

LENNOX, J.

DECEMBER 11TH, 1912.

## TRETHEWEY v. MOYES.

*Sale of Goods—Action for Rescission of Contract—Electric Motor Car—Not in Accordance with Specifications—Scienter of Defendant—Variation of Contract—Estoppel by Silence—Sale by Sample—Implied Warranty.*

Action for rescission of a contract of sale by the defendant to the plaintiff of an electric motor car at the price of \$4,300, on the ground that it was not in accordance with specifications, and for the return of \$3,300 paid on account thereof, and of the Babcock motor car, given in part payment, or in the alternative for \$3,000 damages.

R. McKay, K.C., for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

LENNOX, J.:—There will be judgment:—

(a) Rescinding and setting aside the contract in the pleadings mentioned;

(b) Directing the defendant to deliver up to plaintiff, upon demand, the Babcock car in the pleadings mentioned; and

(c) For payment by the defendant to the plaintiff of the sum of \$3,300 and the costs of this action.

The defendant, amongst other things, is a dealer in motor cars. In consideration of the payment of \$3,300 in cash, and the delivery to him of the plaintiff's Babcock motor car, the defendant agreed to furnish and deliver to the plaintiff on or about the 15th of January, 1912, a Detroit Electric Brougham motor car, the same in all respects (except upholstery) as a car which the defendant had previously sold to Dr. C. J. O. Hastings.

The Hastings car is equipped with a 60 a 4 Edison battery and motor to correspond. It is admitted that the car furnished by the defendant, in alleged pursuance of the contract, is equipped, not with a 60 a 4, but with a 40 a 6 Edison battery and a motor to suit this battery. It is also admitted—or is not denied—that in several minor points the car in question does not correspond with the Hastings car.

It is hardly denied by the defendant, and at all events it is abundantly clear upon the evidence, that for some cause or other the car in question has never worked properly—has never been shewn to be an efficient, workable car of the class to which it