

The company did not appear at the trial, and judgment was directed to be entered against it for the full amount of the plaintiff's claim, and against Mills for the amount of the April and May commissions, \$619.28, with costs.

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

D. L. McCarthy, K.C., for the appellant.

J. L. Killoran, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant attacked the finding of fact and contended that, assuming the alleged promise to have been made, it was a promise to answer for the debt of another, and, not being in writing and the Statute of Frauds being set up, could not be enforced.

Where a liability on the part of a third person exists or is contemplated, the promise falls within the statute: *De Colyar on Guaranties*, 2nd ed., p. 70.

When the appellant's promise was made, as found by the trial Judge, not only was it contemplated that the company should be liable to pay the commissions for April and May, but it was actually liable to pay them, and the written contract by which it was agreed to pay them was executed at the time the promise of the appellant was made, and the two things formed part of the same transaction. In bringing this action, the respondent treated the company, as well as the appellant, as being liable to him for the commissions, and had obtained judgment against the company for the amount of them.

Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, distinguished.

It was doubtful whether the finding of fact was fully supported by the evidence; but, assuming that it was, the plaintiff could succeed against the appellant.

The appeal should be allowed with costs and the action as against the appellant dismissed with costs.