as it was admitted that there was no writing to which such a question could be applicable, it was useless, and therefore, properly rejected. We are to confirm with costs.

Judgment confirmed.

Kerr & Carter for Appellants.

Abbott, Tait & Abbotts for Respondents.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1883.

Before JOHNSON, J.

BYRD v. CORNER.

Negligence—Estimation of Damages.

Per Curiam. This is an action of damages for $10,000 by the widow of a man named Macklaier, who is alleged to have been killed on the wharf here, against the master of the steamer Harold which was leaving the port, and in swinging round snapped her stern hawser, breaking both of Macklaier's legs, and so seriously injuring him that he died in consequence, at the General Hospital within two or three days. The case is clearly proved in every particular except one, viz.: the damages, in which, by the nature of things, there can only be proof of facts which may serve as a means of estimating them; and this proof is abundantly before the court. The deceased was a young man of about 33, of excellent conduct, and in perfect health, and leaves a widow and five children who have no means of support. He is proved to have been earning $14 a week—but that was as checker, which I take it only gave him employment about seven months in the year—and I have no evidence as to what he may have been able to earn at other times—though it is not probable that such a man would have earned nothing all winter. I have not entered into details as to the accident, or the particulars of the evidence: it is not necessary. I shall say that from the evidence of the circumstances attending the misfortune, it appears to me an inevitable conclusion of common sense that there is negligence (*culpa*) in the defendant.