was excused by Madame Goddard's illness, he was entitled to have notice of it in sufficient time; I do not enter into the question of whether notice was necessary in this case; if the lady had been attacked by illness three or four weeks before the time when the performance was to take place, I do not say that she would not have had to give notice. But assuming that it was proper to leave to the jury the evidence as to the amount of damages resulting from insufficient notice, I think they found a very proper verdict. My brother Channell acquiesces in this, but does not express any opinion as to whether there was any legal liability to give notice of the illness.

BRAMWELL, B.—Following the example of my brother Channell, I will not say whether it was necessary for the defendant to give the notice, the want of which is complained of.

Mr. Cave seemed disposed to contend that it was not necessary for the plaintiff to amend, because the defendant was relying on a conditional condition which could not be of any avail to him, inasmuch as he had not sent the notice which was a condition precedent to his being entitled to claim exoneration from his contract by reason of his wife's illness. I do not agree with the argument; to give notice may have been the defendant's duty, but it was not a condition, non-performance of which would prevent the wife's illness from excusing the fulfilment of the original contract. If the plaintiff had replied that the condition pleaded by the defendant was itself subject to a condition which had not been performed, that would have been a departure.

I take it as admitted that the lady was practically not in a condition to play; she could not have played efficiently, and it would have been dangerous to her life to play at all—is it or is it not a condition of the contract that the lady, being in such a state, shall play? I will go further, is it not a condition that she shall not play? Could it be said that she was entitled to go down to Lincolnshire, and get her fee for playing in such a way as to disgust her audience?

It has been argued that to allow inability arising from illness to be an excuse for non-performance of this contract, is to engraft an implied on an express contract, but this is a fallacy, though such a consideration appears to have had weight in the minds of some of the learned judges who decided *Hall* v. *Wright* (*ubi supra*), of which case I entertain with unabated strength, the opinion I there expressed. The fallacy is in taking the original contract to be absolute and unqualified, and the new term to be a superadded condition, whereas the whole question is, what was the original contract, was it absolute or conditional? Of course there might be an agreement to play and not to die or be ill, and for breaking such an agreement, the defendant would have to pay in damages, but no such term formed part of the contract between the parties to this action, and in my judgment the contract between them must be taken to have been subject to the condition pleaded by the defendant. Were we to hold otherwise, we should arrive at the preposterous result that though the lady might have been so ill as to be scarcely able to finger the instrument, she would have been entitled to play and pay.

CLEASBY, B.—I do not intend to express any opinion on the question of the necessity of notice.

The contract in this case was that the lady should play the piano, to do which well demands, as we all know, the greatest skill and most exquisite taste; if it is not well done, it is better left undone. Now, if the performance of such a contract is prevented by the act of God, as by a sudden seizure or illness, the parties are exonerated from the contract, for it is wholly based on the assumption that the musician will live, and will be in health at the time when the contract is to be carried out; that is an assumption made by both the parties to the contract, both are responsible for the imprudence and folly, if any, of making that assumption, but as it is the foundation of the contract, if that assumption fails the whole contract is at an end. The case of *Boast* v. *Firth*, was decided on the same principle, which is extremely well expressed by Brett, J., in these terms—"This contract is for personal services, and both parties must have known and contemplated at the time of entering into it that the performance of the services was dependent on the servant's continuing in a condition of health to make it possible for him to render them, and if a disability arises from the act of God, the non-performance of the contract is excused." I agree that that is the law and in my judgment, it is decisive in this case.

*Rule discharged.**

CHANCERY.

NEWILL v. NEWILL.

Will—Construction—Gift of property "for benefit of wife and children."

A testator devised and bequeathed all his property to his wife, for the use and benefit of herself and of all his children.

Held, that it was a gift to the wife for life, with remainder to the children.

[19 W. R. 1001, V. C. M.]

This was an administration suit. The testator by his will, dated the 19th of October, 1863, devised and bequeathed unto his wife, Anna Elizabeth Newill, for the use and benefit of herself and all his children, whether born of his former wife, or such as might be born of her, Anna Elizabeth Newill, all his property of every description, real and personal, whether in possession, reversion, remainder, or expectancy, at the time of his decease.

The testator was twice married, and left eight children surviving him, six by the first marriage, and two by the second. He had no real estate, but died possessed of considerable personal estate.

The only children living at the date of the will were those by the first wife.

The suit now came on to be heard on further consideration, and the question was whether the widow and children took as joint tenants, or whether the widow took a life estate, with remainder to the children.

Pearson, Q.C., and *Holmes*, for the plaintiffs, the children of the first marriage, contended that the will created a joint tenancy between the widow and children. They cited *De Witte* v. *De Witte*, 11 Sim. 41; *Bustard* v. *Saunders*, 7 Beav. 92; *Bibby* v. *Thompson*, 32 Beav. 646

Marcy, for the guardian of some of the children, who were infants, supported the same view.

* Leave to appeal was refused.