

trial Judge. The \$9,100 was paid between October 8th, 1910, and March 10th, 1911, and the shipments according to exhibit 9 filed by the respondent, began on June 28th, 1911. So that it is fairly clear that the payments meantime were on estimates merely and on the basis of not more than \$12.25 per thousand. The amount due on March 29th, 1911, as per exhibit 33 (C. D. Tait's estimate) was \$9,013.54 at the rate of \$12.25. I do not think payments made generally and in advance of measurements, and which slightly overrun what is afterwards shewn to be the vendor's liability, can be treated as conclusively establishing any definite price.

On May 29th, 1911, the balance had not been agreed upon nor any account stated so that I am unable to agree with the conclusion that the payment for the respondent's camp outfit must be treated as shewing an acceptance of the position that the overpayment was recognized and that the basis of \$13.25 and not \$12.25 per thousand was adopted.

The utmost that can be said is that the amount overpaid is not specially referred to as recoverable back, but I think the provision in the contract that the balance over \$11 was only to become due and be paid "after actual measurement" saves the appellant's right in that regard. I do not see that in any case any additional amount was agreed upon for soft wood lumber.

I think the question of the 28,000 feet said to have been cut outside the appellant's limit should not be finally disposed of now. If the appellant has to pay it this judgment should not prevent him making a claim therefor against the respondent, and this may be stated in the judgment.

The result would seem to be that the respondent's recovery should be reduced by the sum of \$733 made up as follows: \$1 per thousand on 660,714 feet of hardwood and on 72,308 feet of soft wood. Judgment will therefore go reducing the amount found due to the respondent from \$1,426.55 to \$693.55 and with that variation, and reserving the right spoken of relating to the trespass, the judgment will be affirmed and the appeal dismissed.

There should be no costs of the appeal.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE agreed.