

he saw it done and gave directions for the doing of it, without any objection at that time. I do not interfere, then, on that ground.

The fourth ground is that Charles Holland swears that he attended at the time and place appointed on the 10th of December, 1870, to shew cause why he should not pay the sum demanded from him, "but did not meet the fence-viewers nor any person representing them."

Charles Holland had no one representing him on the return of the summons, though it seems he concurred and united in procuring it. That he was present is of no consequence, then, on this argument. Patrick Holland does not say he was present, or if he was he does not say he did not meet the fence-viewers, nor does he say the fence-viewers were not present. Charles Holland himself does not say the fence-viewers were not present at the time and place. He says he "did not meet them nor any person representing them." That may have been because he would not meet them. The place of meeting is "on lot 27, in the 3rd concession"—rather a wide circuit. Charles lives on the west half of that lot, and he may never have left his own house, and yet have been able to make the affidavit he has made. that he did not meet the fence-viewers, though he may have seen them all the time they were upon the lot. He may not have met them because he was in his house or on another part of the lot than they were upon, and yet they may have been on the lot, and he may have seen them or known of them being there all the time.

I consider his affidavit as being intentionally so worded, in order to mislead. The difficulty has arisen, however, from the whole lot being specified as the place of meeting, instead of some determinate house or field, or other unmistakable locality.

As Patrick has made no affidavit on this point, I presume he did not attend, or that the fence-viewers did attend at the time and place appointed under section 16 of the Act, and that they did determine as they say they did, that Roberts had done the work for Charles and Patrick Holland, "being 160 rods awarded to them"—said Patrick and Charles Holland being defaulters to the aforesaid award."

This last objection fails also.

I must therefore discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

EXCHEQUER.

ROBINSON v. DAVISON.

Contract for personal services—Excuse of non-performance—Act of God.

In contracts to render services purely personal there is implied a condition that the parties shall be exonerated from the contract if performance thereof is prevented by inability resulting from the act of God.

The plaintiff engaged the defendant's wife to play the piano at a concert he was about to give; meanwhile she fell ill, and consequently the concert did not take place. The plaintiff then brought this action to recover his expenses and loss of profits from the defendants, on behalf of whom the wife had made the contract.

Held, that the contract was conditional on the lady being in a fit state of health to play, and that there had not been any breach of contract on the part of defendant. *Quare*, whether the plaintiff was entitled to notice of the lady's inability to perform the contract.

[19 W. R. 1036, Exch.]

Declaration—that in consideration of twenty guineas to be paid by the plaintiff to the defend-

dant, the defendant promised that his wife should perform at a musical entertainment to be given by the plaintiff, but that she did not perform, whereby the plaintiff was unable to give the entertainment, and lost the profits that he would have made, and incurred expenses in taking a room and circulating advertisements.

The question in the case arose on the 9th plea, which averred that the promise made by the defendant was subject to a certain term and condition—namely, that if his wife should be unable to perform at the entertainment in consequence of illness, the defendant should be exonerated and discharged from fulfilling his promise, and that she was unable to perform at the entertainment in consequence of illness.

The action was tried before Brett, J., at the Lincolnshire Spring Assizes, when it appeared that the defendant's wife was Madame Arabella Goddard, the well known pianist; and that on the 17th of December, 1869, she agreed with the plaintiff, a music master at Gainsborough, to play at a concert to be given by him at Brigg, in Lincolnshire, on the 14th of January, 1870; nothing was said about what was to be done in case of her illness. Madame Goddard had been ill for some days before the 13th of January, and about one o'clock on that day her doctor told her that she would not be well enough to go into Lincolnshire next day, and it was ultimately admitted by the plaintiff that she was, in fact, prevented by illness from fulfilling her engagement.

When Madame Goddard found that she was too ill to go, she wrote to tell the plaintiff; her letter was delivered to him about nine o'clock on the morning of the 14th, and he thereupon put off the concert and returned the money he had taken.

His claim in this action was for £70. of which £30 was for the expense of hiring a room, advertising, &c., and £40 the profit he reckoned he would have cleared if the concert had taken place.

It was admitted that Madame Goddard had contracted as agent for her husband, the defendant.

The learned judge directed the jury that "when a professional person like Madame Goddard enters into an engagement, it is part of the contract that if she is so ill as to make it unreasonable and practically impossible that she should perform her engagement, she is not obliged to do it; and if under those circumstances she does not do it, she is not liable to an action for not having done it. But at the same time if a person in her position is disabled by illness, or is so ill as to be unable to keep her engagement, she is bound within a reasonable time after she knows that she cannot from illness keep her engagement, to inform the person with whom she has contracted of that fact." A count for not giving such reasonable notice was added at the trial, and it having been proved that the plaintiff had spent £2 13s. 9d., for telegrams and mounted messengers to prevent people coming from the country to the concert, which would not have been necessary if Madame Goddard had notified her illness by telegram instead of letter, the jury found on the only question left to them, that she had not given reasonable notice, and gave a verdict for £2 13s. 9d. on the added count.

The plaintiff having obtained a rule nisi for a new trial on the ground (amongst others) that the learned judge had misdirected the jury in telling them, as above stated, that the contract was impliedly conditional.