

The defendants alleged that the plaintiffs sold and delivered to the defendants on the 12th September, 1918, a machine known as a No. 2 "Tellsmith Crusher;" that the machine was paid for on the 2nd December, 1918, when the property passed and the contract became fully executed; that the machine broke down on the 29th March, 1919, after five days' use, and the defendants "threw it out." They counterclaimed for a declaration that the contract was rescinded, on the ground that the machine was not fit for the purpose intended nor merchantable. The defendants also counterclaimed for \$33.50 for extra expenses incurred in installing piers for certain machinery purchased through the plaintiffs.

The action and counterclaims were tried without a jury at Haileybury.

J. B. Allen, for the plaintiffs.

D. Inglis Grant, for the defendants.

MASTEN, J., in a written judgment, said that the evidence wholly failed to establish any legal liability on the part of the plaintiffs in regard to the counterclaim for \$33.50.

Turning to the main branch of the counterclaim, the sale was of a specific, ascertained article, not manufactured by the plaintiffs; a similar machine was inspected by the defendants before they ordered the one they got. The plaintiffs contended that, in the absence of any fraudulent concealment, there could in this case be no implied warranty of fitness, and that the maxim *caveat emptor* applied. It was, however, unnecessary to determine that point, because the defendants had failed to satisfy the onus resting on them of establishing by evidence that the machine was not, at the time it was delivered, reasonably fit for use as a crusher. The defendants were in fact driven to rely upon the rule *res ipsa loquitur*, and to argue that because the machine broke down it was unfit for its purpose. Upon the evidence the learned Judge was unable so to hold. The defendants had failed to establish that the machine was unfit at the time it was delivered.

There was no express warranty, and no fraud or misrepresentation was established.

The plaintiffs should have judgment for \$3,183.12 with costs, and the counterclaim should be dismissed with costs.