O'Brien, *Serjt.*, and *Wills*, showed cause.—The contract that the defendant's wife should perform at the concert was conditional on her not being incapacitated by illness; such a condition is implied in all contracts of this kind. This point was much discussed in *Hall* v. *Wright*, 8 W. R. 160, E. B. & E. 746, where to an action for breach of promise of marriage, the defendant pleaded that after the promise and before breach thereof, he fell into such a state of health that he became incapable of marriage without great danger of his life; the Court of Queen's Bench was equally divided on the question of the validity of this plea; and though the Court of Exchequer Chamber held that it did not afford any defence to that action, yet the tenor of the judgments delivered shows that such a plea is a good defence to this action. And in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, it was held to be an established principle, that, if the nature of a contract shows that the parties must all along have known that it could not be fulfilled unless some particular thing continued to exist, such a contract is not to be construed as a positive contract, but as impliedly subject to a condition that a breach shall be excused, in case before breach performance becomes impossible from the perishing of the thing without default of the contractor, and although this principle was somewhat qualified by the decision of the Court of Common Pleas in *Appleby* v. *Meyers*, 14 W. R. 835, L. R. 1 C. P. 615, that decision was reversed in the Exchequer Chamber, 15 W. R. 128, L. R. 2 C. P. 651. Now in the present case the contracting parties have assumed the continuing existence of Madame Goddard's health, and as that failed, the contract came to an end.

D. Seymour, *Q.C.*, and *Cave*, in support of the rule.—Sickness is no excuse for non-performance of a contract of this kind. The cases go to show that nothing short of death affords such an excuse, and strictly speaking, the death of a party to a contract for personal services operates as a dissolution of the contract, and not as an excuse for its non-performance; the law is clearly so laid down in the case of *Stubbs* v. *The Holywell Railway Company*, 15 W. R. 869, L. R. 2 Ex. 311, and *Farrow* v. *Wilson*, 18 W. R. 42, L. R. 4 C. P. 745,* is to the same effect. When a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performing it, occasioned by some inevitable accident or unforseen cause, is no answer to an action for damages for breach of contract: *Kearon* v. *Pearson*, 10 W. R. 12, 7 H. & N. 386; *Barker* v. *Hodgson*, 3 M. & S. 267. But these and other cases to the same effect refer back to and are grounded upon *Paradine* v. *Jane*, Aleyn, 27, in which case the material resolution of the Court was that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then 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." That is adopted in *Clifford* v. *Watts*, 18 W. R. 925, L. R. 5 C. P. 577, which is the last case bearing upon the question. It is there laid down by Willes, J., in the course of his judgment that "where a thing becomes impossible of performance by the act of a third party, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency." This case falls within the precise terms of *Hall* v. *Wright*, (*ubi supra*); putting it in the way most favourable to the defendant, Madame Goddard could not have fulfilled her engagement without endangering her life; it was prudent of her to stay away, but for so doing she must pay damages.

Kelly, C.B.—This case no doubt raises a highly important question. It appears that it was agreed that in consideration of a sum certain, the defendant's wife should be present on the 14th of January at Brigg, in Lincolnshire, to play the piano at a concert, of which the proceeds were to belong to the plaintiff; she was prevented by illness from fulfilling her engagement, the consequence of which was that the concert did not take place, and in answer to an alleged breach of the contract, it is pleaded that it was a condition of the contract that the defendant should be exonerated therefrom if his wife was prevented by illness from performing it, and that such, in fact, was the cause of her not performing it, and the question is, whether that is a lawful and sufficient defence. In my opinion it is. The contract is not merely for personal services, but it is one that could not have been performed by any other person, and the law applicable to such a case is laid down most clearly and accurately by Pollock, C.B., in *Hall* v. *Wright*, 8 W. R. 160, E. B & E. 746, in these terms, "It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. . . . . A contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be subject to the condition that, if the author became insane or the painter paralytic and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be liable if he had been removed by death." The law thus stated clearly applies to this case, which is that of an artiste who having contracted to play is prevented from so doing by illness, and it follows that in such a case the non-performance of the contract is excused. And the passage cited in the course of the argument from the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B & S 826, when construed with reference to the illness of a player on the pianoforte, is a strong authority in favour of the construction put upon this contract by the defendant. Indeed *Boast* v. *Firth*, 17 W. R. 29, L. R. 4 C. P. 1, and other cases all go to establish that non-performance of a contract for personal services is excused, if it is owing to a disability caused by the act of God or of the other contracting party. Some question has been raised as to the degree of illness which will excuse the performance of a contract of this kind, but if the party is unable to carry out the contract according to the real intention of the parties, that inability is an excuse for non-performance.

Then comes a further question: the plaintiff contends that if non-performance of the contract

* For report of this case see 6 U.C.L.J.N.S. 17.—Eds. L.J.