

September, 1914, the practical effect of which was to put the sale and marketing of the starters, when manufactured under the first agreement, into the hands of the appellants, and to make them responsible to the respondent for the amount received on sales, less selling expenses.

The arrangement which included the new contract and the giving of the note was a settlement of matters up to that date, was made with full knowledge of the situation, and was binding upon the respondent. The appellants were, therefore, *prima facie* entitled to recover upon the note.

The first \$1,000 was properly paid and retained. The note was given with knowledge of previous breaches of contract and upon the understanding that these were waived. The contract, however, was to remain in full force, and there was no waiver of future breaches. The new agreement did not impair the obligation to manufacture according to sample, which was not done. The note arose out of the contract, and amounted only to a promise of payment under its terms. Not having manufactured according to sample, the appellants could not recover upon the note. It was at least doubtful whether the profit-sharing arrangement affected the first 100 starters.

The result was to affirm the part of the judgment dismissing the action upon the note, and to reverse the part as to the counterclaim. The counterclaim should be dismissed except as to the re-assignment of the patent.

The appellants should pay the costs of the action and the respondent the costs of the counterclaim; and, success in the appeal being divided, there should be no costs of the appeal to either party.

Appeal allowed in part.

FIRST DIVISIONAL COURT.

JANUARY 12TH, 1917.

*COCKBURN v. TRUSTS AND GUARANTEE CO.

*Master and Servant—Contract of Hiring—Breach—Damages—
Salary for Unexpired Portion of Term of Hiring—Mitigation—
Profits of Business Venture—Employment of Time and Ability
as well as Responsibility and Assets—Nominal Damages.*

Appeal by the defendants from the judgment of MIDDLETON, J., 37 O.L.R. 488, 10 O.W.N. 388.