

of pulpwood logs. The defence was that by a subsequent contract plaintiff agreed to pay a proportion of the cost of driving the logs down the Wahbe river, which proportion amounted to \$277.73. Defendant paid the difference, \$238.84, into Court. At the trial judgment was given for plaintiff for \$5 in addition to the amount paid into Court, but plaintiff was allowed costs only up to the time of the payment into Court.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

H. D. Gamble, for plaintiff.

R. McKay, for defendant.

FALCONBRIDGE, C.J.:—The judgment appealed from was delivered orally at the close of the argument, and it is contended for plaintiff that it contains no finding of fact as to the alleged subsequent agreement respecting the cost of driving the timber, but rests solely on defendant's supposed right in law to charge plaintiff with the cost of driving the logs, in the absence of any contract therefor.

I am not sure that the criticism is well-founded, because the trial Judge twice uses the phrase "I find upon the evidence," and this particular question of fact was the one most particularly in issue on the evidence.

We have consulted the Judge, and he says that he intended and intends to find the fact to be as stated by defendant, and that he thought he had done so.

Defendant is corroborated to some extent by the witness Edwards, and we should probably be justified in coming to the same conclusion, and we certainly could not ignore the opinion of the Judge who saw the witnesses.

The discussion, therefore, of what defendant's rights would otherwise be, becomes purely academic.

The motion to interfere with the trial Judge's disposition of the costs is entirely without merits. The award of \$5 depends on whether \$490 or \$495 was paid on account, and there is no very clear evidence as to which sum is correct, plaintiff's counsel having remarked . . . "The \$5 is not here or there between us."