

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A.—The plaintiffs' right to a specific performance was contested on the grounds that there never was any concluded contract, or at all events no such contract evidenced by writing sufficient to bind the defendant within the provisions of the Statute of Frauds; that if there was any contract it was not with the defendant, but with the firm of Playfair & White; and that, in any case, there was such a mistake or misunderstanding with regard to the subject-matter of the contract as to justify the withholding of the relief of specific performance. It was also contended that plaintiffs were unable to make title to or convey the property to defendant.

The evidence of the contract between the parties, so far as it is required to be in writing, is contained in correspondence, and it was, of course, a necessary part of the plaintiffs' case that they should shew, not only that there had been a final agreement come to between them and the defendant, but that the terms of it were evidenced in a manner to satisfy the Statute of Frauds.

[The learned Judge then stated and commented upon the facts shewing the course of dealing leading to the contract, and set out the letters which passed between the parties.]

The defendant first wrote to the plaintiffs: "Re your berths in Mills, Pringle, and Lount. Mr. Benson made a very careful estimate of them, and he is three millions less than you claimed, and then the pine is scattered, and will cost quite a lot extra to lumber. . . . Some of the pine of a very nice quality. Taking everything into account, very best I can give for outfit would be \$45,000." The plaintiffs' answer was: "In reply to your letter of the 20th ult., in re the white pine timber on berths No. 4 Lount, No. 2 Mills, and 3 and 4 Pringle, and the spruce 12 inches and up in No. 4 Lount, district of Parry Sound, recently offered you and explored by your Mr. Benson, we hereby accept your offer of \$45,000 cash, subject to Crown timber regulations." The defendant received this letter on 4th October, and wrote plaintiffs as follows: "Yours of the 3rd duly received. Note you say the spruce 12 inches and up in Lount, whereas the agreement is for all timber in this berth. Kindly have this fixed."

The matter rested until the 8th October, when a conversation took place over the telephone, the upshot of which was