of the tenant, and for forcibly thrusting them into the street, or attempting to do so, he would be liable to such damages as a jury might deem the case to require.

A landlord, however, would have the right to enter upon the possession of his tenant for certain purposes, as to demand rent, or to make necessary repairs; and we must be understood as confining the action of trespass *quare clausum* by the tenant against the landlord, even for the recovery of nominal damages, to those cases where an action of forcible entry and detainer would lie under our statute. By the application of this rule much of the apparent conflict in the authorities can be explained.

Reversed and remanded.

RECENT ENGLISH DECISIONS.

Court of Common Pleas.

APPLEBY v. MEYERS.

The plaintiffs agreed to make and erect, on premises under the control of the defendants, certain machinery, and the latter were to provide all necessary brickwork, &c. Before the works were completed, the buildings in which the work was to be done were destroyed by fire:—*Held*, that the plaintiffs were entitled to recover for the amount of work done. It was an implied term of the contract, that the defendant should provide the buildings in which the work was to be done, and enable the plaintiffs to perform their part; and therefore, that the defendant was not relieved by the occurrence of the fire; as a party who contracts to do a thing is bound to carry out his engagement, or to make compensation, notwithstanding he is prevented by inevitable accident.

THIS was an action brought by the plaintiffs, who are engineers, against the defendant, to recover the sum of 419*l.*, for work done and materials provided, under the circumstances hereinafter stated. It came before the court on a case stated, without any pleadings, under the Common Law Procedure Act.

1. On the 30th March 1865 the plaintiffs entered into a certain agreement with the defendant. The material portion of it is set out, and was as follows:—

"Specification and estimate of engine, boiler, lifts, &c., for B. Meyers, Esq., Southwark Street, Messrs. Tillott & Chamberlain, Architects. March 30th 1865.

[Here follows list of boiler, engine, &c., to be made.]

"We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work, for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from the date of completion. All brickwork, carpenters' and masons' work, and materials, are to be provided for us, but the drawings and general instructions required for them to work to, will be provided by us, subject to the architect's approval.

(Signed) "APPLEBY BROTHERS."

2. The total costs of the said works, if they had been completed under the said contract, would have amounted to 459*l*.

3. On the 4th July 1865 a fire accidentally broke out on the premises of the defendant, in Southwark Street, which entirely destroyed the said premises, and the works which then had been erected by the plaintiffs in part performance of the contract above set out; at the time of the fire, the works contracted to be erected as aforesaid, had not been completed.

4. The premises upon which the several works were to be erected were the property of the defendant, in his occupation, and under his entire control. The plaintiffs had access thereto only for the purpose of performing their contract. At the time of the fire, portions of the items, numbered 1 to 8, were erected and fixed, and some of the materials for others were on the premises. The defendant had not completed the carpenters' and masons' work to be prepared by him under the said agreement. The tank had been erected by the plaintiffs, and was used by the defendant, by taking water therefrom for the purpose of his business, but the other apparatus connected with it, as specified in No. 8, were not completed. The plaintiffs' workmen were still engaged in continuing the erection and completion of the same at the time of the fire.

The question for the opinion of the court was, whether, under the above circumstances, the plaintiffs were entitled to recover for the whole or any portion of the contract price.

If the court should be of opinion that the plaintiffs were entitled to recover for the whole, judgment was to be entered up for the plaintiffs for 412*l*. 10*s*.

If the court should be of opinion that the plaintiffs were entitled to recover for part only, then judgment was to be entered for

such sum as an arbitrator should direct, he having power to certify for costs if necessary. In either case, with costs of suit.

If the court should be of opinion in the negative, then judgment of *non pros.*, with costs of defence, was to be entered up for the defendant.

Holl, for the plaintiffs.—The value of the work done at the time of the fire should be assessed. By referring to paragraph 4 of the case, it will be found that, at the time of the fire, portions of items in the contract mentioned were erected and fixed, and some of the materials for others were on the ground. The tank, too, was in actual use by the defendant. Here, a portion of the work was affixed to the freehold of the defendant, and therefore all interest in them had passed to him. Suppose the defendant had paid the plaintiffs something on account, could it have been recovered back? *Menetone* v. *Athawes*, 3 Burr. 1592, where it was decided that the value of repairs may be recovered though a ship be burnt in dock, is almost precisely in point. [*Hannen.*—It is found that no single portion was complete; paragraphs 3 and 4 of the case show that it was so.] Suppose the defendant had sold the premises, could it be contended that the things affixed to the freehold did not pass? Story on Bailments, § 426, 7th ed., is in my favor, for the plaintiffs were employed in adding their labor and property to the premises of their employer. As the defendant could not supply that which would enable the plaintiffs to finish their contract, surely the latter are entitled to payment.

Hannen, for the defendant.—The payment depends on a condition precedent, that the works should be finished. In *Menetone* v. *Athawes* there was no stipulation as to the time when the works should be completed: Chit. Cont. 514, 7th ed. In *Adlard* v. *Booth*, 7 Car. & P. 108, it was decided, that where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number have been worked off, the printer cannot recover anything, although a part have actually been delivered. Suppose that the different parts of the contract are separable, then each has to be done complete. [KEATING, J.—Suppose a fire had occurred after completion of the works, but before expiration of the two years?] But when the fire

broke out, the time for payment had not arrived; it was our common misfortune. *Taylor* v. *Caldwell*, 32 L. J. Q. B. 164, supports this view. [ERLE, C. J.—The fire has come on the defendant's premises, and hindered the plaintiffs from completing.] Here is an accident by the act of God, which neither party can foresee, and it must be so treated.

Holl, in reply.—The case of *Taylor* v. *Caldwell* is in my favor, for it was seeking to enforce a claim for damages when the hall ceased to exist, and I say that these buildings of the defendant's being burnt down, excuses the plaintiffs from carrying out the remainder of the contract, but does not exclude them from being paid for what they have done. The fire in the case of *Adlard* v. *Booth*, which has been referred to, took place on the plaintiff's own premises. [KEATING, J., referred to *Roberts* v. *Havelock*, 3 B. & Ad. 404, where a shipwright was allowed to maintain an action for work done in the way of repair to a ship, though the repair was incomplete, and the vessel was thereby kept from continuing her voyage at the time when the action was brought.]

Cur. adv. vult

June 12.—SMITH, J., delivered the judgment of the court.—In this case the plaintiffs, who are engineers, had contracted, by an agreement in writing with the defendant, to do certain works upon buildings on his premises, &c.; to provide and erect upon them a steam-engine, and machinery connected with it. The works were divided into different parts, and separate prices were fixed upon each of these parts. The plaintiffs agreed to provide and erect the machinery for those prices.

The case finds that the premises were in the occupation and under the entire control of the defendant. That all parts of the works were far advanced towards completion; that some parts were so nearly finished, that the defendant had used them for the purposes of his business, but that none of the parts into which the work had been divided were absolutely complete.

The works were in this state when an accidental fire broke out on the defendant's premises, and destroyed the defendant's buildings, and the works done upon them by the plaintiffs.

The question submitted to us is, whether, under the circumstances, the plaintiffs are entitled to recover the whole, or any

portion of, the contract price. It is clear the plaintiffs cannot recover the whole contract price as a specific sum, for that was only to be paid on the completion of the works—an event which has not happened. But we think that, under the circumstances, they are entitled, upon an implied contract, to be paid the value of the work done, which value we assume, from the form of the question, the parties are content to estimate upon a due proportion of the contract price. It was contended for the defendant, that the fire was a common misfortune, excusing both parties from a performance of the contract, and we were pressed to adopt the principle laid down by the Court of Queen's Bench in the case of *Taylor* v. *Caldwell*, 3 B. & S. 826. In one part of that judgment it is said, no doubt in general terms, "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

The Court of Queen's Bench may have properly adopted and applied this principle in the case of the contract before them, but we think it cannot be correctly applied to the present case, where the contract is of a different kind, and appears to us to fall within the qualification of the principle found in the early part of the same judgment, where the court say, that "*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 by the perishing of the thing before breach.

By the agreement between these parties, the machinery was to be fixed to the buildings of the defendant, so that the parts of it, when and as fixed, would become his property, and subject to his dominion; and we think we fulfil the intention of those who entered into this contract, by holding that it is an implied term of it, that the defendant should provide the buildings, the subject on which the work was to be done, and keep them in a fit state to enable the plaintiffs to perform their part of the contract.

If the defendant had refused to allow the plaintiffs to have the use of the buildings, or by his own act or default had rendered them unfit to receive the work, there can, we apprehend, be no doubt that the plaintiffs might either have sued for a breach of the contract, or have treated the contract as rescinded, and have

recovered the value of the work done on a *quantum valebit* account.

These rights of action would accrue to the plaintiffs, not by reason of any express words of agreement, but in virtue of the implied term of the contract to which we have referred.

Then, is the non-performance of this implied term, on the part of the defendant, excused by the happening of an accidental fire? We think it is not excused by that event.

The general rule of law is clear, 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.

We hold that an implied promise is present in this contract on the part of the defendant to provide and keep up the buildings, and, as a consequence, he must be liable in this case, unless we ought to annex a condition or exception to his promise, exonerating him from the performance of it in the case of fire or other accident.

When the plaintiffs agreed to expend their materials and labor on buildings of the defendant, of which he was to retain the possession and control, it is reasonable to infer that it was contemplated that the subject, on which the work was to be done, should be provided and kept at his risk and peril, and it is unreasonable to suppose that the parties intended, that if a fire happened, in no way attributable to the plaintiffs, the defendant should be set free from all obligation under the contract.

We think, that if we were to imply an exception or condition having this effect, we should not fulfil but frustrate the real intention of the parties. It appears to us, that such a fire no more excuses the defendant than an eviction of both plaintiffs and defendant from the buildings by title paramount would have done.

No decision directly in point was cited to us. But the learned counsel on both sides referred to Story on Bailments, § 426, and following sections, and each relied on certain passages as being in his favor. The application of the maxim "*res perit domino*" to cases of a kind, in some respects, like the present, is discussed by the learned author. But the authorities he has collected appear to leave open the precise question we have to decide in this case.

The judgment of the court is for the plaintiffs to the extent before indicated.