FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

*FORSYTH v. WALPOLE FARMERS MUTUAL FIRE INSURANCE CO.

Insurance (Fire)—Contents of Barn—Limitation of Liability to Two-thirds of Cash-value—Provision in Application—Insurance Act, R.S.O. 1914 ch. 183, sec. 156(3)—Statutory Condition 8—Mutual Insurance Company—Membership in, of Assured—By-law—Value of Property Destroyed—Absence of Proof of Excess over "Estimated Value."

Appeal by the defendants from the judgment of LATCHFORD, J., ante 114.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. J. Agar, for the appellants.

R. S. Colter, for the plaintiff, respondent.

HODGINS, J.A., read a judgment in which he said that he did not think that, upon the wording of the insurance contract sued upon, the question chiefly argued really arose. That question was, whether the provision in the application limiting the insurance to two-thirds of the cash-value controlled the operative words of the policy, because in the latter were contained the words, "the said application forms and is made part of this policy." It was not necessary to consider whether the application was, notwithstanding the provisions of the Ontario Insurance Act, by that reference incorporated as part and parcel of the policy. If the point had to be expressly decided, it would be proper to deal again with the difficulties caused by the Supreme Court of Canada's decisions referred to and discussed by this Court in Youlden v. London Guarantee and Accident Co. (1913), 28 O.L.R. 161, and Town of Arnprior v. United States Fidelity and Guaranty Co. (1914), 30 O.L.R. 618. These difficulties are not cleared up by Sharkey v. Yorkshire Insurance Co. (1916), 54 S.C.R. 92; see Beury v. Canada National Fire Insurance Co. (1917), 39 O.L.R. 343.

If the application were looked at, however, there was really no inconsistency. In it the respondent applied for insurance to the extent of $1,600 upon the ordinary contents of his barn. Very few of the questions asked were answered and little information was given. No statement of the cash-value appeared in the application. Hence, reading the clause, "Not more than two-thirds of the cash-value of any building or personal property will be insured