

ligence because he did not foresee and prevent that which, as my Brother Alderson says, was so remote that the cause of it could not be found out for many months? I think, therefore, that the judge should have nonsuited the plaintiff; and if he refused to be nonsuited, to have told the jury there was no evidence of negligence for them to act on. Judgment for the defendants.

ABSTRACTS OF POINTS DETERMINED IN THE ENGLISH
COURTS OF COMMON LAW.

GODTS *vs.* ROSE. 17 Com. B. 229.

Sale of Goods—Property and right of possession, how passed.

This was an action of trover, to recover a quantity of rape-oil.

The plaintiff having a quantity of rape-oil at Humphrey's wharf, contracted to sell five tons thereof to the defendant. The bought note was as follows:—"Bought for account of Mr. W. A. Rose, of Mr. H. A. Godts, five tons of first quality, foreign refined rape-oil, at 53s. per cwt., usual allowances; to be free delivered, and paid for in fourteen days, in cash, less 2½ per cent. discount."

The plaintiff sent an order to the wharf, directing the wharfinger to transfer into the defendant's name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave the plaintiff's clerk a transfer-order, addressed to the defendant, acknowledging to hold the five tons for him. The plaintiff's clerk took the invoice and transfer-order to the defendant's counting-house, and offered them to him, at the same time demanding a cheque for the amount. The defendant, without (as the jury found) the consent of the plaintiff's clerk, took the transfer-order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to the defendant. In defiance, however, of this notice, the oil was afterwards delivered.

The Court of Common Pleas held that, under the circumstances, neither the property, nor the right to the possession thereof, passed to the defendant.

"If it were necessary," says Mr. Justice Willes, "to pronounce an opinion upon the construction of the contract, I should have little hesita-

tion in holding it to be, that the seller should have the option of the time of delivery, and that then the buyer should have the goods only upon payment of the price. I, however, proceed upon this ground, that the property in the oil was in the seller at the time of the contract, and that nothing which took place between him and the buyer had the effect of taking that property out of the former, and vesting it in the latter. This was not a contract for the sale of any specific and ascertained parcel of oil; but for five tons out of any oil of the character specified. The contract is simply a contract for the sale of five tons of oil of the description therein mentioned. Now, when one man sells to another goods which are not specifically defined, it is necessary that they should agree upon what is to be delivered in fulfilment of the contract. The seller has the option of delivering, and the buyer of accepting, goods of the kind mentioned, subject to their being of the quality contracted for. In the present case the seller for the purpose of doing this, selects certain casks of oil as the oil which he tenders to answer the contract on his part; and he sends his clerk to the wharfinger with an order to him to hold these particular casks for the buyer, which the wharfinger assents to do. Still, however, there is no assent on the part of the buyer. The seller's clerk then goes to the buyer, and producing the transfer-order he had obtained from the wharfinger, offers to give it to him, subject, however, to the condition that he shall receive a cheque in return. The buyer takes the transfer-order, but declines to give the cheque; he does not assent to the appropriation of the particular casks of oil, as a fulfilment of the contract, upon the terms upon which alone the seller was content to make it. There was no agreement *ad idem*, as to the appropriation, and consequently no property passed. The law upon the subject of the passing of the property in goods by appropriation is well laid down by Parke, B., in *Dixon vs. Yates*, 5 B. & Ad., 34, where he observes upon a note of my brother, Manning 'I take it to be clear,' said the learned judge, that, by the law of England, the sale of a specific chattel passes the property in it to a vendee, without delivery. The general doctrine, that the property in chattels passes by a contract of sale to a vendee without delivery, is questioned in *Bailey vs. Culverwill*, 2 M. & R. 566, in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the specific chattel, and to pay the