

trust for the said creditors." There was no agreement in writing. The applicants received \$2,752.09 as the purchase-money; they obtained waivers of more than 60 per cent. of the creditors named by L., both in value and in number.

In fact there were many other creditors of L. not named by him, although the solicitors were ignorant of it.

Some of these saw L., and in the result L. made an assignment for the benefit of creditors, in the usual form. The assignee made a demand upon the applicants for the purchase-money; the creditors named in L.'s declaration asserted that the money was held in trust for them only, and demanded its division accordingly.

The applicants asked "for an order as to the interpretation of the trusts on which the said solicitors held the sum of money received by them from the proceeds of a sale of the restaurant in the city of Ottawa owned by L., and for an order as to the disposition to be made of the said moneys, and for certain further and other directions as counsel may be advised."

The present case did not come within Rule 604—there was no "deed, will or other instrument" to be construed. Rule 600 did not apply—that is only for trustees under a will, a deed, or an instrument also. The fact that the declaration of L. and the list of his creditors were in writing was nihil ad rem—the trust was wholly oral.

It was urged that an issue might be directed under Rule 233—but the power to direct the trial of an issue given by that Rule is to be exercised only where the motion is itself for something the Court has power to grant, not a wholly unauthorised motion.

This application was wholly unwarranted and without precedent, and must be dismissed with costs.

The learned Judge said that he had had the opportunity of consulting a number of his brethren, and they all agreed in this disposition of the motion.

MASTEN, J.

DECEMBER 22ND, 1919.

GRODWARDS CO. v. KIRKLAND LAKE GOLD MINING CO.

*Sale of Goods—Machinery—Action for Price—Counterclaim for Rescission of Sale—Machine Breaking down after Use for Short Period—Evidence—Onus—Failure to Establish that Machine not Reasonably Fit for Use—Non-applicability of Rule Res Ipsa Loquitur—Absence of Express Warranty—Absence of Fraud.*

Action for \$3,183.12, the balance of an account for machinery and goods supplied.