1893

Acceptance and Receipt under Seventeenth Section of the Statute of Frauds

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ACCEPTANCE AND RECEIPT UNDER SEVENTEENTH

SECTION OF THE STATUTE OF FRAUDS.

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ACCEPTANCE AND RECEIPT UNDER SEVENTEENTH
SECTION OF THE STATUTE OF FRAUDS.

The Act 29 Car. II, c. 3 entitled "An act for the prevention of fraud and perjuries" and better known as the Statute of Frauds, remains, after an experience of over two hundred years, the most remarkable embodiment of purely legal reform, which the history of our common law affords. It came into operation on June 24th, 1677, and has probably given rise to more litigation than any enactment ever placed upon a statute book. Who is the author of this marvelous piece of legislation is not definitely known, but Sir Lionel Jenkins, Lord Keeper Guilford, Lord Nottingham and Sir Matthew Hale seem to
share equally the praise from the legal profession, and the blame from the defeated litigants, for the preparation and guiding of this Bill through the House. Who the originator of the Statute was, is of very slight importance, the fact remains, that it has modified the judicial procedure of the courts throughout Great Britain and the United States, and regulated modern methods and dealings, in the most momentous affairs of common life. Notwithstanding the re-enactment of this Statute by so many independent legislatures its original form has suffered very little change.

The following discussion will be devoted entirely to show what acts are essential to constitute, an acceptance and actual receipt of part of the goods sold, within the meaning of that portion of the Statute known as
section 17, which reads in the original enactment and
which has been substantially re-enacted wherever the
Statute appears, as follows:— "And be it further enact-
ed: That no contract for the sale of any goods, wares,
and merchandises 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 re-
ceive the same or give something in earnest to bind the
bargain or in part payment, or that some note or memoran-
dum in writing of the said bargain be made and signed by
the parties to be charged by such contract or their
agent thereunto lawfully authorized."

The words of this section that the sale "shall not
be allowed to be good, except the buyer shall accept part
of the goods so sold, and actually receive the same seem clear and simple, but from the large number of cases litigated and judicial opinions rendered upon their interpretation, it can be seen that no little difficulty has been experienced in determining what acts are necessary to constitute a sufficient acceptance and receipt to satisfy their requirements.

The earlier cases confound the meaning of these two words with delivery, and many late ones carelessly use the word delivery as though it were equivalent to them. In Searle vs. Keeves 2 Esp. 598 (1799) Eyre C.J. says: "The Statute of Frauds, does not attach where there has been earnest, or a delivery of a part of the things sold."

In Chaplin vs. Rogers 1 East 192 (1800) Lord Kenyon says:
"I do not mean to disturb the settled construction of the statute, that, in order to take a contract for the sale of goods of this value out of it, there must be either a part delivery of the thing or a part payment &c." And again in a note to Anderson vs. Scot 1 Camp. 235 (1808) Lord Ellenborough spoke of "an incipient delivery sufficient to take the case out of the Statute of Frauds."

Similar expressions occur in cases as late as 11 Johns. 283. 8 L.J.Q.B. (N.S.) 258 and 97 Ind. 253. On the other hand the plain wording of the statute is disregarded by some and it is treated as though it read acceptance or actual receipt and the Superior Courts have been frequently called upon to reverse or overrule de-
cisions of this nature.

The basis of the whole law upon the subject is, that in order to manifest an acceptance and receipt within the meaning of the statute, the buyer must deal with the goods, in such a way, as to prove that he recognizes the existence and obligation of a contract, and the property must pass entirely beyond the dominion and control of the seller. Thus as the following quotations from some of the leading cases will show, there must be a delivery by the vendor and an acceptance by the vendee, the one without the other will not satisfy the requirements of the statute. In Stone vs. Browning et al. 51 N.Y. 211 an action to recover the price of goods sold under a verbal contract, Lott Ch. C. said "The
mere receipt is not a compliance with the requirements.

There must be some act or conduct on the part of the buyer, indicating and manifesting his intention in receiving them, to accept them absolutely and unconditionally in execution and full performance of the contract of sale."

Earl C. in the same case said "There was no compliance with the statute unless the defendant both accepted and received the cloth purchased, or some of it. It was not sufficient to answer the statute that the cloth was delivered to the defendants, they must also have accepted it. A delivery of property to satisfy the requirements of the statute of frauds, must be a delivery by the vendor with the intention of vesting the right of pos-
session in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner."

And again in Caulkins et al. vs. Hellman 47 N.Y. 453

Rapallo J. says "There must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title or make the vendee liable for the price, and his acceptance must be voluntary and unconditional. Even the receipt of the goods without an acceptance is not sufficient." This rule is established by the authorities beyond a question and is laid down in 2 B. & C. 511, 48 Me. 381, 120 Mass. 290, 36 N. H. 311 and numerous other cases including Billen vs. Henkel 9 Colo. 394.
Having seen that both acceptance and receipt are essential to satisfy the requirements of the statute, it will next be necessary to show what acts are requisite to constitute such an acceptance, and what to establish a sufficient receipt.
The rule as laid down by Lord Blackburn was "So long as the buyer can without self contradiction declare, that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. The question is not whether he ought to accept, but whether he has accepted them. The question of acceptance is a question as to what was the intention of the buyer as signified by his outward acts."

In the case of Morton vs. Tibbett (see ante) Lord Campbell lays down the following rule: - "We are of opinion that there may be an acceptance and receipt within the mean-
ing of the act, without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract, appears to me, to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled." These two rules cannot stand together since the basis of Blackburn's rule is that until the buyer has done something to preclude him from objecting to the goods there is no acceptance, while Campbell's rule says there may be an acceptance sufficient to satisfy the statute and the buyer not precluded from objecting. The part of Blackburn's rule which says "If there has been no acceptance the statute is not satis-
fied, whether vendee ought to have accepted or not" is not good law, but the first part is bad and Morton vs. Tibbett holds although some of its dicta have been overruled. Sir Robert Campbell in looking at these rulings laid down the following propositions. "Acceptance may be conditional and if a case should arise on a verbal contract, where the buyer accepts the goods conditionally, and afterwards rightly refuses to take them, the statute has not been complied with." But this makes the question of whether there is a contract or not depend upon whether or not the contract has been carried out. With reference to this subject Mr. Leake in his work on contracts p. 281 says: "Upon an acceptance and receipt within the statute being established, the contract is left to the
rules of common law: the evidence is no longer restricted and it may be proved in the form in which it was in fact made. The receipt of the goods refers to the possession and necessarily imports a delivery of the possession actual or constructive to the buyer. The statute mentions acceptance as well as receipt, and it is generally stated that both these requisites must exist or else the statute is not satisfied; thus implying that the acceptance may be something different from and not included in the receipt of them. According to the course of judicial decisions that prevailed for some time, it was held that the acceptance was to be understood with reference to the contract, and required such an act as precluded the buyer from disputing the
performance of the contract as to the goods accepted: but it has since been deliberately decided, that such an acceptance is not intended, and that the buyer may accept and receive the goods in a manner to exclude himself from the statute, and to render himself chargeable upon a parol contract, yet without precluding himself from any remedy for not delivering according to the contract if charged in an action for the price. The modern decisions however, since abandoning the test of acceptance by reference to the contract, are not equally conclusive, nor indeed give much satisfaction as to the manner or quality of acceptance intended that may be short of accepting the goods as satisfying the contract and at the same time distinct from or added to the receipt of possession. It seems therefore more con-
venient to treat the acceptance and receipt as a combined or compound requirement of the statute, until some necessity may occur for separating them."

This is the way a great many writers treat this subject, and it cannot be denied that there is a great deal of difficulty in distinguishing in some of the cases whether the acts proved constitute receipt or acceptance or both, the judges have spoken very impatiently of the confusion, and that the decisions are confused is seen in the fact that Mr. Benjamin misquotes many of the judgments in order to make them come into line at all, and from the fact that Campbell puts several cases under the head of acceptance, which are put by Benjamin under the head of actual receipt.
A few notes from some of the leading and much cited English decisions, will show how the law stands on this point in England, where it is comparatively settled.

Morton vs. Tibbetts 15 Q.B. 428 (1850)

On Aug. 25th, defendant made a verbal agreement with plaintiff for the purchase of 50 quarters of wheat according to sample. Defendant by agreement sent a general carrier next morning to a place named, and the wheat was placed on board carrier's lighter for conveyance via canal to Wesbeach, where it arrived Aug. 28th. In the meantime on Aug. 26th, the defendant resold the wheat by the same sample, and on condition that it was to be as represented to him, the defendant by the plain-
The wheat upon arriving was examined and weighed by the purchaser and rejected on account of its being short weight. Defendant wrote plaintiff on 30th rejecting wheat as not up to weight. The wheat remained in the possession of the carrier. This action being brought to recover the price the defendant pleaded, statute of frauds. Court gave judgment for plaintiff, Lord Campbell saying: - "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. As the Act expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of
the residue; and even where the sale is by sample, that
the residue offered does not correspond with the sample:

We are of opinion that there may be an
acceptance and receipt within the meaning of the act,
without the buyer having examined the goods, or done any-
thing to preclude him from contending that they do not
correspond with the contract. The acceptance to let
in parol evidence of the contract, appears to us to be a
different acceptance from that which affords conclusive
evidence of the contract having been fulfilled.

We are therefore of opinion that although the defendant
had done nothing which would have precluded him from ob-
jecting, that the wheat delivered to the carrier was not
according to the contract, there was evidence to justify
the jury in finding that the defendant accepted and re-
ceived it."

It is to be noted that the doctrine in the above case, viz: that the acceptance must precede or be con-
temporaneous with the receipt of the goods, is in all the late cases where the old rule has been departed from, subsequent or contemporaneous with the receipt.

The case of Morton vs. Tibbett was followed in Kibble vs. Gough 38 L.J.N.S. 204 (1878), where defendant verbally agreed to purchase a specific quantity of barley from the plaintiff on the terms that the bulk should be as well dressed as the sample. The plaintiff accord-
ingly delivered an instalment of the barley to defen-
dant, whose foreman received it and gave a receipt marked "not equal to sample." Next morning defendant himself
inspected the bulk and wrote immediately to plaintiff refusing to accept, on the ground that the barley was "not well dressed nor equal to sample." The plaintiff brought an action against the defendant for goods sold and delivered and at the trial Pollock B. left the following questions to the jury. Was there a contract? Was there acceptance by the defendant of part of the barley? And was the barley equal to sample and properly dressed? All of which questions the jury answered in the affirmative. A rule nisi for a new trial was granted, and on argument to make the rule absolute the opinion in Morton vs. Tibbett was sustained.

Bramwell L.J. said: - "I will not say that the decision in Morton vs. Tibbett was wrong: on the contrary I think it
was right. A man may accept goods without losing his
right of objection to them." Brett L.J. said "There
must be an acceptance and an actual receipt; no absolute
acceptance but an acceptance which could not have been
made except on admission of the contract and the goods
sent under it. I am of opinion that there was a suf-
ficient acceptance under the statute of frauds, although
there is a power of rejection. - - - - I think the
decision in Morton vs. Tibbett is right, and that such an
acceptance is sufficient although the purchaser in cer-
tain cases may still have his right of rejection.

Cotton L.J. "I quite agree with the principle laid down
in Morton vs. Tibbett. - - - - All that is wanted
is a receipt and such an acceptance of the goods as
shows that it has regard to the contract, but the contract may yet be left open to objection." Closely following this decision comes Rickard vs. Moore 38 L.T.N.S 841. Plaintiff verbally sold to defendant six bales of wool on July 31st. Plaintiff delivered goods at Railway station and they were there received by defendant, who unpacked the wool and wrote same day to plaintiff, that two bales were inferior to sample. Plaintiff replied by letter Aug. 1st. denying that the bales were not equal to sample. On Aug. 4th. defendant who had been from home since Aug. 1st. returned, and having seen plaintiff's letter, sent the goods back to the railway station, and wired plaintiff his refusal to accept them. Between July 31st. and Aug. 4th. defendant offered the goods for sale on the market, stating however, that he had not ac-
cepted them and that he would make other arrangements before he could sell. Plaintiff having brought this action to recover the price of the goods, the jury found the goods not up to sample and a verdict was given for defendant.

It seems difficult to distinguish this case from that of Kibule vs. Gough decided by the same court a few months previous in which the same judges wrote opinions, but the way in which Bowen L.J. in the next case treats them shows the distinguishing point.

Page vs. Morgan L.R.15 Q.B.D.228 (1885)

Defendant bought of plaintiff by oral contract 84 quarters of wheat. The sale was by sample. The wheat was shipped by barge and arrived at defendants mill at night, and at eight next morning some of the sacks by
direction of the defendant's foreman were hoisted up out of the barge, to the mill, and examined by him.

After 24 sacks were hoisted up, defendant arrived and inspected the sacks and ordered more to be sent up.

When 38 had been sent up defendant told bargeman to send up no more, as the wheat, he said, was not equal to sample.

Defendant same day notified plaintiff that wheat was not up to sample and that he should not take it. Some days after the wheat in defendant's mill was restored to the barge, which remained at defendant's mill until suit was brought, when the wheat was sold by order of court, and the money paid into the same to abide the event of the action.

The jury were directed on authority of Morton vs. Tibbett and Kibble vs. Gough that there was evidence of an ac-
ceptance by defendant sufficient to constitute a contract within the 17th. sec. of the statute of frauds, although defendant was not precluded from rejecting the wheat if not equal to sample. The jury found the wheat was equal to sample, and that defendant had accepted it within the meaning of the 17th. sec. and gave a verdict for plaintiff. On a motion for a new trial on the ground that there was no evidence for the jury of an acceptance of the wheat by defendant to satisfy the statute: Brett M.R. said; "It seems to me that Kibble vs. Gough lays down the governing principle with regard to the question, whether there is evidence of an acceptance to satisfy the 17th. sec. It was there pointed out that there must be under the statute both an acceptance
and actual receipt, but such acceptance need not be an absolute acceptance, all that is necessary is an acceptance which could not have been made except upon an admission that there was a contract and that the goods were sent to fulfil that contract. Cotton L.J. in giving judgment in that case said "All that is wanted is a receipt and such an acceptance of the goods as shows that it has regard to the contract, but the contract may yet be left open to objection; so that it would not preclude a man from exercising such a power of rejection. I think that in this case enough has been done to satisfy the statute." In the present case how could defendant have these sacks taken in the mill and there opened and examined, without the recognition of the existence of a contract, entitling him so to deal with them?
How could a reasonable man come to any other conclusion from his dealing with them, than that he had made a contract of purchase with regard to them, and that the goods were delivered to, and received by him under such contract and examined by him to see if they were according to the contract? It seems to me clear that under these circumstances there was evidence for the jury of an acceptance within the meaning of the statute. I can conceive of many cases in which what was done with regard to the delivery and receipt of the goods, may not afford evidence of an acceptance. Suppose that goods being taken into defendants warehouse by defendants servants, directly he sees them instead of examining them he orders them to be turned out or refuses to have anything to
do with them. There would then be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purpose of my judgment in the present case on the fact that defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract."

Bowen L.J. "Having regard to the mischief at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of a
contract. That is the effect of the decision in Kibble vs. Gough. In Rickard vs. Moore there was a distinction. In Kibble vs. Gough the goods were found to be equal to sample, and it therefore became necessary to decide in that case whether there was an acceptance within the 17th. sec. In Rickard vs. Moore the goods were found not to be equal to sample, so it was only necessary to decide whether they were rightly rejected. I do not think that Lord Bramwell by his remarks on what had thus become a by point, can have intended to overrule the previous decision of this court. In any case we are bound by the decision in Kibble vs. Gough." Baggally L.J. in above case clearly means to say that there may be a conditional acceptance depending on the fulfilment of
the contract as laid down in Campbell's rule, which is clearly untenable. Bowen L.J. in explaining this gets rid of Kibble vs. Gough perhaps, by saying that they disposed of the question of fulfilment of the contract first and afterwards of acceptance, the contract having been fulfilled, but it is difficult to see how you can consider a contract fulfilled before you establish the contract, and in explaining Rickard vs. Moore he fails entirely since he makes the question as to whether there was a contract depend wholly on the fulfilment.

The Law Quar. Rev. for April 1893 mentions the fact that another important case has been decided upon this point, Taylor vs. Smith it is said to throw some doubt upon the soundness of the judgment in Page vs. Morgan, or at any rate, prove that the judgment has not all the ef-
fect generally attributed to it. Not being able to obtain a full report of it, the case of Page vs. Morgan will have to remain for the purposes of this paper as the English authority of today which is shortly stated as follows: that it is not necessary in order to satisfy the requirements of the 17th. sec. of the statute, that there should be an absolute acceptance of goods, there is sufficient evidence of an acceptance of goods within the statute, where upon delivery of the goods the purchaser has received them, and done any act in relation thereto, recognizing the existence of a contract for the purchase of them, though he subsequently refuses the goods.

Stevens in 1 Law Quar. Rev. 14 gives the following very complete and comprehensive classification of the law upon the subject of acceptance.
"Acceptance may either precede, or accompany, or follow the actual receipt of the goods, and may be inferred as a fact from any of the circumstances mentioned in the following classes.

I. Where goods are marked or set apart for the buyer with his consent before his actual receipt of them, or where he inspects and approves them before his actual receipt of them.

II. Where the buyer omits to reject goods actually received by him for an unreasonable time after he has had an opportunity of exercising the option (if he has an option) of rejecting them.

III. Where the buyer acts with reference to the goods or to documents of title representing them, before or after their actual receipt in a manner in which the owner
only would be entitled to act in relation to them.

If the buyer directs the seller to send the goods to the buyer by any common carrier or other person, such common carrier or other person is not deemed to be the agent of the buyer for the purpose of accepting the goods.

A tender of the goods for acceptance, and a wrongful refusal to accept is not deemed to be equivalent to an acceptance of them."

The law on this subject in the United States is far from being settled but seems to require, that the buyer shall take the goods as owner under a contract of sale. In Remick vs. Sandford 120 Mass. 309 Devens J. says the acceptance must be by some unequivocal act done on the part of the buyer, with the intent to take possession
of the goods as owner." In Knight vs. Mann 120 Mass. 219 where goods were selected by the vendee's order, placed ready for delivery and seen by buyer who promised to call for them, they having been destroyed by fire, it was held that there had been no sufficient acceptance. This case is followed by Atherton vs. Newhall 123 Mass 141 and in New York by Stone vs. Browning 51 N.Y. 211 s.c. 68 N.Y. 598 where it was held that there must be an acceptance of the goods with the intention of taking possession as owner absolutely and unconditionally, in full performance of the contract of sale.

On the other hand are the cases of Meyer vs. Thompson (Oreg.) 18 Pac. Rep. 16 where the acts of the servants of the buyer, in removing coal from a wharf to
his premises was a sufficient acceptance, although he had never seen the coal and when he did see it refused to accept it. And Vanderbilt vs. Little 43 N.J.Eq. 669 where it was held that an actual taking of goods delivered under certain contracts, and use of the goods, amounted to an acceptance although they were taken in ignorance of certain facts, and not accepted on account of those contracts.
"PART OF THE GOODS."

The law is apparently well settled both here and in England that acceptance of a sample, where it is understood by both parties that the sample is to form part of the goods sold, and to diminish the quantity or weight thereof to the extent of its bulk is sufficient to satisfy the requirements of the statute.

Moore vs. Love 57 Miss. 765.

Fanner vs. Gray 10 Neb. 401

Hinde vs. Whitehouse 7 East 558.

So also where only part of the goods are in existence at the time of the contract an acceptance of that part is sufficient.

Scott vs. Eastern Counties R. Co. 12 M & W 33

Van Woert vs. Albany & Sus. R. Co. 67 N.Y. 538.
And where several purchases are made at an auction, for example, where the price of each is less than the amount named in the statute, but the aggregate is greater, the acceptance and receipt of one article, if the whole thing forms one transaction, is sufficient to satisfy the statute.

Allard et al. vs. Greasert et al. 61 N.Y. 1.

Garfield vs. Paris 96 U.S. 557 where liquor and labels were purchased and the labels received — held a good acceptance to take the case out of the statute.
RECEIPT.

Stephens 1 Law Quar. Rev. 16 says "A buyer is said actually to receive goods from the seller

I. When the seller or his agent actually delivers the goods to the buyer or his agent or authorizes the buyer or his agent to assume control of the goods, wherever they may be.

II. When the seller continues to hold the goods after the sale agreeing with the buyer to hold them as a bailment from the buyer.

III. When the goods being at the time of the sale in the possession of any person as agent or bailee for the seller, it is agreed between the buyer and the seller and such agent or bailee, that such agent or bailee shall from the time of the agreement hold the goods for the buyer and not for the seller.
IV. If at the time of the sale the buyer himself holds the goods as agent or bailee for the seller, an agreement that the buyer shall from the time of such agreement, hold the goods as owner may be inferred as a fact from any dealings by the buyer with the goods inconsistent with the continuance of his relation of agent or bailee to the seller.

Pollock's definition of receipt is; "the mere physical transfer of the goods without any animus possedendi."

Probably as good a definition of receipt as can be given is, that the seller must divest himself of his lien, and since possession is necessary by the purchaser, he must have either actual or constructive possession.
There must be a taking by the purchaser or his authorized agent, with the intention of holding adversely to the seller, merely placing them in the buyer's custody is not enough.


Where the parties entered into a verbal agreement for the sale of wheat the defendant to take all left in plaintiff's barn, after a certain order was filled.

Previous to said order being filled the defendant went to plaintiff's barn and took 100 bushels. Plaintiff objected to his taking it and demanded its return, defendant refused. After the above order had been filled there still remained 340 bushels defendant having refused to take his plaintiff sold it and brought the present action to recover the difference between the
price received and that agreed upon, and sought to hold him to the contract on the ground that defendant had accepted and actually received part of the goods, but the court held such a receipt not good. In order to constitute receipt there must be an actual or constructive delivery, and this was merely a trespass on the part of defendant; a mere getting into custody without the consent of plaintiff, the plaintiff had not lost his lien, as he could have brought an action in tort against the defendant and recovered the grain actually converted or the price of it, irrespective of the alleged contract.

Nor does placing the goods in a third person's hands for delivery upon certain conditions being complied with, constitute receipt, although there is in a sense a pos-
session by the buyer, it is not adverse to that of the seller who still retains his lien.

The court in Hinchman vs. Lincoln 124 U.S. 49 quoting 44 N.Y. 643 and 1 N.Y. 261 lays down the following rule:

"there must be acts of such a character as to unequivocally place the property within the power, and under the exclusive dominion of the buyer as absolute owner discharged of all lien for the price."

The duration of this possession is immaterial for, the act once done can not be undone.

Somers vs. McLaughlin 58 Wis. 358.

For the purpose of considering the authorities actual receipt may be divided in the following classes:

I. Where there is a delivery of part or the whole of
the goods to the buyer himself, and a taking by him personally with the intention of maintaining a possession adverse to the seller.

II. Where there is a delivery to an agent appointed by the buyer, and a taking by such agent with the buyer's assent, with a similar intent.

III. Where the goods remain in the hands of the vendor or a former agent of his, in the changed character of bailee of the buyer.

The first of these divisions is so clear as not to need any authority, the vendor's lien is gone, the party is in possession of the goods with the intention of holding adversely to the vendor, everything necessary to constitute receipt is present. Under the second division is necessarily involved the question of delivery
to a common carrier; upon this subject Benjamine says:—

"It is well settled that the delivery of goods to a common carrier, a fortiori, to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose." Parsons says he thinks this proposition open to much doubt. Campbell although recognizing Benjamin's statement denies it and asserts the opposite. He says there is no receipt while the goods are in transitu i.e. while the vendor has the right to stop the goods in
transitu, and that Benjamine's reasoning is that vendor is vendee's agent to employ carrier, and thus the carrier having been employed by an agent of vendee, is employed by the vendee himself as his agent to receive the goods. But says Campbell, this is presuming a good contract between the vendor and vendee which is the very thing you want to prove, since the vendor is not vendee's agent unless the contract is established. Is Benjamine fallacious? No his reasoning properly stated is. That there is an actual receipt of the goods by the vendee, because there is a good authorization from vendee for vendor to employ carrier for him, and this authorization has nothing to do with the contract to be established, and need not be in writing.
Langdell agrees with Benjamin but on different grounds, and does not follow Campbell. He makes carrier vendee's agent. He says that whose agent the carrier is, and therefore whether there has been delivery depends upon who pays the carrier.

I. If vendee is to pay for carriage, there is actual receipt by vendee when the goods are delivered to the carrier.

II. If vendor is to deliver at any particular place, there is no actual receipt until they are delivered there.

III. That even where the goods are forwarded at buyer's expense, there is no receipt when the jus disponendi is reserved.

IV. It seems the same effect will be had if carrier agrees with seller not to deliver the goods to the
buyer, except on payment of the price.

Stephens says: - If the buyer directs the seller to send the goods, to the buyer, by any common carrier or other person, such carrier or other person is deemed to be the agent of the buyer for the receipt of the goods.

All writers agree with Lord Blackburn's rule that receipt by a common carrier is not acceptance because he has no authority to accept, to form the intention of taking, and the rules as to receipt by common carrier seem by the authorities to be properly stated by Benjamine and Langdell. Cross vs. O'Donnell 44 N.Y. 603 may be cited as an illustrative authority on this point. In this case the plaintiff entered into a verbal agreement with defendant for the sale of some barrel
hoops, the defendant agreeing to buy if he could have
them landed in New York at $14.00 per thousand. The
master of ship "Curlew" offered to take them for defen-
dant at $2.50 a thousand, and plaintiff agreed to deliver
on board steamer for $11.50. They were accordingly
shipped, consigned to defendant, who was to pay the
freight. The vessel being lost on the voyage the de-
fendant refused to pay for them, on the ground that there
had been no actual receipt of them by him. The court
held that such a delivery to a carrier designated by
defendant was an actual receipt by him of the goods,
sufficient to satisfy the requirements of the statute.

Under the third division Benjamin has two state-
ments which seem to be conflicting, in sec. 187 he lays
down the proposition that in order to constitute receipt, the vendor must part with his lien, to quote his words, he says "It is safe to assume as a general rule that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place" and at sec. 801 he says "In cases where the vendor retains possession of the chattel, in the changed character of bailee for the buyer, there is a clear distinction between such a delivery as would suffice under the Statute of Frauds, and a delivery sufficient to divest the vendor's lien." In support of the latter statement he cites Townley vs. Crump 4 A. & E. 58 and Dodsley vs. Varley 12 A. & E. 632. The first case seems to decide really not what was exactly a vendor's
lien, as that there was a right of stoppage in transitu.

Vendee was bankrupt, and the whole stress was laid on that fact. The right of vendor was a purely equitable one analogous to the right of stoppage in transitu. The Judges make it depend on the insolvency of vendee by reason of which the vendor acquired the right to retain the goods in his possession, for the unpaid purchase money and this is no more inconsistent with sale, than the right of stoppage in transitu. Therefore the case is not a very strong one on which to support such a contention. In Dodsley vs. Varley the question was whether the vendor had lost his lien, for if not, it was conceded that there was no actual receipt to take the case out of the statute. The facts were that a parcel
of wool was bought by defendant while it was in the plaintiff's possession; the price was agreed on but the wool would have to be weighed, it was sent to the warehouse of a person employed by the defendant and weighed and packed but not paid for. Defendant insisted that the vendors lien remained and that the goods had been actually received by him as purchaser. The court held that the property had passed, that the goods had been delivered and were at the risk of the purchaser. In relation to the vendors right they said "The plaintiff had not what is called a lien, determinable in the loss of possession but a special interest, sometimes but improperly called a lien, growing out of his original ownership, and consistent with the property being in the defendant."
This he retained in respect of the term agreed upon, that the goods should not be received to their ultimate place of destination before payment." This case should cause Benjamin no difficulty in sec. 801 since he says in sec. 188 "It is plain that there is nothing in this case which conflicts with the rule — that there can be no actual receipt by purchaser while vendor's lien continues for the court held that the lien." The authorities do not seem to support sec. 801 but the law as stated in sec. 187 is good both in this country and in England and it appears from an examination of the decisions that the vendor must not only be holding as bailee, but his lien must be parted with in order to bring the case within the statute.
Green vs. Merriam 28 Vt. 804.

Elmore vs. Stone 1 Taunt. 458.

Some text writers make another division under this head that is where the goods are in the hands of the buyer or his agent at the time of the sale, the real question under such conditions is, that there must be some outward act capable of being reasonably interpreted as showing an intention on the part of the bailee to hold the goods henceforth as owner. This appears to be rather a question of acceptance than receipt, and would be more properly treated under that head. As Campbell says "The goods being in actual possession of vendee the question is merely one of acceptance" and adds "the question is has the party taken the goods as owner."
Having shown that acceptance and receipt are both necessary and what acts are essential to constitute them, it now remains to consider the question of time. When must these acts take place? The authorities on this point are clear that they may occur at any time before the action on the contract is instituted, but will not be sufficient if they take place after the action is brought or after the contract has been revoked by the seller.

The rule in New York formerly was as laid down in 2 Sandif. 239, that the acceptance and receipt must be at the time the contract was entered into but this case is overruled by Jackson vs. Tupper 101 N.Y. 518 where the court said that the acceptance and receipt might be at any time after the oral contract was made. In Sullivan vs.
Sullivan (Mich.) 38 N.W.472 the court held that an acceptance prior to the rescission of the contract was good but it must be before such rescission.