

CONTRACTS IMPOSSIBLE OF PERFORMANCE.—PROSECUTIONS AND THE POLICE.

was thereby incapable of marrying without danger to his life. The Court of Queen's Bench was equally divided; and the Exchequer Chamber was also divided, four Judges holding the plea bad, three holding that it was good. Judgment was therefore entered for the plaintiff. The contract of marriage is peculiar, and likely to be affected by bodily illness on the one side or the other; and as Baron Watson said, unless stated to be otherwise, a contract to marry must be taken—as was stated in the declaration—to be of the ordinary kind, with all its usual obligations and incidents. It is difficult to speak of this case with any confidence one way or the other, but the view put by Mr. Justice Willes seems to be consistent with common sense—that which cannot without danger be consummated by either contracting party ought to be voidable only on the election of the other. “If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life . . . I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and a nurse, if she could not be the mistress, of her sweetheart.” Not even a lawyer can regret that the plaintiff had a verdict.

Such a case as *Hall v. Wright* puts in a clearer light the accuracy of the decision in *Robinson v. Davison*, for the services of the performer are required for one single purpose, which purpose she was unable to accomplish; whereas, in *Hall v. Wright*, some of the objects of the contract might be attained, and performance of the contract was not impossible but only dangerous. But it is to be observed what the nature of the contract is of which the law will excuse the performance, on the ground that it is impossible. The rule and the exceptions are carefully stated by Mr. Justice Blackburn in *Taylor v. Caldwell* (8 L. T. Rep. N. S. 356), where he says—“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 the damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible.” He then goes on to say; “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.”

Now it is clear that no ordinary contract would contain a warranty as to the continuance of health on the part of one of the contractors, and where there is no such warranty it is hard to see how it was possible to enforce a personal contract, or to recover damages for its breach where illness prevents its performance. And there is only one further question in connection with the subject, and that is raised by Baron Cleasby, who would seem to suggest that a performer was not bound to appear and carry out her contract unless it is possible to fulfil it in all respects according to its terms. His Lordship said: “This was a contract to perform as a pianiste at a concert; in truth, to be the sole performer, and to do what requires the most exquisite taste and the greatest artistic skill, and which, unless well done, would disgust the audience, who naturally expect a great deal from so great a performer. That being so, the question arises, can this be done by the person engaged unless well and in good health?”

No such considerations as are here stated, can, in our opinion, be accepted as weighing on one side or the other. If a performer can scramble or struggle through an entertainment even discreditably, and even, we would add, disgusting the audience thereby, and is not absolutely disabled, he is bound to go on with his undertaking. If a skillful person contracts to do a certain thing requiring the utmost skill, he cannot be excused on the ground that he is by reason of ill health incapable of fulfilling his contract as skillfully as he would have done had he been in health. It would be vain to give greater latitude to a plea of impossibility arising out of natural incapacity than has hitherto existed. The incapacity, as in *Hall v. Wright*, should be total for all intents and purposes, and in no degree merely partial. If it is ever held otherwise, a wide gate would be open to the fraudulent evasions of a contract.—*Law Times*.

PROSECUTIONS AND THE POLICE.

The police have been severely censured for their conduct of the prosecution in the Eltham murder. It is said that having constructed a theory at the commencement of the case, they devoted their entire attention to the procuring of evidence to confirm their suspicion. They believed that they had got the right man, and so believing, they could recognise no evidence that did not fall in with their preconceived views.

Undoubtedly there was much in the conduct of the case for the prosecution that proved the need for a professional public prosecutor. The proper business of the police is to gather to-