The appeal was heard by MACLAREN and MAGEE, JJ.A., and LATCHFORD and MASTEN, JJ.

A. M. Dewar, for the appellants.

J. A. Rowland, for the defendants, respondents.

LATCHFORD, J., read a judgment in which he said that the right of the plaintiffs to the price of the two car-loads of coal—paid into Court by the coal company, after it was claimed from them by both the plaintiffs and the defendants—did not depend upon whether a valid contract was made on the 1st August at Buffalo, between McLean, acting for the plaintiffs, and Voelker, acting for the defendants, for the purchase and sale of the 14 car-loads then "on wheels or in breaker," at the colliery operated by the defendants.

What was done at the mine on the 1st August, upon receipt by the defendants' superintendent of a telephone message from McLean, was to weigh 6 cars of coal then loaded and to send way-bills for these cars to the plaintiffs. As of the same date, but after 3rd August, an invoice for the coal was sent to the plaintiffs from the office of the defendants in Pittsburg.

For some reason not clearly appearing, the defendants did not ship to the plaintiffs any of the 6 cars of coal.

It was unnecessary to consider whether an enforceable contract was or was not made between the plaintiffs and the defendants, for the breach of which an action would lie. There was no action for damages before the Court. The sole contention was that the property in the two car-loads had passed to the plaintiffs.

It was held in the County Court that the two car-loads never became the property of the plaintiffs; and in that conclusion the learned Judge agreed.

The attempt made by the plaintiffs to establish that the defendants' superintendent was an agent of the Lehigh Valley Railway Company wholly failed. Had he delivered the coal to the railway company, or handed over the way-bills to an agent of that company, as was the practice when coal was shipped, the delivery of the coal or the way-bills to the carrier would, in the absence of evidence of an intention to the contrary, vest the coal in the plaintiffs. Delivery to a carrier by order of the buyer is delivery to the buyer: Dutton v. Solomonson (1803), 3 B. & P. 582.

There was, no doubt, an intention on the part of the superintendent to appropriate the 6 car-loads to the defendants' order; but that intention was to be effective only upon receipt from the defendants of instructions to ship; and, no such instructions having been received, the intention was revoked. It was not intended that the property in the coal should pass to the plaintiffs except in an event or events which did not happen.