

DIVISIONAL COURT.

FEBRUARY 21ST, 1910.

*YOUNG v. MILNE.

Contract—Statute of Frauds—Engagement to Pay Debt of Another—Withdrawal of Execution from Sheriff's Hands—Payment of Part of Execution Debt—Guaranty of Balance—Evidence.

Appeal by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiff in an action on an alleged promise in the nature of a guaranty on the part of the defendant to pay the amount of the plaintiff's judgment against the Charles B. Lentz Lumber Co., if the plaintiff would withdraw his execution against that company from the sheriff's hands. The execution was withdrawn, the plaintiff was paid \$250 by a cheque of the company, and now sued the defendant for the balance.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

H. E. Rose, K.C., for the defendant.

G. H. Kilmer, K.C., for the plaintiff.

BOYD, C.:— . . . The defendant says—and he is credited by the solicitor as being a man entitled to respect—that he made no such promise as is relied upon—that he was asked if he would guarantee the balance and he refused. The solicitor for the plaintiff will not deny that he asked Milne for a guaranty. The confusion of evidence and of recollection exemplifies the value of the rule of law which requires that the promise to pay the debt of another should be manifested in writing. The sole question is, does this promise, even giving credit to the solicitor's version, fall within the Statute of Frauds, which is pleaded. The authorities are, according to the latest exposition, in favour of the defendant. When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realised, and when the effect of relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But, if the promise is given in consideration of for-

*This case will be reported in the Ontario Law Reports.