

agent of the railway company had always treated these orders, when presented, as requiring him to deliver the grain represented therein to the holder; and that, if the appellant had presented them promptly before the fire, they would have been honoured, and that the agent was aware of the various transactions, either through his intervention in placing the order, or by subsequent notice from the respondents. . . .

Intention is the test finally applied as determining the passing of the property; and there is authority for the position that when everything has been done that, having regard to the situation of the parties and the position of the goods in question, could be done, on the one hand to part with the dominion over the goods, and on the other to accept the right to demand the goods from a third party in lieu of actual present delivery, the intention to pass the property will be presumed. . . .

[Reference to Benjamin on Sale, 5th ed., pp. 312, 338; *Swanwick v. Sothorn*, 9 A. & E. 895; *Greaves v. Hepke*, 2 B. & Ald. 131; *Turley v. Bates*, 2 H. & C. 200; *Young v. Matthews*, L.R. 2 C.P. 127; *Whitehouse v. Frost*, 12 East 614; *Snell v. Highton*, 1 Cab. & Ell. 95; *Boswell v. Kilborn*, 15 Moo. P.C. 309; *Seath v. Moore*, 11 App. Cas. 350; *Coffey v. Quebec Bank*, 20 C.P. 110; *Coleman v. McDermott*, 1 E. & A. 445; *Bank of Montreal v. McWhirter*, 17 C.P. 506; *Wilson v. Shaver*, 3 O.L.R. 110; *Ross v. Hurteau*, 18 S.C.R. 713; *Box v. Provincial Insurance Co.*, 18 Gr. 280, 289.]

It would . . . seem that the Courts here have not advanced beyond the point of holding that an accepted order, or the proved assent of the warehouseman, will be a sufficient appropriation to allow the property to pass.

This accords with the judgment . . . in *Cushing v. Breed*, 96 Mass. 376 . . .

[Reference to *Coffey v. Quebec Bank*, 20 C.P. 110, at p. 550.]

On the facts of this case it is not a long distance to go to hold that the warehouseman assented to hold the 3,000 bushels for the appellant. One of the orders was presented and acted upon; and, while the subsequent order was not formally communicated, the evidence leads to the conclusion that either Simpson, the man in charge of the elevator, or Seaman, his clerk, were in constant communication with the respondents, and aware, through them, of the various sales and the amount thereof, as well as of the names of the purchasers.

In this case it also appears that the parties intended the price to be paid before the grain was delivered or put in a deliverable