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THE UNITED STATES SUPREME COURT.

There are two very remarkable facts in reference to this Court; first, that it has achieved so much; and, secondly, that its utter failure to keep pace with the work has not sooner compelled the adoption of some scheme of relief. In this Province it is considered a hardship that in ordinary cases a year must elapse before an appeal will be called in its turn on the roll; but a case usually stands three years on the docket of the U. S. Supreme Court before it is reached. Yet, as we have said, the work actually accomplished is marvellous. For the first twenty years after the organization of the Court in 1790-1, the average number of causes pending annually was less than one hundred. But during the past twenty years the average number of causes on the docket, at the beginning of each term, has increased from less than three hundred and fifty to nearly twelve hundred, while the number annually disposed of has increased from an average of less than one hundred and fifty to nearly three hundred and sixty. In 1880-1, the term opened with a docket of 1,202 cases, of which 365 were disposed of during the year, leaving 837 cases untouched. The Court has therefore attained a speed of one case per day, Sundays and holidays included—a pace which it can hardly be expected will be exceeded without detriment to the usefulness of the tribunal. The measures of relief proposed are conflicting. On one side it is desired to have the Court sit in divisions at Washington, while others urge the establishment of intermediate appellate courts in various portions of the country.

IMPLIED WARRANTY.

An interesting question, on which the Lords Justices of the English Court of Appeal were divided, is discussed in *Robertson* v. *Amazon Tug & Lighterage Co.*, which will be found in the present issue. The plaintiff agreed to take a named steam tug for a particular service, and it turned out that the boilers were out of order, and that she was not fit for the service, but this was not known to either party at the time of the contract. The question was whether there was an implied warranty by the owners of the tug that the vessel was reasonably fit for the service for which it was to be used. Lord Justice Bramwell was for affirming the judgment of Chief Justice Coleridge, that there was such a warranty; but Lords Justices Brett and Cotton concurred in reversing the judgment, holding that when there is a specific thing there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. It will be observed that Lord Justice Bramwell referred to French as well as United States authorities in support of his view. The decision of the majority, however, would seem to be consonant with our law, for it was admitted that the defects were obvious to any one who had looked at the boilers, and the plaintiff had an opportunity of inspecting the vessel.—See Art. 1523, C. C.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 22, 1882.

Before TORRANCE, J.

EX parte JAMES B. WALKER, petitioner for certiorari; & THE CITY OF MONTREAL, prosecutor.

Power to license and regulate—Junk store.

A power to license and regulate junk stores does not include a power to tax them for revenue.

PER CURIAM. This is a motion to quash a conviction made by the Recorder on the 30th December, 1881. On the 28th June, 1876, by-law No. 99 was passed by the City Council enacting that (sec. 2) "From and after the first August next no person shall carry on the business of a junk dealer in this city, unless such person shall have obtained from the City Treasurer a license to that effect, for which such person shall pay the sum of fifty dollars."

The petitioner was charged by the city in 1881, business duty on rental $1,200 at 7½ per cent, $90, and special rate for junk dealer, $50. The special rate as junk dealer was not paid, and he was accordingly convicted of the offence of carrying on the business of a junk dealer without license, and fined accordingly. The conviction is alleged by petitioner to be bad, "be-

cause the Council of the said city is authorized by the charter of the said city to license and regulate, but not to tax, junk stores, and has only the right to charge a reasonable fee for the cost of the license and for the labor attending the issue thereof, but not to use such license as a means of raising revenue for the said city." "Because the said by-law illegally requires that the sum of fifty dollars shall be paid for the issue of a license in virtue thereof." "Because the said sum of fifty dollars is more than the reasonable cost of such a license as is contemplated by said by-law and of the labor attending the issue of the same, and of inspecting and regulating the business of persons carrying on the business of junk dealers, and the same is sought to be collected from the defendant as a tax for revenue purposes." "Because the defendant has already been taxed and has already paid the full amount of the business tax allowed by law, to wit, seven and one half per cent. on the annual value of the premises by him occupied for his business."

Let us now examine the clauses of the city charter bearing upon this matter. Section 78 of the charter, 37 Vic., c. 51, as amended by 39 Vic., c. 52, section 1, says: S. 78. The said Council may pass and promulgate a by-law or by-laws for the following purposes: * * * S.S. 1. To impose and levy an annual assessment on all real property liable to taxation in the said city, or upon the owners or occupiers thereof, such assessment not to exceed one and a quarter per cent. of the assessed value of such property.

S.S. 2. To impose and levy an annual tax (to be called the "business tax") on hotel-keepers, brewers, distillers, merchants, traders, &c., &c., &c., and generally on all trades, manufactures, occupations, business, arts, professions or means of profit or livelihood, whether hereinbefore enumerated or not, which now are or may be hereafter carried on, exercised or in operation in the said city; PROVIDED that such business tax shall not exceed seven and one-half per cent. on the annual value of the premises occupied by the said parties in the said city, in which they carry on or exercise such trades, manufactures, occupations, business, arts, professions, or means of profit or livelihood.

S.S. 3. To impose and levy an annual tax on pedlars and carters doing business in the said city; on owners of horses, vehicles and dogs in the said city; on brokers, money lenders or commission merchants; on pawnbrokers and auctioneers; on innkeepers, brewers and distillers; on theatres, circuses, menageries and minstrels; on billiard tables; on livery stable keepers; and on ferrymen or steamboat ferries plying for hire for the conveyance of travellers to the city, from any place not more than nine miles distant from the same; provided such tax do not exceed those respectively imposed in the year 1874."

S.S. 4 refers to statute labor. S.S. 5 and 6 to tax on insurance companies. S.S. 7 to tax on banks. S.S. 8 to tax on gas companies. Section 81 says: "Every *special* tax imposed in virtue of the foregoing provisions may, in the discretion of the said council, be a fixed annual rate on all or any of the several classes of persons subject to such tax, and on the premises by them occupied for the purpose of their trade, business or manufacture, or a proportional tax to be determined by the said council according to the assessed annual value of the real estate or any part thereof, occupied as aforesaid, or according to the annual value of the lease of such real estate or any part thereof, occupied as aforesaid, by the persons liable to such tax, or by both modes at once, that is to say, a fixed tax on the persons liable to such tax, and a proportional tax on the real estate occupied as aforesaid; or only a fixed tax on such person, according as the said council may in each case consider it to be the most advantageous to the said city; the said council may also, if they see fit, impose the said tax in the form of a license payable annually at such time, and under such conditions and restrictions as the said council may determine."

S. 123—1. "The Council of the said city may make by-laws for the following purposes, that is to say:—26. To license and regulate junk stores, wherein bits of brass, lead, or iron, pipes, cocks, cord, old furniture, or other like articles are sold."

27. "To establish and regulate public markets and private butchers' or hucksters' stalls; and to regulate, license or restrain the sale of fresh meats, vegetables, fish, or other articles usually sold on markets," &c.

Looking carefully through these clauses, the only one which *nominatim* mentions the junk

dealer is S. 123, S.S. 26. He is included in the general terms of S. 78, S.S. 2, allowing the imposition of the business tax, with the important provision that such business tax shall not exceed 7½ per cent. on the annual value of the premises occupied. Walker has paid this business tax. He is not included in S.S. 3; he is not included in S. 81, save and except for a business tax such as intended by S.S. 2 of S. 78. It remains to consider the powers conferred by S.S. 26, "To license and regulate junk stores, wherein bits of brass, lead, or iron, pipes, cocks, cord, old furniture, or other like articles are sold." I hold that the power to *license* and *regulate* junk stores, does not include a power to tax for revenue. Nothing is plainer to me than that a power to license and a power to tax for revenue, are entirely different, and a power to tax must be given in unequivocal terms to be exercised. Dillon, Municipal Corporations, § 763, 3rd edition: "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, *unless the power be plainly and unmistakably conferred.* § 764. Therefore the power to tax (using the word in its strict and proper sense, as a means of raising municipal revenue), cannot be inferred from the general welfare clause in a charter; nor is it usually to be implied from authority to license and regulate specified vocations, &c."

"§ 768. The taxing power is to be distinguished from the *police* power, &c. The power to license and regulate particular branches of business or matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes." See also §§ 769, 357, 358, and Cooley on Taxation, p. 408.

The conclusion of the whole matter is that I do not find any power in the corporation to exact the sum of $50 for the license in question, though $5 or $10 might be beyond criticism. I would observe that I do not consider the judgments on the butchers' tax as assisting the decision in the present case. S.S. 27 of S. 123, referring to markets and butchers, confers a *restraining* power upon the Council, which is not given in S.S. 26, referring to junk dealers. On the whole, the judgment of the Court is that the conviction in question be quashed, on the ground that the by-law is *ultra vires*.

Conviction quashed.

Ethier for the City of Montreal.
McGoun for Walker.

SUPERIOR COURT.

MONTREAL, June 23, 1882.

Before TORRANCE, J.

THE CITY OF MONTREAL v. GEDDES.

City taxes—Prescription.

The Municipal taxes of the City of Montreal are prescriptible only by the lapse of thirty years.

The plaintiff demanded from the defendant the City taxes on his house, namely, $96, with interest amounting to $29.12 more, alleged to be due for the year 1876. The defendant pleaded payment, and moreover that the debt was prescribed by the lapse of five years. The taxes in question were exigible, according to the City Treasurer, in the month of August, 1876, namely on the 24th August, 1876. The action was instituted on the 30th November, 1881.

PER CURIAM. Against the prescription, the plaintiff cited *Guy* v. *Normandeau*, 21 L. C. Jur. 300, and C. C. 1994, 2004, 2250, and the Court will follow the case cited of *Guy*, and pass on to the proof of payment. It is positively sworn by A. T. Patterson that payment had been made and the receipt had been lost. There is the further presumption in favour of the payment that the subsequent years were duly paid. The Court therefore receives the proof of payment and maintains the plea of payment.

Action dismissed.

Harnett for the City.
Beauchamp for Geddes.

SUPERIOR COURT.

MONTREAL, June 28, 1882.

Before TORRANCE, J.

TRUDEAU et al. v. THE SOUTH EASTERN RAILWAY CO.

Measurement—Contract by the "toise."

The plaintiffs demanded from the defendants the sum of $347 as a balance due them by the company, under a contract by which they undertook to deliver stone at Longueuil at the rate of $4.80 per toise. They alleged delivery.

The defendants said that the toise was a French measure and contained 261½ cubic feet,

and the plaintiffs had delivered stone at the rate of 216 feet per toise as an English measure. They said that at the rate of 261½ cubic feet there was only due to plaintiffs the sum of $52.47, for which they contessed judgment.

PER CURIAM. There is clearly an error on the part of the engineer of the company in receiving from the plaintiffs 216 cubic feet as the contents of a toise which is a French measure. The amount the defendants were entitled to was 261½ cubic feet for each toise. The pretension of the defendants is therefore well founded. The Counsel for the defendants further cited 42 Vict., c. 16, s. 20 of the statutes of Canada, according to which he contended that all contracts made by the toise are null. It is certainly against plaintiffs. The Court holds the plea of defendants to be proved, and judgment will be entered up according to their offer, with costs of contestation against plaintiffs.

Préfontaine for plaintiffs.

Duffey for the Company.

T. W. Ritchie, Q. C., Counsel.

SUPERIOR COURT.

MONTREAL, June 28, 1882.

Before TORRANCE, J.

PERRAULT v. CHARBONNEAU, and BUSSEAU, opposant.

Contempt—Resistance to process.

This was on the merits of a rule taken against the opposant, Busseau, on the 27th December last. The plaintiff had obtained judgment against the defendant for the sum of $434.93 due for rent. He took out an execution against the *meubles meublant* the premises leased, and it was now charged against the opposant that he fraudulently, and without motive, claimed the property seized by his opposition, which was on the 28th April, 1881, dismissed with costs, and costs taxed against the opposant, amounting to $77.05, in favor of the plaintiff. Thereupon the plaintiff took out a *venditioni exponas* to sell the moveables seized, and could not find them, and he charged that Busseau had concealed, hidden and diverted the goods, and refused to deliver them to the guardian, with the intent to defraud plaintiff and evade the judgments against the opposant and defendant, and was in contempt of this Court. Plaintiff, therefore, asked that Busseau be declared to be in contempt of this Court, and imprisoned until he had paid $7.55, balance due on the original judgment, $154, costs on the original action, $4 for subsequent costs, $9.20 for additional costs on the execution, $77.05 costs on the opposition.

PER CURIAM. The plaintiff invokes in support of his demand C. C. 2273 and C. C. P. 569 and 782. Art. 2273 says persons are also subject to imprisonment for contempt of any process or order of court, and for resistance to such process or order, and for any fraudulent evasion of any judgment or order of court, by preventing or obstructing the seizure or sale of property in execution of such judgment. C. C. P. 569 enacts: "If the debtor is absent, &c., &c., the judge may order the opening to be effected by all necessary means, &c., &c., without prejudice to coercive imprisonment in case of refusal, violence, or other physical impediment." C. C. P. 782 says: "In all cases of resistance to the orders of the court respecting the execution of the judgment by seizure and sale of the property of the debtor, as well as in all cases in which the debtor conveys away or secretes his effects, or uses violence or shuts his doors to prevent the seizure, a Judge out of Court may exercise all the powers of the Court, and order the defendant to be impr soned until he satisfies the judgment." What is the evidence of record? There is the judgment condemning the defendant to pay $434; there is the opposition of Busseau claiming the property seized as his, and the judgment overruling his pretensions. There is also the evidence of Olivier Daoust, the seizing bailiff, that he gave notice of the sale, but they did not produce the effects and he could not find them. There is no evidence that Busseau had them or concealed them. He had made an opposition and had failed. That was all that appears of record. The rule must therefore be discharged.

E. Lareau for plaintiff.

Sarrasin for Busseau.

IMPLIED WARRANTY THAT ARTICLE FURNISHED FOR SERVICE SHALL BE EFFICIENT.

ENGLISH COURT OF APPEAL, AUGUST 5, 1881.

ROBERTSON v. AMAZON TUG AND LIGHTERAGE CO., 46 L. T. REP. (N. S.) 146.

The plaintiff agreed to take a named steam-tug towing six sailing barges from Hull to the Brazils, paying and providing for the crew and furnishing all necessary instruments. The defendants agreed to pay for these services £1020. After she had started, the boilers and engines of the steam-tug in question turned out to be considerably out of repair, and in consequence the voyage occupied sixty days more than it would otherwise have done. The fact of the engines being out of repair was not known to either party at the time of the contract. *Held* (Bramwell, L. J., *dissentiente*), that there was no implied warranty by the defendants that the tug should be reasonably efficient for the purposes of the voyage.

Judgment of Lord Coleridge, C. J., reversed.

The plaintiff, a master mariner, brought this

action against the defendant company for an alleged breach by them of a contract, the terms of which are expressed in the following document:

I, Robert Robertson, hereby agree to take steam-tug towing six sailing barges from Hull, and one small steamer from the Downs, the latter-named to assist when required, to Para, Brazils, providing and paying crew of officers, sailors, stokers and trimmers (forty-one men all told), also provisions for all on board for seventy days, and finding nautical instruments and charts for the navigation of the above said steam-tug, steamer and six barges, the company paying pilotage from Hull to sea; all surplus stores to be left on board to be taken over by and to be the property of the company. I hereby undertake to do all the above and hold the company harmless in regard to the return of the above crew from Para, expenses for which shall be borne by me wholly from the date of the arrival of the vessels in Para, for the sum of £1020 sterling, £100 of which shall be payable to me on signing contract, and a further sum of £600 sterling before leaving Hull, for which I shall give guarantee satisfactory to the company, the balance of £320 sterling to be paid by the company's agents in Para, on their being satisfied that no claim exists against the company in regard to me, Captain Robertson, or my crew.

(Signed) ROBERT ROBERTSON.

LONDON, *July* 12, 1876.

The steam-tug supplied by the defendants under this contract was the Villa Bella which had been named to the plaintiff at the time of the contract, and during the voyage it turned out that her boilers and engines were very much out of repair. In consequence the voyage took considerably longer than was contemplated by the plaintiff, and he brought this action to recover the loss that he had thereby incurred.

The action was tried by Lord Coleridge, C. J., without a jury, who gave judgment upon further consideration for the plaintiff, the amount of damages to be referred.

From this judgment the defendants now appealed.

Sir Hardinge Giffard, Q.C., and *Kenelm Digby*, for defendants.

Butt, Q.C., and *Edward Pollock*, for plaintiff.

BRAMWELL, L. J. I am of opinion that the judgment should be affirmed. We disposed on the hearing of that part of the case which relates to the Galopin, holding that in respect of it the plaintiff had a cause of action if he could prove any damages resulting from the breach of contract in relation to that tug caused by its desertion from the enterprise. It remains to consider the question as to the larger tug. Now the plaintiff's complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough; nor did he complain that the machinery or boiler was inadequate, not of the best make or a good make, or strong or large enough. Had such been his complaint then I think it ought to have failed, because his engagement was with respect to specific things and he took them for better or worse. It is admitted that this was so and rightly admitted. For in the same way as it might be shown that on the sale of a horse or carriage a particular horse or carriage was meant, so might it be shown in this case that a specific and definite vessel and specific and definite barges were meant. The plaintiff's complaint was that he had agreed upon a lump sum to take this vessel, towing several lighters, to the Brazils, that it was important to him that the vessel and apparatus should be efficient, as the faster he went the more he gained, and the slower he went the less he gained or the more he lost. He proved as a fact that the boilers were out of order, that they were sufficient in themselves but needed repairs, and that in consequence it took him much longer to perform his undertaking than it otherwise would have done. The defects, the want of repair were obvious—obvious to any one who had looked at or tried the boilers. The question is if this gives a cause of action. I am of opinion that it does. The contract of the defendants was to deliver to the plaintiff the tug and barges, with and in relation to which he was to perform a certain work or bring about a certain result, for the profitable doing of which the efficiency of the tug was all important. The case seems to me the same as a contract of hiring, and as all contracts where one man furnishes a specific thing for another which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but

he undertakes for the condition being such that it can do what its means enables it to do. Thus if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on and that it should not have been excessively worked or used the day before. I am asked where I find this rule in our law; I frankly own I cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is I think in accordance with the analogous authorities. I am afraid that the nearest is the dictum of Lord Abinger in *Smith* v. *Marrable*, 11 M. & W. 5. "No authorities were wanted;" "the case is one which common sense alone enables us to decide." The subject is treated in Story on Bailments, § 383. And certainly according to what is said there, if this had been a case of letting to hire the defendants would be liable. But as Story says, speaking of the letter's obligations (§ 392): "It is difficult to say (unreasonable as they are in a general sense) what is the exact extent to which they are recognized in the common law. In some respects the common law certainly differs." This is so." What Story mentions however does not affect the principle I contend for. I have referred to some of Story's authorities; I may also refer to Merlin, Répertoire, Bail § 6. *Smith* v. *Marrable*, 11 M. & W. 5; and *Wilson* v. *Finch Hatton*, 36 L. T. Rep. (N. S.) 473; L. R., 2 Ex. Div. 336, are favorable to the plaintiff's contention. In the former case is Lord Abinger's reference to "common sense." But as to these two cases I am afraid "common sense" has differed much in different people, and it is certainly remarkable that in the latter case the Lord Chief Baron refers to the plaintiff as "a lady who generally resides in the country coming to town for the season, sending her carriage, horses, and servants," etc., and proceeds, "therefore it is abundantly clear that it was in contemplation of both parties that the house should be ready for her occupation." Even if both parties "contemplated" that I do not know it follows that they "agreed." The cases of *Readhead* v. *Midland Ry. Co.*, 16 L. T. Rep. (N. S.) 485; L. R., 2 Q. B. 412, and *Hyman* v. *Nye*, 44 L. T. Rep. (N. S.) 919; L. R., 6 Q. B. Div. 685, do not help. They and similar cases show that where there is an undertaking to supply an article not specific, the article must be "as fit for the purpose for which it is hired as care and skill can make it." The article here was specific, but I think the same reasoning which leads to that conclusion shows that when the article is specific it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it. It was asked in the course of the argument whether the defendants would have complied with their agreement had there been no rudder to the ship—if, as was suggested, a ship is not a ship without a rudder, or if some of its copper was off if it was a coppered ship, or if there was a large hole in the deck or no covering to the hatchway? I think it impossible to say that there was not a duty on the defendants to have the tug free from such defects, and consequently impossible to say that there would not be in such a case a breach of their implied agreement. So I think there is now, and that the judgment must be affirmed.

BRETT, L. J. I am sorry that in this case I cannot agree with the judgment of Bramwell, L. J. The case was tried before Lord Coleridge without a jury, and Lord Coleridge was of opinion that under the circumstances, there was an implied warranty that the larger tug was reasonably fit for the purposes for which it was to be used. The contract between the plaintiff and defendants was in writing, and the only parol evidence which was admissible to my mind for the purpose of construing the contract was evidence to show what was the subject-matter of the contract. That evidence showed that the defendants were the owners of the large tug the Villa Bella and of the smaller vessel the Galopin, and that they were desirous that these tugs should proceed to the Brazils with certain barges. The larger vessel, the Villa Bella, was named to the plaintiff at the time of the contract, and although I do not think it is material, the plaintiff had an opportunity of seeing it. That at once makes the contract a contract with regard to that specific vessel. Now the plaintiff, being a skilled mariner and master, undertook by this contract to take the command of the expedition to the Brazils, and to conduct the large tug, the Villa Bella, and the barges across the sea. He was to be supplied of course with the means of working the large

tug and also the smaller vessel, but he undertook amongst other things to provision the crews, and further he undertook to conduct the expedition for a fixed sum. It therefore was most material to him to calculate what would be the time in which he should in all probability perform the voyage. The larger tug, the Villa Bella, at the time when the contract was made, had been kept during the winter in a state which is not infrequent, that is to say, sunk in the water, which may not be so bad for the vessel itself, but it certainly is very deleterious to the engines. She was in fact a vessel with engines considerably damaged, but she was the vessel which the plaintiff undertook to conduct across the Atlantic. I agree with my Lord that there is an analogy, and a somewhat close one, between this case and the case of a person hiring some chattel for the purpose of using it. I think it would be true to say, as in the case he puts of the horse, that where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the latter that he will, in the meantime, keep the thing as I should say in repair, that is, he will not, by want of reasonable care after the contract is made, allow it to become worse than it was at the time the contract was made. But with great deference to him I think that the facts of this case do not raise the point upon which his judgment rests. The Villa Bella was a vessel with damaged engines at the time the contract was made, it was that vessel with these engines such as they were that the plaintiff undertook to conduct across the Atlantic. Now I think there would be an implied contract on the part of the defendants that they would not, by want of reasonable care, allow that vessel with its damaged engines to get more out of repair at the time the voyage was to commence than it was at the time that the contract was made. I think that they were bound by an implied contract to take all reasonable care to keep the vessel as good and as efficient for the work it was to do as it was at the time the contract was made. But it would be to say that they were bound to make it better than it was at the time of the contract, if it is to be said that they were bound to hand it over to the plaintiff in a state reasonably fit for the purpose of the work it was to do. Now as I understand my Lord, he would not imply such a contract as that, but if he would, I must say that with all deference I cannot agree to it. When there is a specific thing there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is a great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made. Therefore it seems to me that the judgment of my Lord really does, I believe come to what was the opinion of Lord Coleridge although in words he negatives it. It seems to me that he holds that the defendants were bound to supply this large tug in a condition reasonably fit for the purpose for which the contract was made, and the breach upon which he relies really is that it was not so fit, whereas it seems to me that there was no such implied contract. I wish to put my view as plainly as I can. If there had been evidence in this case that after the contract was made, the machinery, from want of reasonable care by the defendants, had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract for which the defendant would have been liable. But I find no such evidence. The only misfortune about the tug was that the machinery at the time the contract was made was in such a condition that the vessel was not reasonably fit for the purpose of taking barges across the Atlantic. Therefore the misfortune which happened was the result of a risk which was run by the plaintiff and of which he cannot complain, and consequently he has no cause of action as regards the Villa Bella. The plaintiff is thus reduced, in order to maintain his action, to show that he suffered damage by the desertion of the Galopin. He is entitled to nominal damages in respect of such desertion, and if he can prove that he suffered any substantial damage by reason of it, then the nominal damages will be increased accordingly

COTTON, L. J. This is an action for breaches of a contract, and the breaches related to two matters. One of them related to the smaller vessel, the Galopin, and that we disposed of at the time the case was argued, and we did so on the ground that on the fair construction of the written contract there was a contract on the part of the defendants that the smaller steamer which was not named, the Galopin, should assist when required by the plaintiff, and that she deserted the expedition, and that there was a breach as to that part of the contract. Our judgment was reserved as to that part of the plaintiff's claim which sought to recover damages for loss sustained by the inefficiency of the Villa Bella. This inefficiency was attributed to the fact that the boilers of the Villa Bella were not sufficiently powerful for the engines, and principally to the fact that the

boilers were in a bad condition, in consequence of what had happened to the tug before she became the property of the defendants. The defendants were not aware of these defects, and the plaintiffs cannot recover on the ground of false representations. He must recover, if at all, on the ground of breach of warranty. The contract does not contain in express terms any warranty, and there is some uncertainty as to the form of the warranty on which the plaintiff relies. It must be either, as urged in argument and held by Lord Coleridge, that the Villa Bella was a vessel reasonably fit for the service to be performed, or, as I understand Bramwell, L. J., to hold, the Villa Bella and her engines were in a reasonable state of repair and otherwise in a condition fit for the service, so far as that vessel and her engines could be so. The plaintiff tendered evidence to show that there was such a contract between the parties. But parol evidence is not admissible to construe the contract; and even if in such action it would be open to the plaintiff to reform the contract, the evidence would not establish what is essential for such a case, viz.: that both parties agreed to a contract not expressed in the written document. But evidence is admissible to show what the facts were with reference to which the parties contracted, and thus enable the court to apply the contract. The evidence showed that at the time of the contract the defendants were proposing to send out the Villa Bella and that this was known to the plaintiff. The contract must therefore be dealt with as one made with reference to an ascertained steam vessel. Though the contract contains no warranty in terms, the question remains whether there are in it expressions from which, as a matter of construction, any such warranty as that relied on by the plaintiff can be inferred. In my opinion this is not the case. The question remains, does the contract put the plaintiff and defendants into any relation from the existence of which the law, in the absence of any actual contract, implies such a warranty as is relied on by the plaintiff? In my opinion it does not. The plaintiff was to be master of the Villa Bella, but the law does not, as against the owner, imply in favour of a captain or master any warranty of the seaworthiness or efficiency of the vessel. *Couch* v. *Steel*, 3 E. & B. 402. Here, however, the plaintiff is more than master. It has been suggested that plaintiff is in the same position as the hirer of an ascertained chattel, and the defendants in the same position as the person who lets the chattel for hire. There is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel. But, however this may be, in my opinion the relation of the parties here is different. The plaintiff here contracts with the defendants for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug. I say with liberty, for it can hardly be said that it would have been a breach of contract on his part not to use the motive power of the tug, but to tow both the Villa Bella and the barges to their destination. If the vessel was not at the time of the contract ascertained and known to both parties, probably the contract would imply such a warranty as is relied on by the plaintiff. But a contract made with reference to a known vessel in my opinion stands in a very different position. In such a case in the absence of actual stipulation, the contractor must in my opinion be considered as having agreed to take the risk of the greater or less efficiency of the chattel about which he contracts. He has to determine what price he will ask for the service or work which he contracts to render or to do. He may examine the chattel and satisfy himself of its condition and efficiency. If he does not, and suffers from his neglect to take this precaution, he cannot in my opinion make the owner liable. He must in my opinion be taken to have fixed the price so as to cover the risk arising from the condition of the instrument which he might have examined if he had thought fit so to do. It may well be that where parties enter into such a contract as that which exists in the present case, there is an implied contract that the owner of the chattel will not after the agreement, and while the chattel remains in his possession, use or treat it in any way which will render it unfit for the service which has to be performed, and that he will take such care of it as is reasonable, having regard to the purpose for which it is under the contract to be used. But in the present case the inefficiency of the Villa Bella arose not from any improper use of the vessel by the defendants, or any neglect on their part to take care of it after this contract, but from defects which, though unknown to the plaintiff and defendants, existed at the date of the contract. The cases of *Smith* v. *Marable* (*ubi sup.*) and *Wilson* v. *Finch Hatton* (*ubi sup.*), or at least the judgments in those cases, have been relied on in support of the plaintiff's case. Each of those cases arose on a contract of hiring, and in each the hirer was defending himself against a claim for damages in respect of a refusal on his part to perform his contract of hiring, while in this case the plaintiff who is (in my opinion erroneously) said to be in the position of hirer, is suing for damages. In those cases if there was an implied condition that the thing, a furnished house, was fit for the purpose for which it was let by reading into the contract to take the house "if fit for habitation," the defendant was excused. Here the plaintiff must establish that there was a warranty to that effect. In my opinion the plaintiff cannot establish that there was such a warranty as that on which he must rely, and the defendants are, as regards this part of the claim, entitled to have the judgment reversed.

Judgment reversed.