

FIRST DIVISIONAL COURT.

JANUARY 12TH, 1917.

ACME STAMPING AND TOOL WORKS LIMITED v.
McMILLAN.

Contract—Manufacture and Supply of Patented Articles—Commercial Failure—New Contract—Promissory Note—Breaches of Contract—Waiver—Return of Money Paid—Re-assignment of Patent.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., at the trial, in favour of the defendant McMillan. The action was brought to recover \$748.63 on a promissory note made by the defendants. The defendant McMillan counterclaimed for breach of contract and for delivery up of the note. The judgment dismissed the action with costs, ordered the note to be delivered up to the defendant McMillan and the return to him of \$1,000 paid on the making of a certain contract, and directed the re-assignment of a certain patent for an invention.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

S: F. Washington, K.C., and J. G. Gauld, K.C., for the appellants.

G. Lynch-Staunton, K.C., and J. A. Soule, for the defendant McMillan, respondent.

The defendant Olson was not represented, having suffered judgment by default.

HODGINS, J.A., read the judgment of the Court. He said that the contracts in respect of which the note was made related to a self-starter for Ford machines, to be manufactured by the appellants under patent rights in Canada owned by both defendants. It proved a failure commercially. The trial Judge found that there were variations in the manufactured article from the sample upon which the first contract was based, and that these variations rendered the starters less durable, very easily broken, and less effective; and no Court could, on the evidence, reverse that finding, which applied to all the starters turned out by the appellants from first to last.

The first contract was dated the 30th June, 1914, and was a straight manufacturing contract, under which the appellants were to complete a sufficient manufacturing equipment to turn out 6,000 starters. A new agreement was made on the 25th