

When the defendant entered into the covenant, she was still the owner of the road and had the right to maintain it; but, when the soil passed to the Crown, she ceased to be so entitled. Assuming it to be physically possible to rebuild the road, the defendant had no right to do so, the ownership of the soil being in the Crown.

The Court cannot absolve a person from a lawful contract. Its duty is to interpret it, and to that end to ascertain the circumstances in which it was entered into, in order to discover whether the parties made the contract upon the implied understanding that a certain state of affairs would continue to exist. If such implied understanding is found, then a term to that effect must be read into the contract. The underlying principle of the cases is, that, in the construction of a contract, attendant circumstances, as well as the letter of the contract, must be considered. The fact that attendant circumstances are to be considered implies that they may qualify the positive language of the contract itself.

Reference to *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *Howell v. Coupland* (1876), 1 Q.B.D. 258; *Nickoll & Knight v. Ashton Edridge & Co.*, [1901] 2 K.B. 126, 137; *In re Shipton Anderson & Co. and Harrison Brothers & Co.'s Arbitration*, [1915] 3 K.B. 676; *F. A. Tamplin Steamship Co. Limited v. Anglo-Mexican Petroleum Products Co. Limited*, [1916] 2 A.C. 397.

The evidence did not warrant a finding that the defendant could have prevented the waters of the lake from destroying the road and occupying the place where the road once was. The road ran along a small portion only of the shore; but the lake, for a long distance on each side, encroached on and submerged the water-front, making the area thus invaded part of the lake. To maintain the road in its entirety would have required the erection of preventive works in the soil of the Crown, which the defendant would not have the right to erect.

It was contended that, even if the defendant was not bound to rebuild the road, she was liable in damages for not having maintained it. The destruction of the road was the result of the action of the waters of the lake. To maintain the road now would require the defendant to do an illegal act. In the absence of evidence, the Court will not infer wrongful intention. Upon its proper construction, the covenant was to be binding only in so far as it might be legally performed. Enforcement of a contract to perform an illegal act, or an award of damages for its non-performance, would be contrary to public policy: the *Shipton* case, *supra*. If parties enter into a contract, the performance of which at the time is legal, but later, by reason of subsequent