

Prior to the giving of this written order, Samuel Shaw, the manager of defendant company, telephoned to plaintiff to the same effect as is contained in the written order.

The "Smith mixer" is a machine patented in the United States, and is, under some arrangement with the patentees, manufactured by plaintiff, and is warranted to have a capacity of mixing 200 cubic yards in 10 hours. The Fairbanks-Morse gasoline engine is manufactured by the Fairbanks-Morse Company of Montreal, and with it no warranty was given.

The Smith mixer and the gasoline engine and hoisting drum attached thereto were shipped from Montreal on 8th September, 1905, and were invoiced at the price agreed upon, viz., \$1,350, which appears to have been made up as follows: mixer on trucks, \$750, gasoline engine, \$450, and hoisting drum, \$150. Plaintiff also sent a "clutch," charged as an "extra," at \$50, making the whole bill \$1,400.

It was not seriously contended that the Smith mixer did not perform its work satisfactorily, or that the engine supplied was not of ample power to run the mixer itself; but the contention of defendants is that, although they had ordered a Fairbanks-Morse gasoline engine, the one sent was insufficient for the purpose of running the mixer and hoisting a load at the same time, and that there was an implied warranty that it would do so.

The order being for a machine of a specified kind, viz., a Fairbanks-Morse gasoline engine with hoisting drum attached, without an express warranty, the defendants are liable, although the engine did not answer their purpose: *Chanter v. Hopkins*, 4 M. & W. 399; *Prideaux v. Bennett*, 1 C. B. N. S. 613.

The evidence, however, satisfies me that the engine was of sufficient capacity to run the mixer and hoist the load.

In a trade catalogue issued by the Smith Mixer Company, which (at p. 18) gives the capacities of the different sized mixers made by them, it is said that for 2½ mixer a ten-horse power engine is required for the running of the mixer alone; and at p. 13 the advantages and disadvantages of using gasoline power are fully pointed out. It is there stated that a gasoline engine, being a more complex apparatus than a steam engine, is more easily deranged, and the causes of trouble are harder to find; and that "in