JUDGE FAIRFIELD.

We regret to record the death of David L. Fairfield, Esq., Judge of the County Court of the County of Prince Edward, which took place on the 8th instant.

The deceased gentleman, who was in his 69th year, was one of the earliest settlers of the Bay Quinté district, and had held the position of County Judge for nearly a quarter of a century. Dignified but courteous in his bearing, a man of unimpeachable integrity and excellent judgment, his loss will be very deeply felt in the community of which he has been so long a useful and respected member.

SELECTIONS.

CONTRACTS IMPOSSIBLE OF PERFORMANCE.

A new case of importance confirms a rule which, however, has been far from invariably assented to. *Robinson* v. *Davison* excited some interest when it was first heard at the assizes, and in its form in the Court of Exchequer (24 L. T. Rep. N. S. 755) it loses none of that interest for lawyers. It will be remembered that the defendant was the husband of the famous Arabella Goddard, and he undertook that she should perform at a particular concert. She was unable to do so owing to illness. Could damages be recovered for the breach of the contract? The Court of Exchequer said, No.

It was argued in *Thorburn* v. *Whitacre* (2 Lord Raym. 1164). that there are three descriptions of impossibility that would excuse a contractor—legal impossibility, as a promise to murder a man; natural impossibility, as a promise to do a thing in its nature impossible; and, thirdly, that which is deemed as "*impossibilitas facti*," "where, though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day." All must agree with Chief Justice Holt that these may be reduced to two—impossibilities in law, and natural impossiblity. Without discussing all the cases relating to impossible contracts, which will be found collected in a note to Mr. Benjamin's work on the Sale of Personal Property, p. 428, we will confine ourselves to the effect of illness.

One of the leading cases on this subject reveals one of the delightful differences of judicial opinion with which we are familiar. In *Hall* v. *Wright* (1 L. T. Rep. N. S. 230) a plea to an action for breach of a contract to marry, was that before breach the defendant became afflicted with dangerous bodily illness, and was thereby incapable of marrying without danger to his life. The Court of Queen's Bench was equally divided; and the Exchequer Chamber was also divided, four Judges holding the plea bad, three holding that it was good. Judgment was therefore entered for the plaintiff. The contract of marriage is peculiar, and likely to be affected by bodily illness on the one side or the other; and as Baron Watson said, unless stated to be otherwise, a contract to marry must be taken—as it was stated in the declaration—to be of the ordinary kind, with all its usual obligations and incidents. It is difficult to speak of this case with any confidence one way or the other, but the view put by Mr. Justice Willes seems to be consistent with common sense—that a marriage that cannot without danger be consummated by either contracting party ought to be voidable only at the election of the other. "If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. . . . I might put the case of a real attachment, where such illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and the nurse, if she could not be the mistress, of her sweetheart." Not even a lawyer can regret that the plaintiff had a verdict.

Such a case as *Hall* v. *Wright*, puts in a clearer light the accuracy of the decision in *Robinson* v. *Davison*, for the services of the performer are required for one single purpose, which purpose she was unable to accomplish; whereas, in *Hall* v. *Wright*, some of the objects of the contract might be attained, and performance of the conlract was not impossible, but only dangerous. But it is to be observed what the nature of the contract is of which the law will excuse the performance, on the ground that it is impossible. The rule and the exceptions are carefully stated by Mr. Justice Blackburn in *Taylor* v. *Caldwell* (8 L. T. Rep. N. S. 356), where he says—"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible." He then goes on to say: "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, 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 in case, before breach, performance becomes impossible