

HIGH COURT DIVISION.

DIVISIONAL COURT.

JANUARY 27TH, 1913.

AUTOMOBILE SALES LIMITED v. MOORE.

Promissory Note—Action on—Defence—Part Failure of Consideration—Unascertained Amount—Sale of Motor Car not in Running Order—Counterclaim—Damages—Sum Required to Place Car in Order.

Appeal by the plaintiffs from the judgment of MORGAN, Junior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the defendants, in an action upon a promissory note and a counterclaim for the return of \$100 paid by the defendants to the plaintiffs.

The appeal was heard by MIDDLETON, LENNOX, and LEITCH, JJ.

R. J. McLaughlin, K.C., and R. D. Moorhead, for the plaintiffs.

G. N. Shaver, for the defendants.

The judgment of the Court was delivered by MIDDLETON, J.:—The note was given in part payment for an automobile purchased by the defendant Ida Moore, under a written contract dated the 18th April, 1912, which called for the payment of \$600 cash upon the delivery of the car.

When the note matured on the 3rd May, Ida Moore gave her cheque for the amount. Payment of this cheque was stopped.

The contract is in the words following: "I hereby place my order for one Guy car as seen . . . car to be put in good running order. Price, \$1,000. Deposit, \$100. Date of delivery, when ready. Terms: \$600 on delivery of car; balance, note for three months, 6%."

When the car was delivered, the note was given in lieu of the cash payment. Complaint was made that the car had not been placed in good running order; and upon the evidence it appears that this complaint is well-founded. The experts called for the defence place the amount necessary to make the car satisfactory, at various sums, the highest being \$200.

The trial was allowed to proceed without any discussion of the law applicable; and apparently the case went to the jury as though the sole issue was, whether the car had been placed in good running order.