

belongs. And it is shewn by the defendant's own evidence, and by the evidence of his brother, that the defendant deliberately determined, without the knowledge of the plaintiff, to substitute the 40 a 6 for the 60 a 4 battery provided for by the contract. The defendant's alleged reason is that he considered a 40 a 6 battery better than the other.

The defendant's evidence was, I thought, in the main straightforward and candid. Yet at the trial the defendant was, I think, entirely mistaken as to the motive which actuated him in making this substitution. A battery is worth about a thousand dollars. This one was in stock when Burke came to work for the defendant, some two years ago.

The evidence of William Wilkie Moyes as to what took place when he was in Detroit, the correspondence put in, particularly the letter from this witness to the Anderson Company on his return to Toronto, and the whole trend of circumstances, clearly convinced me that, consciously or unconsciously, the defendant's real motive was to get rid of a battery in stock and thus avoid the purchase of a new one. Motive, however, or even merit or result, is not the question. The defendant has not done what he bargained to do: *Forman & Co. v. The Ship "Liddesdale,"* [1900] A.C. 190.

I judge, too, from the circumstances—although I may easily be mistaken as to this—that the defendant intended to keep the plaintiff in ignorance of the difference in the equipment of the two cars. It is a fact, however, that before the car was tried the plaintiff knew that the batteries were not exactly the same; but it is not suggested that, except by an actual trial and demonstration, he would be able to judge at all as to the relative merits of the two batteries.

It happened in this way. In looking at the car in presence of the plaintiff, Dr. Hastings said to the man representing the defendant that there were not so many cells as there were in his car—or that they were larger—or some words to this effect. This circumstance has given me a great deal of anxious consideration; although, of course, at most it only touches one of the causes upon which the plaintiff bases his action. The difficulty I have felt is as to whether the silence of the plaintiff at that time, pending the trial, prevents him from now setting up this difference in the two cars as a specific answer, in itself, to the defendant's contention that he has complied with the contract.

Upon the whole, I do not think it should. Even if in some cases it would have that effect, the answer of the man in charge in this case should, I think, prevent such a conclusion. This