

FIRST DIVISIONAL COURT.

DECEMBER 20TH, 1918.

## WILLIS v. PEOPLE'S DAIRY CO.

*Restraint of Trade—Sale of Business—Covenant by Vendor not to Engage in Business of "Milk-dealer"—Action for Breach—Whether Sale of Butter and Buttermilk Included—Evidence of Understanding of Persons in Trade—Evidence of Conduct of Parties—Declaration of Rights under Agreement.*

An appeal by the defendant from the judgment of COATSWORTH, Jun. Co.C.J., dismissing the counterclaim of the defendant, delivered in an action in the County Court of the County of York.

By the counterclaim the appellant claimed to recover damages for alleged breaches by the plaintiff, respondent, of an agreement entered into between the parties on the 15th February, 1916.

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

George Kerr and G. M. Clark, for the appellant.

Gideon Grant, for the respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the respondent had been carrying on the business of manufacturing, buying, and selling butter, and manufacturing and selling ice-cream; that, being desirous of extending his business, he purchased two "milk-routes;" and, after carrying on the business of selling milk in conjunction with his other business, he came to the conclusion that the new business was not a profitable one, and so decided to sell it, and entered into negotiations with the appellant for the sale of it to him, as a result of which the agreement upon which the counterclaim was based was entered into.

In the agreement it was recited that the respondent "now carries on the business of a milk-dealer," and by the agreement there were transferred to the appellant "the milk business so carried on" by the respondent as a going concern, and certain chattels used in the business, together with the goodwill of the business and all contracts, engagements, benefits, and advantages, including the milk-routes. The respondent agreed that he would not carry on or take part in the business of a milk-dealer in the city of Toronto for 7 years, except by selling at his shop milk purchased from the appellant; and the appellant agreed to sell and supply to the respondent such quantities of milk as the respondent should require. In case of any breach of this covenant, the respondent was to pay to the appellant \$200 as liquidated damages, and not as a penalty.