

undersigned, agree to deliver S. S. Mutton & Co. 40 M. ft. Blk. Ash, with mill-culls out, F. O. B. vessel on Cornwall Canal, @ \$10 per M. ft. Also 10 M. ft. Soft Elm at \$10 per M. ft., F. O. B. vessel on Cornwall Canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified.

Held, [affirming the ruling of the County Court Judge, (York)] that the plaintiffs were not entitled to inspect the elm with a view of rejecting culls, but were bound to accept as it stood, subject only to a proper measurement thereof.

The plaintiffs had not a vessel on the Cornwall Canal ready to receive the lumber on the first of June, nor until the month of September. The defendant, however, was willing then to deliver it, but the plaintiffs refused to accept unless subject to inspection.

Per OSLER, J.—Time, by the very terms of the memorandum itself, was of the essence of the contract, and the plaintiff was not bound to deliver the lumber in September.

Rose, Q.C., for appellants.

McDougall, for respondent.

JAMES V. BALFOUR.

Statute of Frauds—Promise to pay debt of another.

A promise to pay the debt of another, so long as that other remains liable, and such promise is, therefore, only collateral, must be in writing, even where there is a new and valuable consideration for such promise, otherwise it cannot be enforced against the promissor. Therefore, where the defendant had bought at sheriff's sale the stock of one A., who was indebted to the plaintiff for wages earned in A.'s employ, and in order to induce the plaintiff to continue such service with the defendant, he promised to see that he was paid, and the plaintiff did accordingly work for the defendant, who afterwards refused to pay the plaintiff's demand.

Held, [reversing the judgment of the County Court, (Welland)], that the defence of the Statute of Frauds was a bar to the action.

Rose, Q.C., for appeal.

Osler, Q.C., contra.

ELLIS V. THE MIDLAND RAILWAY.

Contract.

"The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance;" therefore, where the plaintiff was engaged by the defendants, for "the season," *i.e.*, from early in May till sometime in November, as master to manage the steamer *Idyl-Wyld*, and he continued so employed until September, when the steamer was burnt,

Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon; and it appearing that he had already been paid more than the proper proportion, the Court reversed the decision of the County Judge (York), making absolute a rule to set aside the nonsuit granted at the trial, and for a new trial between the parties. But as this conclusion was arrived at on a ground not taken in the Court below, or suggested in the reasons of appeal, the Court refused the successful parties their costs of the appeal.

Lash, Q.C., for appeal.

Huson Murray, contra.

HUNTER V. VANSTONE.

Interpleader suit—Claimant not appearing—Judge's decision final.

In a proceeding against one P. the defendant made a claim to certain goods seized by the plaintiff, as bailiff, under execution, whereupon the Judge, on the final hearing, made a minute, "The claimant, not having put in his claim . . . is barred, and is ordered to pay the costs incurred in fifteen days," in obedience to which the claimant did pay the costs of the interpleader but not the fees payable on the execution to the plaintiff as such bailiff, who thereupon instituted these proceedings.

Held, on appeal, [affirming the decision of the County Court Judge,] that the minute so made by the Judge in the interpleader issue, was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the goods of P.

H. J. Scott, for the appellant.

McCarthy, Q.C., for the respondent.