

## ENGLISH REPORTS.

## EXCHEQUER CHAMBER.

## FROST v. KNIGHT.

*Breach of promise of marriage—Repudiation of the contract before the time agreed upon for performance.*

The defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father, the defendant announced his absolute determination never to fulfil the promise.

*Held* (reversing the decision of the Court of Exchequer), on the authority of *Hochester v. De La Tour* (2 E. & B. 678; 22 L. J. 455, Q. B.), that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue for the breach thereon.

(Feb. 7, 1872.—26 L. T. N. S. 77.)

This was an appeal from the judgment of the Court of Exchequer, and was an action for a breach of promise of marriage, tried before Martin, B., at the Staffordshire Spring Assizes, 1870. Evidence was given to show that the defendant promised to marry the plaintiff on the death of his father, and also that he refused to perform the promise; while it was proved that defendant's father was still alive.

A verdict having been obtained for the plaintiff with £200 damages. *Powell, Q. C.*, obtained a rule, which was afterwards made absolute, for a new trial, on the ground that the learned judge ought to have consulted the plaintiff, Martin, B., dissenting (39 L. J. 227, Ex.; 23 L. T. Rep. N. S. 714). The plaintiff having appealed, the case was reargued last Trinity Term in the Exchequer Chamber before Cockburn, C.J., Byles, Keating, Lush, and Smith, JJ.

*Feb. 8.*—The judgment of Cockburn, C. J., Keating and Lush, JJ., was delivered by Cockburn, C. J.—This case comes before us on error brought on a judgment of the Court of Exchequer, arresting the judgment in the action on a verdict given for the plaintiff. The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule *nisi* was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event no claim for performance could be made, and consequently no action for breach of the contract could be maintained. A rule *nisi* having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin B. dissenting. And the question for us is whether the judgment of the majority was right? The cases of *Lovelock v. Franklin* and *Short v. Stone*, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil the contract, an action will at once lie. The case of *Hochester v. De la Tour*, upheld in this court in the *Danube and Black Sea Company v. Xenos*, went further, and established that notice of an intended breach of a contract to be performed in future had a like effect. The law with reference to a contract to be performed at a future time where the party

bound to performance announced prior to the time his intention not to perform it, as established by the cases of *Hochester v. De la Tour* and the *Danube and Black Sea Company v. Xenos* on the one hand, and *Avery v. Bowlen*, 6 E. & B. 953, and *Reid v. Hoskyns*, 6 E. & B. 953, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand the promisee may, if he thinks fit, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on the breach of it; in which action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the prescribed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of *Philpotts v. Evans* and *Ripley v. MacLure*, we should have had no difficulty in applying the principle of the decision in *Hochester v. De la Tour* to the present case, were it not for the difference which undoubtedly exists between that case and the present, namely, that whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the life of both the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself before the time of performance arises; but here we have a further contingency, depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise. After full consideration, we are of opinion that, notwithstanding the distinguishing circumstances to which I have referred, this case falls within the principle of *Hochester v. De la Tour*, and that consequently the present action is well brought. The considerations on which the decision in *Hochester v. De la Tour* is founded, are, that by the announcement of the contracting party of his intention not to fulfil it, the contract is broken; and that it is to the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time, and that an action may be at once brought, and the damages consequent upon nonperformance be assessed at the earliest moment, as thereby many of the injurious effects of such nonper-