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.

Note

Taylor v Caldwell mitigates the rigor of the old principle by establishing the rule that, in contracts whose performance depends on the continued existence of a person (contracts *intuitu personae*) or of a thing, there is an implied condition that the impossibility of performance resulting from the disappearance of the person or the thing releases the debtor. Noteworthy in this connection is the reference to Pothier's *Traité du contrat du vente*—rather than to the Civil Code.[28]

The rule laid down in *Taylor v Caldwell* is limited but offers the means of extending it by application of the doctrine of implied terms, which can be and has been used for other contracts. We will see later that the 'implied term' has been abandoned as the explanation for 'frustration', in particular by the judgment in *Davis Contractors Ltd v Fareham* UDC.[29] Frustration was however, developed on the basis of the implied term to cover cases in which the implied 'foundation' of the contract has disappeared, particularly in the judgments in the Coronation cases given following postponement of the Coronation of King Edward VII because of illness.

Court of Appeal **23.11 (UK)**

***Krell v Henry*[30]**

A contract may be frustrated when its essential feature no longer exists.

Facts: Henry hired a room in order to watch the passing of the Coronation procession. The price agreed was £75. He paid £25 on account. Although the Coronation was postponed, the hirer claimed payment of the remaining amount, that is £50. Henry counterclaimed for recovery of the payment on account, though he later abandoned this claim.[31]

Held: At first instance Henry was successful on both points. Krell's appeal was dismissed.

Judgment: VAUGHAN WILLIAMS LJ: . . . The real question is the extent 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* . . .

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,

[28] See Art 1722 Cciv, above, p 1091.
[29] (1956); see below, p 1111.
[30] [1902] 2 KB 740.
[31] For the reasons, see below, p 1114.

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 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 nonexistence 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 20 June 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 26 and 27 June, for the sum of £75, £25 then paid, balance £50 to be paid on 24 June. 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 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 26 and 27 June. 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, 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 non-happening of the procession, to use the words of Sir James Hannen in *Baily v De Crespigny*, 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* and *Nickoll v Ashton* 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*, and refused to be implied in *Hamlyn v Wood*. But *The Moorcock* 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 authority for this proposition. Thus in *Jackson v Union Marine Insurance Co*, 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* 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 . . .

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* 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* ought to be applied. This disposes of the plaintiff's claim for £50 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 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*; that in the case of contracts falling directly within the rule of *Taylor v Caldwell* the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of 24 June 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 24 June, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

Notes

(1) *Krell v Henry* seems to expand the notion of 'destruction of the subject matter' to cover situations in which it seems that in a literal sense the parties could still perform but the change of circumstances means that the foundation of the contract has disappeared. As it is sometimes said, the 'contractual venture' has become impossible.[32]

(2) It is noteworthy that the courts are prepared to look at 'parol evidence' (in other words, to look beyond what is written in the contract documents[33]) to establish what the foundation of the contract was.

(3) In another 'Coronation' case, *Herne Bay Steam Boat Co v Hutton*,[34] Hutton had chartered a boat to take a party to see the naval review which to be held on the following day and to take them round the naval fleet. The naval review was cancelled but the fleet remained in the offing. Hutton did not use the boat and the shipowner sought payment of the amount due under the charter-party. The case was heard by the same judges as *Krell v Henry* but they reached a different outcome: the contract to charter the boat was held not to have been frustrated by the cancellation of the naval review. There has been considerable debate over the reason for the different result.[35]For Stirling LJ it seems to have been that it was still possible to view the fleet at anchor. But the majority do not mention this—nor do they mention an explanation offered by a modern commentator, that Henry was a consumer whereas Hutton, who intended to sell tickets for the trip on the boat, was not.[36]Vaughan Williams LJ likened the case to that of the cab hired to take someone to Epsom, which he discusses in his judgment in *Krell v Henry*. It is hard to follow the first part of his reasoning on this point: why does it matter that any other cab would have done as well? (Presumably any other room with a view of Pall Mall would have done as well for Henry.) But his second point may be the crux of the matter. Just like a cab, the boat in the *Hutton* case was regularly for hire and it was not of any particular concern to the owner what the purpose of the journey was. In contrast, the purpose was crucial to Krell. The owner of a flat

[32] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679 at [59]–[60].
[33] See above, p 691.
[34] [1903] 2 KB 683.
[35] See Treitel, n 25 above, para 19-042.
[36] R Brownsword (1985) 129 SJ 860.

is most unlikely to rent it out to strangers for the day unless there was something like the coronation procession going on.

House of Lords **23.12 (UK)**

Davis Contractor Ltd v Fareham UDC[37]

For frustration to occur, there must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

Facts: An undertaking contracted to build 78 houses for a local authority within a period of eight months. In actual fact 22 months were required for completion chiefly owing to the lack of labour. The undertaking which was paid the contractual price sought additional compensation on the basis of unjust enrichment.

Held: The action was dismissed. There was no frustration.

Judgment: LORD REID: . . .Frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands . . .

I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott Sons Ltd v Del Sel*: 'A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.'

I think that there is much force in Lord Wright's criticism in *Denny, Mott Dickson Ltd v James B Fraser Co Ltd*: 'The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.'

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

LORD RADCLIFFE: . . .Before I refer to the facts I must say briefly what I understand to be the legal principle of frustration. It is not always expressed in the same way, but I think that the points which are relevant to the decision of this case are really beyond dispute. The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule and, consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law.

It has often been pointed out that the descriptions vary from one case of high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an

[37] [1956] AC 696.