Appeal by the plaintiffs from the judgment of MASTEN, J., 17 O.W.N. 307.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

Shirley Denison, K.C., and W. J. Beaton, for the appellants.

Angus MacMurchy, K.C., and J. Q. Maunsell, for the defendants the Canadian Pacific Railway Company, respondents.

J. M. Ferguson, for the defendants the Pere Marquette Railroad Company, respondents.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts, that he was of opinion that whatever was in the car when the railway company received it and signed the bill of lading was still in the car at the time the plaintiffs broke the seals and opened the car. The evidence which led to this conclusion also led the learned Judge to doubt the correctness of the finding that 19,636 castings were delivered to the railway company, but was not sufficient to enable him to say that the finding was so much against the weight of evidence that it was clearly wrong and should be reversed. In such circumstances, it must be taken as established that 19,636 castings were delivered to the railway company at Sarnia, and that 19,636 were in the car when the plaintiffs opened it; and the liability of the defendants must be determined on the hypothesis that the loss occurred after the opening of the car.

A carrier is bound not only to carry safely but also to deliver or to afford the consignee a reasonable opportunity to take delivery.

The question was: "Did the plaintiffs, by their own acts in breaking open, entering, and unloading the car, in the absence and without the permission of the carrier, terminate the contract of carriage or free the carrier from the obligation to make any other delivery?" The foundation of the argument for the appellants was, that delivery could not be and was not made till the castings were out of the car.

Delivery implies surrender by the carrier and acceptance, express or implied, by the consignee, of possession, dominion, and control; but it was not necessary for the determination of this case to decide when the surrender and acceptance would have been complete had the consignees chosen to insist on their strict rights under the contract. The plaintiffs did not choose to abide by the contract; but, waiving their own and in breach of the defendants' rights as to time, place, and manner of delivery, they, for their own convenience, without surrendering the bill, without paying the freight, in the absence of the defendants and without their permission, broke open, entered, and unloaded the defendants' car,