

Held, also, upon the evidence, that the descent of the highway passing under the bridge was not greater than one foot in twenty; and, besides, the grade of the descent had no connection with the accident.

Quære, whether the plaintiff could have succeeded in any event against the railway company, he having deliberately incurred the risk of the squeeze, which he foresaw, instead of stopping his horses and putting himself into a place free from danger, as he might easily have done.

Du Vernet, for plaintiff. *Walter Cassels*, K.C., for the Grand Trunk R. W. Co.

Armour, C.J.O., Falconbridge, C.J.]

[Feb. 11.

WILSON v. SHAVER.

Sale of goods—Contract—Unascertained future goods—Delivery—Payment—Appropriation to contracts—Acts of purchaser.

By an agreement in writing dated the 23rd January, 1897, between the defendant and the plaintiff, the defendant sold and made over and agreed to deliver to the plaintiff certain specified quantities of cord firewood of specified kinds, to be cut, drawn, and delivered at a specified place, and there piled, in consideration of certain specified prices, which the plaintiff undertook to pay to the defendant as follows: "The sum of \$1.50 per cord as the same was delivered at said (specified place) in manner aforesaid and at the end of each month from the date thereof, but upon which payment the plaintiff would be entitled to stamp the same with his own stamp." The \$1.50 per cord was to be upon an estimated measurement, and the plaintiff was to pay the balance on or before the 1st May, 1897, upon final measurement. Subsequently in the month of March it was agreed that the defendant should deliver the wood at the place mentioned unassorted into its different kinds, that he should load it upon the cars at an agreed price, assorting it in loading, and should accept as final the plaintiff's measurement at the place to which the wood was to be shipped. Before the 1st May, 1897, the plaintiff had made advances to the defendant on account of the wood to the extent of \$2,000, and on or about that date, having been previously informed by the defendant that he had got all the wood out, he went to where the wood was piled, and, with the assistance of the defendant's clerk, who pointed it out, measured the piles of wood, and estimated them to contain 714 cords, and marked each pile, and stamped all the wood with the plaintiff's own stamp. On the 5th May the plaintiff wrote to the defendant and told him that the estimate was only 714 cords, and that the defendant had been overpaid about \$400. Thereafter a part of the wood was shipped to the plaintiff as he required it, and on the 5th October, 1897, the residue was destroyed by fire.

Held, that this was a sale by description of unascertained future goods, and 714 cords of the wood described in the contract were delivered at the