

INEVITABLE ACCIDENT.

Jur., N. S., part 1, p. 500) appear to have been as follows:—The plaintiffs had entered into a contract to perform certain works on the defendant's premises, and had been engaged in carrying it out; but before the completion an accidental fire broke out on the defendant's premises, which entirely destroyed what the plaintiffs had erected thereon. The premises were occupied by the defendant, and entirely under his control, the plaintiffs having access thereto only for the purpose of performing their contract. The question was, whether the plaintiffs were entitled to recover the whole, or any portion, of the contract price. The Court took time to consider their judgment, which was delivered by Smith, J. It was laid down, that the whole of the contract price could not be recovered. It was stated in the course of the judgment, that when a man contracts to do a thing, he is bound to do it, or make compensation, notwithstanding he is prevented by inevitable accident; and the defendant was held liable on an implied promise to provide and keep up the premises in a state fit for the plaintiffs to work thereon. The case of *Taylor v. Caldwell* (32 L. J., Q. B., 164) was mentioned and distinguished. In this case, there had been a contract, that the defendants should allow the plaintiffs to give four concerts on four different days at the Surrey Gardens and Music Hall; before any one of the concerts were given, the music hall was burnt down. The plaintiffs having brought an action to recover damages for the defendants not allowing them to have the use of the music hall, the judges of the Court of Queen's Bench held that it could not be maintained; and that by a fire which occurred through the default of neither party, both parties were excused from liability to perform the terms of the contract. Allusion was made in the judgment to the class of contracts in which a person binds himself to do something which requires to be performed by him in person, such as promises to marry, or to serve for a certain time; and it was stated that it had been very early determined, that if the performance of a contract is personal, the executors are not liable. A passage from Williams on Executors was cited with approval, to the effect, that 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. The above were instances where an implied condition exists of the continuance of a man's life; but the judges of Queen's Bench considered that there were others where the same implication was made as to the continued existence of a thing, and hence drew the conclusion, that the defendants were not liable to be sued for the failure to allow to the plaintiffs the use of the music hall on the agreed nights.

It will be useful to compare the decisions given in the two above-mentioned cases with

what has been thought to be well ascertained law in the case of a lease. In Woodfall's Landlord and Tenant, 354, ed. 1863, it is said, that where a lessee covenants generally to pay rent, he is bound to pay it, though the house be burnt down: and in *The Brecknock Company v. Pritchard* (6 T. R., 750), it is laid down by one of the counsel, that the rule is, that when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. This doctrine is stated by Lord Kenyon, C. J., to be correct; but the former portion of it seems hardly consistent with the old rule of law, as to the liability of a person on whose premises a fire had occurred without any default on his part, for damage occasioned to another person by the spreading of the fire. In *Roll, Ab. B. 2*, it is said, "If a fire light suddenly in my house, I know nothing of it, and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me;" in such a case the law imposed on a person a duty (*sic utore tuo ut alienum non ledas*), which an accident disabled him from performing; but nevertheless he was held liable. The law is now altered by the 6 Ann. c. 31, and 14 Geo. 3, c. 7, s. 86. (See Gale on Easements, 239). The latter part of the doctrine, of which Lord Kenyon, C. J., approved, does not seem to agree with *Appleby v. Meyers* and *Taylor v. Caldwell*; for if it were correct, it would seem to be a necessary conclusion, that in the former case the plaintiffs would have been bound to do again the works destroyed by the fire, and complete the contract before they could recover anything; and that in the latter case the defendants would be liable, as they were bound unconditionally to allow the plaintiffs the use of the music hall.

It is of frequent occurrence to insert in a lease a clause exempting the tenant from payment of rent if the house be burnt down. (See Davidson's Precedents in Conveyancing, vol. 5, pp. 181, 455, note, ed. 1861, and Pridaux's Precedents in Conveyancing vol. 2, pp. 7, 34, ed. 1866.) It appears to have been at one time thought that equity would relieve the lessee if sued at law for the rent agreed to be paid for premises burnt down during the lessee's occupation. In *Baker v. Holtzopfel* (4 Taunt. 45) the plaintiff had obtained a verdict for rent claimed for premises which had been consumed by fire. The action was for use and occupation, and it was contended, on motion to set aside the verdict, that since the buildings were not capable of being occupied, the plaintiff must fail. The Court refused to grant a rule, on the ground that the land was still in existence on which the defendant might rebuild, and that the landlord, if he entered