There is no release; and the question of accord and satisfaction is one of fact, which must be determined upon all the relevant evidence which may be adduced at the trial. The latter agreement is evidence, and should have its due weight, but cannot exclude all other evidence.

A substituted promise may, if there be a good consideration, and if so intended by the parties, be a valid satisfaction of the breach of the prior promise. The question whether the parties so agreed is, in such a case as this, one for the jury, or for the trial Judge, if tried without the intervention of a jury; see Evans v. Powis, 1 Ex. 601; and Edwards v. Hancher, 1 C. P. D. 111.

There must be a new trial, unless the parties agree to a reference; and, as neither party sought the ruling in question, all costs should be costs in the action.

P. H. Bartlett, London, solicitor for plaintiffs.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for defendants.

[March 3rd, 1902.

DIVISIONAL COURT.

KEESO v. THOMPSON.

Work and Labour—Agent—Joint Liability—Guarantee—Damages for Unskilful Work—Set-off, not Counterclaim—Costs—Rule 1172.

Appeal by defendant Thompson from judgment of County Court of Perth for $105 and costs in favour of plaintiff, and for appellant on his counterclaim for $71.95 and costs, in action in that Court to recover $165.40, balance alleged to be due to plaintiff for sawing, skidding, and piling 128,208 feet of lumber delivered by defendants at plaintiff's mill in the village of Listowel. The action was dismissed as against defendant Marshall on the ground that, to the knowledge of the plaintiff, he acted only as agent for his co-defendant. The appellant brought into Court $90 as the balance due, alleging that the number of feet of lumber was only 103,669, according to log measure as agreed, and claimed $100 damages for the negligent, unskilful, and wasteful way in which the lumber had been sawed and piled.

The plaintiff cross-appealed on the ground that the amount, $71.95, awarded as damages to defendant Thompson was, upon the evidence, excessive, and that it also shewed that defendant Marshall was jointly liable as a principal.

H. L. Drayton, for defendant Thompson.

J. Idington, K.C., for plaintiff.