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July 13, 14,
15;

Aug. 11.

[IN THE COURT OF APPEAL.]

KRELL v. HENRY.

Contract—Impossibility of Performance—Implied Condition—Necessary Inference—Surrounding Circumstances—Substance of Contract — Coronation Procession—Inference that Procession would pass.

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the coronation processions, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent :—

Held (affirming the decision of Darling J.), from necessary inferences drawn from surrounding circumstances, recognised by both contracting parties, that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract.

Taylor v. Caldwell, (1863) 3 B. & S. 826, discussed and applied.

APPEAL from a decision of Darling J.

The plaintiff, Paul Krell, sued the defendant, C. S. Henry, for 50*l.*, being the balance of a sum of 75*l.*, for which the defendant had agreed to hire a flat at 56A, Pall Mall on the days of June 26 and 27, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty. The defendant denied his liability, and counter-claimed for the return of the sum of 25*l.*, which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.

The facts, which were not disputed, were as follows. The plaintiff on leaving the country in March, 1902, left instruc-

tions with his solicitor to let his suite of chambers at 56A, Pall Mall on such terms and for such period (not exceeding six months) as he thought proper. On June 17, 1902, the defendant noticed an announcement in the windows of the plaintiff's flat to the effect that windows to view the coronation processions were to be let. The defendant interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the processions could be obtained from the premises, and he eventually agreed with the housekeeper to take the suite for the two days in question for a sum of 75*l*.

On June 20 the defendant wrote the following letter to the plaintiff's solicitor:—

"I am in receipt of yours of the 18th instant, inclosing form of agreement for the suite of chambers on the third floor at 56A, Pall Mall, which I have agreed to take for the two days, the 26th and 27th instant, for the sum of 75*l*. For reasons given you I cannot enter into the agreement, but as arranged over the telephone I inclose herewith cheque for 25*l*. as deposit, and will thank you to confirm to me that I shall have the entire use of these rooms during the days (not the nights) of the 26th and 27th instant. You may rely that every care will be taken of the premises and their contents. On the 24th inst. I will pay the balance, viz., 50*l*., to complete the 75*l*. agreed upon."

On the same day the defendant received the following reply from the plaintiff's solicitor:—

"I am in receipt of your letter of to-day's date inclosing cheque for 25*l*. deposit on your agreeing to take Mr. Krell's chambers on the third floor at 56A, Pall Mall for the two days, the 26th and 27th June, and I confirm the agreement that you are to have the entire use of these rooms during the days (but not the nights), the balance, 50*l*., to be paid to me on Tuesday next the 24th instant."

The processions not having taken place on the days originally appointed, namely, June 26 and 27, the defendant declined to pay the balance of 50*l*. alleged to be due from him under the contract in writing of June 20 constituted by the above two letters. Hence the present action.

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C. A. Darling J., on August 11, 1902, held, upon the authority of
1903 *Taylor v. Caldwell* (1) and *The Moorcock* (2), that there was an
implied condition in the contract that the procession should
KRELL take place, and gave judgment for the defendant on the claim
v. and counter-claim.
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The plaintiff appealed.

Spencer Bower, K.C., and *Holman Gregory*, for the plaintiff. In the contract nothing is said about the coronation procession, but it is admitted that both parties expected that there would be a procession, and that the price to be paid for the rooms was fixed with reference to the expected procession. Darling J. held that both the claim and the counter-claim were governed by *Taylor v. Caldwell* (1), and that there was an implied term in the contract that the procession should take place. It is submitted that the learned judge was wrong. If he was right, the result will be that in every case of this kind an unremunerated promisor will be in effect an insurer of the hopes and expectations of the promisee.

Taylor v. Caldwell (1) purports to be founded on two passages in the Digest. But other passages in the Digest are more directly in point, and shew that the implied condition is that there shall not be a physical extinction of the subject-matter of the contract.

[VAUGHAN WILLIAMS L.J. The English cases have extended the doctrine of the Digest.]

The limits of the extension are—(1.) the not coming into being of a thing which was not in existence at the date of the contract; (2.) the case of a thing, e.g., a ship, or a person in a contract for personal service, being incapacitated from doing the work intended. In order that the person who has contracted to pay the price should be excused from doing so, there must be (1.) no default on his part; (2.) either the physical extinction or the not coming into existence of the subject-matter of the contract; (3.) the performance of the contract must have been thereby rendered impossible.

In the present case there has been no default on the part of

(1) 3 B. & S. 826.

(2) (1889) 14 P. D. 64.

the defendant. But there has been no physical extinction of the subject-matter, and the performance of the contract was quite possible. Rule 1, laid down in *Taylor v. Caldwell* (1), and not rule 3, is the rule that regulates this case. Rule 1 is directly in the plaintiff's favour, for here the contract was positive and absolute. In that case the music hall which was the subject of the contract had been burnt down, so that performance of the contract by either party had become impossible.

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[VAUGHAN WILLIAMS L.J. referred to *Wright v. Hall*. (2)]

The cases which will be relied on for the defendant are all distinguishable from the present case.

Appleby v. Myers (3), *Boast v. Firth* (4), *Baily v. De Crespigny* (5), *Howell v. Coupland* (6), and *Nickoll v. Ashton* (7) are all distinguishable from the present case, in which two of the necessary elements do not exist.

There are a number of authorities in favour of the plaintiff, such as *Paradine v. Jane* (8); *Barker v. Hodgson* (9); *Marquis of Bute v. Thompson* (10); *Hills v. Sughrue* (11); *Brown v. Royal Insurance Co.* (12) These cases were all anterior to *Taylor v. Caldwell*. (13) There are other cases subsequent to *Taylor v. Caldwell* (13), such as *Kennedy v. Panama, &c., Mail Co.* (14); *In re Arthur* (15); *The Moorcock*. (16)

The real question is, What was the position of the parties on June 20, and what was the contract then entered into between them? The right possessed by the plaintiff on that day was the right of looking out of the window of the room, with the opportunity of seeing the procession from that window; the only sale to the defendant was of such right as the plaintiff had, and that was all that the plaintiff was parting with by the contract. There was, of course, the risk that the procession,

(1) 3 B. & S. at p. 833.

(2) (1858) E. B. & E. 746.

(3) (1867) L. R. 2 C. P. 651.

(4) (1868) L. R. 4 C. P. 1.

(5) (1869) L. R. 4 Q. B. 180.

(6) (1876) 1 Q. B. D. 258.

(7) [1901] 2 K. B. 126.

(8) (1646) Al. 26.

(9) (1814) 3 M. & S. 267; 15 R. R. 485.

(10) (1844) 13 M. & W. 487.

(11) (1846) 15 M. & W. 253.

(12) (1859) 1 E. & E. 853.

(13) 3 B. & S. 826.

(14) (1867) L. R. 2 Q. B. 580.

(15) (1880) 14 Ch. D. 603.

(16) 14 P. D. 64.

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the anticipation of which gave the room a marketable value, might, from some cause or other, never take place; but that risk passed to the defendant by the contract. On entering into the contract with the defendant the plaintiff put it out of his power to let the room to any one else: he passed the right and the risk at the same time. No implied condition can be imported into the contract that the object of it shall be attained. There can be no implied condition that the defendant shall be placed in the actual position of seeing the procession. This case is closely analogous to that of *London Founders' Association, Limited v. Clarke* (1), where it was held that in a contract for the sale of shares in a company there was no implied covenant that the purchaser should be put into the status of a shareholder by registration. So in *Turner v. Goldsmith* (2), where the defendant contracted to employ the plaintiff for a fixed term as agent in a business which he, the defendant, ultimately abandoned before the expiration of the term, it was held that there was no implied condition for the continued existence of the business, and accordingly the plaintiff was held entitled to damages for breach of contract. And that was so although part of the res had perished; here no part of the res had perished. The rule is that the Court will not imply any condition in a contract except in case of absolute necessity: *Hamlyn v. Wood*. (3) No doubt, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7, where the specific goods, the subject of the contract, perish, the contract is gone; but this is not a case of that kind. And s. 14 enacts that, unless specified, no implied warranty or condition as to the quality or fitness of the goods supplied under a contract shall be imported. *Ashmore v. Cox* (4) is an authority in favour of the plaintiff, for it was there held that a buyer under a contract took the risk of the performance of the contract being rendered impossible by unforeseen circumstances.

Blakeley v. Muller (5) is also in the plaintiff's favour to the extent of the counter-claim.

(1) (1888) 20 Q. B. D. 576, 579,
580, 582.

(2) [1891] 1 Q. B. 544, 548, 551.

(3) [1891] 2 Q. B. 488, 491-2.

(4) [1899] 1 Q. B. 436, 441.

(5) (1903) 88 L. T. 90; 67 J. P. 51;
post, p. 760 (note).

[*Duke, K.C.* The defendant abandons his counter-claim for 25*l.*, so that the sole question is as to his liability for the 50*l.*]

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Upon the main question, then, it is submitted that both the decision in *Blakeley v. Muller* (1) and of *Darling J.* in the present case are opposed to the principle of *Taylor v. Caldwell*. (2) The contract here is absolute, and the defendant has not, as he might have done, guarded himself against the risk by suitable words.

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Then, if it is said that this was a mere licence to use the room and therefore revocable as not being under seal, it has now been decided that even if such a licence is revoked an action is still maintainable for breach of contract: *Kerrison v. Smith*. (3)

In conclusion it is submitted that the Court cannot imply an express condition that the procession should pass. Nothing should be implied beyond what was necessary to give to the contract that efficacy which the parties intended at the time. There is no such necessity here; in fact, the inference is the other way, for money was paid before the days specified; which shews that the passing of the procession did not really constitute the basis of the contract, except in a popular sense. The truth is that each party had an expectation, no doubt; but the position is simply this: one says, "Will you take the room?" and the other says, "Yes." That is all. The contract did nothing more than give the defendant the opportunity of seeing whatever might be going on upon the days mentioned.

Duke, K.C., and *Ricardo*, for the defendant. The question is, What was the bargain? The defendant contends that it was a bargain with an implied condition that the premises taken were premises in front of which a certain act of State would take place by Royal Proclamation. A particular character was thus impressed upon the premises; and when that character ceased to be impressed upon them the contract was at an end. It is through nobody's fault, but through an unforeseen misfortune that the premises lose that character. The price agreed to be paid must be regarded: it is equivalent to

(1) 88 L. T. 90; 67 J. P. 51.

(2) 3 B. & S. 826.

(3) [1897] 2 Q. B. 445.

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many thousands a year. What explanation can be given of that, except that it was agreed to be paid for the purpose of enabling the defendant to see the procession? It was the absolute assumption of both parties when entering into the contract that the procession would pass.

The principle of *Taylor v. Caldwell* (1)—namely, that a contract for the sale of a particular thing must not be construed as a positive contract, but as subject to an implied condition that, when the time comes for fulfilment, the specified thing continues to exist—exactly applies. The certainty of the coronation and consequent procession taking place was the basis of this contract. Both parties bargained upon the happening of a certain event the occurrence of which gave the premises a special character with a corresponding value to the defendant; but as the condition failed the premises lost their adventitious value. There has been such a change in the character of the premises which the plaintiff agreed the defendant should occupy as to deprive them of their value. When the premises become unfit for the purpose for which they were taken the bargain is off: *Taylor v. Caldwell* (2), the principle of which case was adopted by the Court of Appeal in *Nickoll v. Ashton*. (3) What was in contemplation here was not that the defendant should merely go and sit in the room, but that he should see a procession which both parties regarded as an inevitable event. There was an implied warranty or condition founded on the presumed intention of the parties, and upon reason: *The Moorcock*. (4) No doubt the observations of the Court in that case were addressed to a totally different subject-matter, but the principle laid down was exactly as stated in *Taylor v. Caldwell* (1) and *Nickoll v. Ashton*. (5) In *Hamlyn v. Wood* (6) it was held that in a contract there must be a reasonable implication in order to give the transaction such efficacy as both parties intended it to have, and that without such implication the consideration would fail. In the case of a demise, collateral bargains do not arise; but here

(1) 3 B. & S. 826.

(2) 3 B. & S. at p. 832.

(3) [1901] 2 K. B. 126, 137.

(4) 14 P. D. 64, 68.

(5) [1901] 2 K. B. 126.

(6) [1891] 2 Q. B. 488.

there is an agreement, and what has to be done is to ascertain the meaning and intention the parties had in entering into it.

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[STIRLING L.J. In *Appleby v. Myers* (1) there was a contract to supply certain machinery to a building, but before the completion of the contract the building was burnt down; and it was held that both parties were excused from performance of the contract.]

In that case the contract had been partly performed; but the defendant's case is stronger than that. When, as here, the contract is wholly executory and the subject-matter fails, the contract is at an end.

[STIRLING L.J. In *Baily v. De Crespigny* (2), where the performance of a covenant was rendered impossible by an Act of Parliament, it was held that the covenantor was discharged.

VAUGHAN WILLIAMS L.J. In *Howell v. Coupland* (3) the contract was held to be subject to an implied condition that the parties should be excused if performance became impossible through the perishing of the subject-matter.]

That applies here: it is impossible for the plaintiff to give the defendant that which he bargained for, and, therefore, there is a total failure of consideration.

To sum up, the basis of the contract is that there would be a procession—that is to say, it is a contract based upon a certain thing coming into existence: there is a condition precedent that there shall be a procession. But for the mutual expectation of a procession upon the days mentioned there would have been no contract whatever. The basis of the contract was also the continuance of a thing in a certain condition; for on June 20 the rooms were capable of being described as a place from which to view a procession on two particular days; whereas when those days arrived the rooms were no longer capable of being so described.

Holman Gregory replied.

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J. read the following written judgment:—The real question in this case is the extent

(1) L. R. 2 C. P. 651. (2) L. R. 4 Q. B. 180. (3) 1 Q. B. D. 258.

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of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor v. Caldwell*. (1) That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law, the case of *Nickoll v. Ashton* (2) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly

(1) 3 B. & S. 826.

(2) [1901] 2 K. B. 126.

mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case? The contract is contained in two letters of June 20 which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, for the sum of 75*l.*, 25*l.* then paid, balance 50*l.* to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, shew that the plaintiff exhibited on his

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premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27. In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10*l.*, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had

no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the

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non-happening of the procession, to use the words of Sir James Hannen in *Baily v. De Crespigny* (1), was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both *Jackson v. Union Marine Insurance Co.* (2) and *Nickoll v. Ashton* (3) the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture: in the former case the carriage of the goods to effect which the charterparty was entered into; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the Court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in *The Moorcock* (4), and refused to be implied in *Hamlyn v. Wood*. (5) But *The Moorcock* (4) is of importance in the present case as shewing that whatever is the suggested implication—be it condition, as in this case, or warranty or representation—one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample

(1) L. R. 4 Q. B. 185.

(3) [1901] 2 K. B. 126.

(2) (1873) L. R. 8 C. P. 572.

(4) 14 P. D. 64.

(5) [1891] 2 Q. B. 488.

authority for this proposition. Thus in *Jackson v. Union Marine Insurance Co.* (1), in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture; and that was a case in which, as Bramwell B. points out in his judgment at p. 148, *Taylor v. Caldwell* (2) was a strong authority to support the conclusion arrived at in the judgment—that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of the contract but discharged the charterer, though he had such an excuse that no action would lie. And, again, in *Harris v. Dreesman* (3) the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the Court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again it was held in *Mumford v. Gething* (4) that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissible to shew in what capacity A. was to serve B. See also *Price v. Mouat*. (5) The rule seems to be that which is laid down in Taylor on Evidence, vol. ii. s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the

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(1) L. R. 8 C. P. 572; (1874) 10

C. P. 125; 42 L. J. (C.P.) 284.

(2) 3 B. & S. 826.

(3) (1854) 23 L. J. (Ex.) 210.

(4) (1859) 7 C. B. (N.S.) 305.

(5) (1862) 11 C. B. (N.S.) 508.

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persons and things to which the instrument refers, must of necessity be received." And Lord Campbell in his judgment says: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." See per Campbell C.J., *Macdonald v. Longbottom*. (1) It seems to me that the language of Willes J. in *Lloyd v. Guibert* (2) points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of *Taylor v. Caldwell* (3) that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of *Taylor v. Caldwell* (3) ought to be applied. This disposes of the plaintiff's claim for 50*l.* unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25*l.* he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in *Stubbs v. Holywell Ry. Co.* (4); that in the case of contracts falling directly within the rule of

(1) (1859) 1 E. & E. 977, at p. 983.

(2) (1865) 35 L. J. (Q.B.) 74, 75.

(3) 3 B. & S. 826.

(4) (1867) L. R. 2 Ex. 311.

Taylor v. Caldwell (1) the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

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ROMER L.J. With some doubt I have also come to the conclusion that this case is governed by the principle on which *Taylor v. Caldwell* (1) was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams L.J., and (as I gather) also arrived at by my brother Stirling. This being so, I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely.

STIRLING L.J. said he had had an opportunity of reading the judgment delivered by Vaughan Williams L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of *Taylor v. Caldwell*. (1)

Appeal dismissed.

Solicitors: *Cecil Bisgood; M. Grunebaum.*

NOTE.—For other cases arising out of the postponement of the coronation, see the next following case; *Elliott v. Crutchley*, ante, p. 476, and *Herne Bay Steam Boat Co. v. Hutton*, ante, p. 683.

(1) 3 B. & S. 826.