

On 11th May the solicitor wrote to defendants as follows: "Mr. Edwin Bell has instructed us to state that he will ship the engine on the 21st of this month for the purpose of having you put it in running order, capable of developing the horse power called for by the contract and in other respects fulfil the terms and conditions of the contract. He does not presume to dictate to you what you should do, as he takes it for granted that you are better able to form a conclusion upon the matter than he is."

Defendants raise no further objection or question, but hope that Mr. Bell will arrange to ship the engine by the 21st, as promised.

Then further delay occurred about sending the engine—defendants consenting to this delay—and finally the engine was received by defendants on 5th July, 1906, and its receipt was acknowledged by letter of that day.

Defendants, by accepting the engine sent to them as I have stated, did so upon the agreement by them that they would put it in running order capable of developing 17 horse power, and that it would in other respects fulfil the terms and conditions of the original contract, viz., that with good care, proper usage, and skilful management, it would do as good work as any other of the same size manufactured in Canada, and if finally the engine (as part of the outfit) would not do as good work, etc., according to the warranty, the notes or moneys given are to be refunded, and the machines to be returned to defendants as provided.

The engine was, as defendants contend, repaired. They put it, as they contend, in "first class working order." According to their statement they did what they felt themselves obliged to do, and what, I think, was the least they could do under the circumstances, but unfortunately in the subsequent test of a practical working with good care, proper usage, and skilful management, it would not do good work. I think it is a perfectly fair inference, if not specifically proved, that the engine as repaired and returned to plaintiffs did not and would not do as good work as any other of the same size manufactured in Canada.

What took place after the return on 31st July, 1906, is fully and correctly set out in the reasons of the trial Judge, and I agree with the conclusions at which he has arrived, and I think there is ample evidence to warrant these conclusions.