

LATCHFORD, J.

JUNE 11TH, 1918.

McPHERSON v. NIAGARA GRAIN AND FEED CO.
LIMITED.

Sale of Goods—Grain Sold by Sample—Appropriation to Contract of Particular Car-load Specified in Bill of Lading—Acceptance of Draft—Failure to Deliver Grain—Recovery by Buyer of Amount Paid—Wrong Car-load Delivered by Reason of Mistake as to Number of Car—Car-load Actually Delivered in Damaged Condition.

Action to recover \$1,949.66, the price of a car-load of barley purchased by the plaintiff from the defendants, but, as the plaintiff alleged, never delivered.

The action was tried without a jury at Stratford.
W. G. Owens and W. E. Goodwin, for the plaintiff.
H. H. Shaver, for the defendants.

LATCHFORD, J., in a written judgment, said that on the 7th May, 1917, the defendants sold to the plaintiff, a grain broker in Stratford, two cars of "sample barley," one at \$1.14 a bushel, and the other at \$1.16 a bushel. The dispute between the parties was only as to the latter. The defendants had, at the time, no samples of the barley actually contained in the cars. They, however, sent a sample of the barley to the plaintiff early in May, before the 5th. They denied this, but the finding on the evidence must be against them. The sample sent was not taken from the cars, but was a fair sample of sound ungraded barley as ordinarily loaded on cars at Fort William.

On the 7th May, the plaintiff handed part of the sample received from the defendants to his selling agent, who, on the 8th, sold one of the car-loads to a Mrs. Dedels, of Breslau. On the 9th May, the plaintiff by letter directed the defendants to have a car-load of the barley delivered at Breslau, and asked for samples of the barley in each car, and for the numbers of the cars.

About the middle of May, Mrs. Dedels cancelled her order.

Car No. 296214 arrived at Breslau on the 3rd June, in a heated condition. The plaintiffs' agent sold the car-load to one Johnston, without examining the barley; and the plaintiff had no knowledge of its condition.

The defendants on the 25th May drew on the plaintiff for the price, \$1,949.60, and he accepted the draft and paid it.

There was a mistake as to the number of the car. The invoice accompanying the draft specified car No. 296212, but the differ-