

## TAYLOR v.CALDWELL

122 Eng. Rep. 309 (Q.B. 1863)

[Taylor rented the music hall for a concert. Between entering into the contract and the date of the performance the building was destroyed by fire. Since the performance was no longer possible, Taylor requested damages for the expenses he had incurred in advertising the concert and preparing for the concert. Should the owner be liable for Taylor's losses?]

[1] BLACKBURN, J. In this case the plaintiffs and defendants had ... entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come... for the purpose of giving a series of four grand concerts, and day and night fêtes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

[2] ... The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfillment of the contract, -- such entertainments as the parties contemplated in their agreement could not be given without it.

[3] After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

[4] There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. ...But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think establish the principle 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 continuing 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 construed as 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.

...

[6] There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g., promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; .... "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." ... In *Hall v. Wright* .. Crompton J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

[7] It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract, is that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter of his eyesight.

...

[9] ... The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

[10] In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

[11] We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently, the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

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## Questions

1. What economic factors should the court take into consideration when deciding who should bear the liability?
2. Should an analysis of risk and who can best control the risk enter into the analysis? Who could have avoided the loss at least cost?
3. Explain how the default rule established by the court might affect future contracts?

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## Related Article

R. Posner & A. Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 *J. Legal Studies*. 83 (1977).