

2. Order. Toronto, Nov. 3rd, 1911: J. L. Simpson, Esq., C. P. R. Agent, Owen Sound, Ont. Dear Sir: On presentation of this order kindly deliver to W. A. Inglis, Inglis Falls, two thousand (2,000) bushels No. 1 Northern wheat. Yours truly, James Richardson & Sons, Limited, per.

3. Draft. \$2,085.00, Toronto, Nov. 3rd, 1911. At sight pay to the order of The Merchants Bank of Canada, two thousand and eighty-five dollars, value received, and charge to account of James Richardson & Sons, Limited. This is to W. A. Inglis, Esq., Inglis Falls, Ont."

The plaintiff says he paid and took up the draft on November 7th, and received the order.

On the 30th November, the plaintiff by telephone placed a further order with defendants for 2,000 bushels of the same kind of wheat at \$1.07 per bushel, and similar documents were on that date forwarded to Owen Sound by the defendants, who also wrote a letter, in which they say: "We confirm sale to you over 'phone to-day 2,000 bushels No. 1 Northern wheat at \$1.07 per bushel track Owen Sound," etc.

The plaintiff paid this draft on the 4th December, and received a similar order on the agent. He also says that he held the orders and the grain remained in the elevator just to suit his convenience. At any time he could telephone those in charge of the elevator, and they would load a car for him. He also adds they could load the wheat when they liked, and make him take it when they wished.

The plaintiff applied to the C. P. R. agent, and on the 2nd December received a car of 1,000 bushels on the first of said orders, and up to the 11th December, 1911, had not apparently obtained the remaining 3,000 bushels. On that date a fire occurred, which destroyed the elevator in which the defendants' wheat of the kind in question, in all about 20,000 bushels, was stored, including the said 3,000 bushels belonging either to the plaintiff or defendants.

Under these circumstances the plaintiff contends that as there had been no separation by the defendants of his wheat from the rest of the wheat of the same quality, the agreement was still executory, and no property had passed. One of the cases relied on in support of this view is *Lee v. Culp*, 8 O. L. R. 210. In that case it was held "that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the