

MIDDLETON, J.

DECEMBER 27TH, 1918.

BURNS CEMENT GUN CO. v. NORMAN McLEOD LIMITED.

Sale of Goods—Machine Rented to Defendant—Subsequent Agreement for Purchase—Proof of by Oral Evidence—Statute of Frauds—Goods in Possession of Purchaser—Delivery and Acceptance—Replevin—Damages—Rent of Machine—Balance Due for Price—Costs.

Action for a declaration that the defendants had no right to a "cement gun" and accessories replevied by the plaintiffs, for recovery of \$395 for rent of the gun and another gun, or for damages, and for delivery up of the plaintiffs' replevin bond.

The action was tried without a jury at a Toronto sittings.
John Jennings, for the plaintiffs.
B. N. Davis, for the defendants.

MIDDLETON, J., in a written judgment, said that in May, 1918, the plaintiffs rented the defendants two "cement guns" at \$25 per day each. One of them had been returned; the other, as the defendants asserted, was sold to them by a later agreement. The agreement thus alleged was established by the evidence; but it was said that it could not be relied upon by reason of the Statute of Frauds. By an order of replevin made ex parte, the plaintiffs had obtained possession of the second machine.

There was some bungling about the return of the first machine and some controversy as to the rent due. There was due to the plaintiffs for rent \$312.50 and for the amount short remitted on the price \$20—in all \$332.50.

The second machine being at the time of the alleged sale in possession of the purchaser, the completion of the sale operated prima facie as delivery of the goods, and acceptance could be shewn as soon as anything was done by the purchaser to shew that he retained the goods as owner: Halsbury's Laws of England, vol. 25, p. 206, para. 355. The remitting of the price was ample evidence of this.

It is stated in Benjamin on Sale, 5th ed., p. 215, 7th Am. ed., p. 160, that there is an actual receipt when the goods are in the possession of the purchaser at the time of the contract, "whenever it can be shewn that the purchaser has done acts inconsistent with the supposition that his former position has remained unchanged," and "these acts may be proven by parol."

In the result, the plaintiffs succeeded in recovering \$332.50, and should have County Court costs of this branch of the case,