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RESTRAINING BREACH OF CONTRACT

PART I.

Introductory

This is the first of two parts of an article concerning the law of injunction in restraint of breach of contract. Both are based upon *Lumley* v. *Wagner*.[1] Although that case has suffered much from misinterpretation, there is nothing confusing in its text, and its authority is unimpaired. Although it neither stated nor purported to state any new doctrine it was attacked so often as having done so that it became the medium through which several aspects of that branch of jurisprudence to which it appertains were authoritatively settled.

Lumley v. *Wagner*

The facts of *Lumley* v. *Wagner* were quite simple. There was a positive term in a contract of the defendant, a professional singer, that she should sing during a definite period of time at a definite theatre of the plaintiff and a negative term in the same contract that she should not sing during the same period of time at any other theatre. The defendant was restrained by injunction from singing during the period of time at another theatre than that of the plaintiff. Lord St. Leonards, Lord Chancellor, in giving judgment, found it necessary to admit that the agreement was one over which Equity could not, under its rules, have exercised jurisdiction by way of *specific performance*. There were two reasons, at least, for this. One was that, in general, a court of Equity will not decree specific performance unless it can do complete and final justice between the parties before the court. Thus, there cannot be such a decree with relation to a dependent part of an agreement when,

[1] (1852), 1 DeG. M. & G. 604.

for any reason, Equity cannot decree specific performance of the remainder of the agreement, on both sides. The other reason was that, in general, Equity does not decree specific performance except in cases where it can compel such performance. Plainly no court could *make the defendant sing* for the plaintiff. Could the court, nevertheless, proceeding not by way of specific performance, but by way of injunction, and ignoring the defendant's positive engagement to sing for the plaintiff, restrain her from singing for other than the plaintiff? The Lord Chancellor held that the defendant could be restrained from breaching the independent negative provision of her agreement. Twelve years before, in *Hopner* v. *Brodripp*,[2] Lord Cottenham V.C., deciding an analogous case—involving a contract for the sale of chattels, which, likewise, Equity will not enforce by way of specific performance — had had "no doubt whatever of the jurisdiction of the court to restrain a party from doing *such acts as he had undertaken not to do*, although it might not be able to compel him to *perform* the acts which he had undertaken that he would *perform*". The subjects of jurisdiction, he added, were "*wholly distinct*".[3]

Lord St. Leonards, when, in *Lumley* v. *Wagner*, speaking of a case such as that with which he was dealing, where the court is, for any reason, not free to decree specific performance of an agreement, said that in such case the court "operates to bind men's consciences as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give."

Specific performance of dependent stipulations

Because most general rules of Equity abound in exceptions it is advisable to restate here, with its inevitable qualifications, the rule that Equity does not enforce by way of specific performance dependent stipulations of agreements. Curiously, this general rule, now definitely decided to be immaterial, so far as the rule of *Lumley* v. *Wagner* is concerned, persisted as a cause of doubt of the authority of that case until 1883. Wright J. said, in *Grimston* v. *Cuningham*,[4] a case which, in principle, was *Lumley* v. *Wagner* all over again, that "until the decision

[2] (1840), 1 Coop. tem. Cott. 89.
[3] See also *Dietrichsen* v. *Cabburn* (1846), 2 Ph. 52; and earlier cases cited by Lord St. Leonards in *Lumley* v. *Wagner*.
[4] [1894] 1 Q.B. 125.

in *Donnell* v. *Bennett*,[5] the doctrine in accordance with which such stipulations" (those of a negative nature) "were enforced by injunction was seriously interfered with by the supposed rule that where there could be no decree for specific performance of a contract on the one side there ought to be no injunction on the other side; but since the decision in *Donnell* v. *Bennett* this view has been somewhat altered".

A court of Equity will, in general, in a suit for specific performance based upon an agreement, leave the parties to the operation of the common law unless it can do complete and final justice between them. Therefore it will not, in general, decree specific performance of a dependent part of the agreement when, for any reason, it cannot decree specific performance of the agreement as a whole, to the extent to which it remains unperformed.[6] But where the parts of the agreement which are incapable of specific performance are subordinate provisions,[7] or are distinct parts, independent of those which the court enforces,[8] specific performance may be granted.[9]

Agreements relating to personal services

At the time when, in 1852, *Lumley* v. *Wagner* was decided, it had already been held in several cases that the negative stipulations of an agreement will be enforced by injunction although the affirmative remainder of the agreement in which they appear is incapable of specific performance. The only then new or unfamiliar material circumstance which *Lumley* v. *Wagner* presented, therefore, was that in that case the agreement concerned was one relating to *personal services*. Agreements *to perform* personal services are not enforced in Equity by means of *any* form of remedy. Fry L.J. in *Millican* v. *Sulivan*,[10] explained why. "Enormous inconvenience would be occasioned," he said, "if courts of equity were to enforce the continuance of strictly personal relations when those relations have become

[5] (1883), 22 Ch.D. 835.

[6] *Gervais* v. *Edwards* (1848), 2 Dr. & War. 80; *South Wales Co.* v. *Wythes* (1854), 5 DeG. M. & G. 880; *Phipps* v. *Jackson* (1887), 56 L.J.Ch. 550. See also *Jones* v. *Tankerville (Earl)*, [1909] 2 Ch. 443.

[7] *Blackett* v. *Bates* (1865), 2 H. & M. 270; overruled on another ground (1865), L.R. 1 Ch. App. 117; *Hamilton* v. *Hector* (1872), L.R. 13 Eq. 511.

[8] *Gibson* v. *Goldsmid* (1854), 5 DeG. M. & G. 757; *Kernot* v. *Potter* (1862), 3 DeG. F. & J. 447; *Ogden* v. *Fossick* (1862), 4 DeG. F. & J. 426; *Frith* v. *Frith*, [1906] A.C. 254 (H.L.); *Measures Brothers* v. *Measures*, [1910] 2 Ch. 248).

[9] *Rolfe* v. *Rolfe* (1846), 15 Sim. 88; *Holmes* v. *Eastern Counties Ry. Co.* (1857), 3 K. & J. 675; *Catt* v. *Tourle* (1869), L.R. 4 Ch. App. 654; *Waring* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1849), 7 Hare 482.

[10] (1888), 4 T.L.R. 203 (C.A.).

irksome, and enforced them under penalty of imprisonment for contempt of court. That would be too gross an interference with the liberty of the subject and upon that ground courts of of equity have refused to enforce them." Even in the case of a negative stipulation with the claimed remedy *injunction*, and not specific performance, if the direct or indirect effect of the injunction will be to compel the defendant to *perform* personal services the injunction will be refused.[11] Remember, however, that the judgment in *Lumley* v. *Wagner* although it related to personal services, entailed no compulsion to *perform* personal services. The decree *restrained*, rather than *compelled* the performance of personal services.

Thus, although it is now firmly established, as a general proposition, that when an agreement contains both negative and affirmative covenants or stipulations the court will restrain by injunction a breach of the negative portion of the agreement, even in a case where the affirmative portion of it is not susceptible of specific performance,[12] it must not be forgotten that Equity leans as strongly against indirect enforcement of agreements to render personal services as it does against direct enforcement of such agreements. This consideration compels an examination of the applicable "personal services" decisions to which we now proceed. The analogous decisions relating to agreements for the sale of goods and chattels will then be reviewed separately.

In *Clarke* v. *Price*,[13] the defendant had covenanted to take notes of cases in court and compose reports thereof for the plaintiff, a publisher. There was no express negative covenant against the defendant's performing like work for others. The covenant was not one capable of being read negatively. Lord Eldon refused to restrain the defendant from writing reports for others than the plaintiff.

In *Kemble* v. *Kean*,[14] Shadwell V.C. refused an injunction on the ground that because the court could not enforce the positive part of a contract to serve, it would not restrain by injunction breach of the negative part, and in *Kimberley* v.

[11] *Milican* v. *Sulivan*, *supra*.

[12] *Hopner* v. *Brodripp* (1840), 1 Coop. tem. Cott. 89; *Hills* v. *Croll* (1845), 2 Ph. 60; *Dietrichsen* v. *Cabburn* (1846), 2 Ph. 52; *Great Northern Ry. Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1851), 5 DeG. & Sm. 138; *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604; *Donnell* v. *Bennett* (1883), 22 Ch. D. 835; *Ryan* v. *Mutual Tontine Westminster Chambers Assn.*, [1892] 1 Ch. 116 per Kay L.J.; *Grimstone* v. *Cuningham*, [1894] 1 Q.B. 125.

[13] (1819), 2 Wils. C.C. 157. See also *Baldwin* v. *Society for Diffusion of Useful Knowledge* (1838), 9 Sim. 393; *Hope* v. *Hope* (1856), 22 Beav. 351.

[14] (1829), 6 Sim. 333. See also *Grimston* v. *Cuningham*, [1894] 1 Q.B. 125.

Jennings,[15] the same Vice-Chancellor, in the case of a contract to serve the plaintiff for a fixed salary for a fixed period and during that period not to serve any other person, refused an injunction against breach of the negative portion of the contract on the same ground. These cases are overruled by *Lumley* v. *Wagner*,[16] although in view of the explanation of them made by Shadwell V.C. in *Rolfe* v. *Rolfe*,[17] they need not have been impugned. In the case just mentioned Shadwell V.C. enforced an express negative covenant by way of injunction although it was part of a contract containing other and affirmative terms which were not enforceable by way of specific performance, explaining that *Kemble* v. *Kean*[18] and *Kimberley* v. *Jennings*[19] were decided upon the state of the pleadings, the suits being for specific performance, and the injunction, because asked for by way of ancillary relief, being dependent on the right to specific performance of the whole agreement, which right was non-existent.

In *Pickering* v. *Ely* (*Bishop*),[20] where a grant of an office had been made to the plaintiff, and filling the office involved performance of duties of a personal and confidential nature, the court refused to enjoin the defendant against employing any other person than the plaintiff in the office. The only covenant in point was of an affirmative character.

Stocker v. *Brocklebank*,[21] *Johnston* v. *Shrewsbury and Birmingham Ry. Co.*,[22] *Chaplin* v. *Northwestern Ry. Co.*,[23] and *Mair* v. *Himalaya*,[24] were in principle alike. There was a contract of service, no power to decree specific performance of such a contract directly or by way of injunction and no negative covenant. In all these cases the injunction was refused, and on the same ground — that the court was not in the habit of enforcing agreements involving personal service.

In *Whitwood Chemical Co.* v. *Hardman*,[25] the Court of Appeal held in substance that where a contract of service is involved any covenant or stipulation which is sought to be enforced by injunction must be of a definitely negative character, that it

[15] (1836), 6 Sim. 340.
[16] (1852), 1 DeG. M. & G. 604.
[17] (1846), 15 Sim. 88.
[18] *Supra.*
[19] *Supra.*
[20] (1843), 2 Y. & C.C.C. 249. And see *Millican* v. *Sulivan* (1888), 4 T.R. 204.
[21] (1851), 3 Mac. & G. 250.
[22] (1853), 3 DeG. M. & G. 914.
[23] (1861), 5 L.T. 601.
[24] (1865), L.R. 1 Eq. 411.
[25] [1891] 2 Ch. 428 (C.A.).

need not be expressly negative, but, if implied, as it might be, the negative covenant or stipulation must appear to have been intended to operate *against the doing of some definite identifiable act.* The negative restriction in the case not being of that character the injunction was refused. Lindley L.J. observed that he agreed with what Fry L.J. had said more than once, that cases of this kind are not to be extended, and that he looked upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. This reference to *Lumley* v. *Wagner* must not be read as one impugning the soundness of the decision in that case. The anomaly presented by that case was that, on the facts, although it involved a contract for personal service, no rule or principle of equity was invaded by decreeing the injunction. The thing covenanted not to be done being a particular identifiable act, and the decree, if made, being one just in the circumstances and easy to enforce according to the normal processes of the court, the reasons upon which the general rule in question was based were not present. To misread a decision such as *Lumley* v. *Wagner* in fact was, as one holding, at large, that negative stipulations may be enforced by injunction would be, indeed, "dangerous". Free as *Lumley* v. *Wagner* was, of any complication arising out of the rule that Equity does not *enforce the performance* of stipulations relating to personal service, the words of Lord Cairns L.C. in *Doherty* v. *Allman*[26] can exactly apply. He said that in cases like *Lumley* v. *Wagner* there is practically a right to an injunction. These are his words :—"If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties."

In *Star Newspaper Co. Ltd.* v. *O'Connor and Wetton,*[27] an injunction was granted to enforce a negative covenant of the usual type, affirmatively to do and negatively not to do an act, entered into by a newspaper employee in a contract of personal service. Kekewich J. said that as to the law it must be regarded as definitely settled — that is to say, settled as far as a decision of the Court of Appeal definitely settles the law—

[26] (1878), 3 App. Cas. 709 (H.L.).
[27] (1893), 9 T.L.R. 526.

by *Whitwood Chemical Co.* v. *Hardman.*[28] There was one passage in Lord Justice Lindley's judgment which pointed to the possibility of granting an injunction in a proper case where there was not "an actual negative clause", or changing the phrase, no express negative clause, but where, nevertheless, you could "put your finger" on some specific thing from which you must of necessity imply that a negative clause was intended. With that passage he did not now propose to deal: that must be left for future consideration. Putting that aside the judgment of the Court of Appeal must go to this, that in order to grant an injunction in aid of a contract of service you must find an express negative purpose. He was able to do so.

In *Grimston* v. *Cuningham,*[29] the court granted an injunction to enforce the negative part of a contract entered into by an actor to act at different theatres under the plaintiff's direction, as required, for not less than 25 weeks nor more than 40 weeks and while so engaged not to act at any other theatre.

In *Mutual Reserve Fund Life Association of New York* v. *New York Life Insurance Co.,*[30] which related to a contract for the services of an insurance agent, there was a contract to "act exclusively for" the plaintiff, in the securing of insurance for five years. Lindley L.J. said: "Before an injunction can be granted in order to enforce a written contract of personal service . . . . . there must be a clear and definite negative covenant, or, if one is to be implied, which is quite possible, it must be *so definite that the Court can see exactly the limit of the injunction that it is to grant.*" The injunction was refused.

In *Ehrman* v. *Bartholomew,*[31] a commercial traveller had agreed to serve a firm of wine merchants for ten years *unless his employment was sooner terminated by three months notice in writing from the employers.* The agreement on the part of the employee provided affirmatively as to his employment and continued "and shall devote the whole of his time during the usual business hours in the transaction of the business of the firm, and shall not in any manner directly or indirectly engage or employ himself in any other business or transact any business with or for any person or persons other than the firm during the continuance of this agreement". The employee broke the agreement, left the service of his employers before the term of service had expired and entered the service of another firm of

[28] [1891] 2 Ch. 416 (C.A.).
[29] [1894] 1 Q.B. 125.
[30] (1896), 75 L.T. 528 (C.A.).
[31] [1898] 1 Ch. 671.

wine merchants. Romer J. declined to grant an injunction on the ground that the covenant was one enforcement whereof would prevent the employee from serving anybody or engaging in any business, and would amount to enforcing specific performance of an agreement for personal service. The terms of the application for the injunction were very broad. "It is to be observed," says Russell J. speaking of this case in *Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler*,[32] "that an injunction in a limited form, confined to restraining the defendant from remaining in the service of the competing firm, to which the objection of specific performance of a personal service agreement would not have applied, was not granted." The reason may have been that the agreement was wholly void for unreasonableness.

In *Robinson (Wm.) & Co. Ltd.* v. *Heuer*,[33] H. agreed to serve the plaintiff company for five years, the company being given an option to renew for another five years. It could dismiss on three months notice. H. agreed that during the term he would devote his whole time and attention to the business of the company and that he would not during the engagement, without consent of the company, engage as principal or servant in any competing business or any other business whatever, upon pain of instant dismissal. H. covenanted that if so dismissed he would not within three years of dismissal be engaged as principal, agent or servant in a competing business within 150 miles of Wolverhampton. The plaintiffs sought to restrain H., during the term of service, from carrying on as a principal, agent, servant or otherwise, any business relating to goods of the description made by the company and from soliciting orders for other firms. North J. refused an injunction on the authority of *Ehrman* v. *Bartholemew*.[34] The Court of Appeal, however, held that as the negative portion of the agreement was severable an injunction as asked, but limited to the first five years, should be granted, the company waiving their option to retain H. in their service for another five years and the Court doubting whether the agreement ought to be enforced for that further term. Lindley L.J. said that — "The real difficulty which has always to be borne in mind when you talk about specific performance of or injunctions to enforce agreements involving personal service is this — that this court never will enforce an agreement by which one person undertakes to be the servant of another; and if this agreement were enforced in its terms it

[32] *Infra.*
[33] [1898] 2 Ch. 451 (C.A.).
[34] [1898] 1 Ch. 671.

would compel this gentleman personally to serve the plaintiffs for the period of ten years; that the court never does." But, as Lindley L.J. explained, all that was asked was enforcement of the provision that the defendant *should not compete.* Thus this case was lifted out of the class of personal service cases and assigned to that of covenants not to compete. The negative covenant not to compete was enforced by way of injunction.

In *Kirchner* v. *Gruban,*[35] the agreement to serve and a covenant claimed to be one not to serve others were in such terms that, in the opinion of the court, they were substantially affirmative and to grant an injunction would be, in effect, to decree specific performance of a contract of service, and this the court refused to do.

In *Chapman* v. *Westerby,*[36] a skipper had contracted to devote the whole of his time, attention, ability and energies for a ten year period to the performance of his duties as skipper of a trawler, the property of his employers, and not to give his time or personal attention to any other business or occupation. Early during the ten year period he sought to obtain other employment and to terminate his relations with the plaintiff. The plaintiff applied for an injunction. The notice of motion therefor was in terms so wide that, if granted, the defendant could not have engaged in any business nor acted as skipper of any other than one of the plaintiff's trawlers. The application was based upon *Lumley* v. *Wagner* and a negative stipulation. Warrington J. refused to grant an injunction stating that the authorities "showed that it was essential that the negative stipulation which the Court was asked to enforce should be a stipulation requiring the contracting party *not to do some particular act* on which the Court can put its finger, and so frame the injunction as to restrain him from doing that act. In the present case the only stipulation which was sought to be enforced was that the defendant should not give his time or personal attention as skipper or otherwise to any business or occupation other than that of acting as skipper of the partnership trawler. In the face of those authorities it was impossible to say that such a stipulation could be enforced by injunction. To so enforce it would involve this, that so far as earning his living was concerned the defendant would have to be absolutely idle for the term of ten years or continue this contract of personal service; in other words it would for all practical purposes be granting specific

[35] [1909] 1 Ch. 403.
[36] (1913), 58 So. J. 50.

performance of a contract of service, a thing which the court would never do."

In *Mortimer* v. *Beckett*,[37] the court refused to imply a negative convenant from affirmative expressions in a contract for personal services and it is stated that the court is always disinclined to do so. The relevant facts of the case were that a professional boxer had agreed that for a preiod of seven years his manager should have the "sole" right to arrange matches for him. It was conceded that a negative convenant not to employ another manager might be implied from the language of the agreement, but the court refused to imply as required, in a case involving personal service. The plaintiff was told, in effect:—"Duplicate the facts of *Lumley* v. *Wagner*, where there was an express covenant, and the court will be bound to decide in your favour, but no broad implication of intent to covenant against service of others than you will be made."

In *Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler*,[38] Eisler had entered the employment of the plaintiffs under an agreement which provided that during the term of his employment he should not enter into any other employment nor be interested in the business of any other company, firm or individual installing or dealing with burglar or fire alarms. During the currency of the term Eisler entered the employment of a competing company. Russell J. held the restriction to be valid, but that the court would not grant an injunction restraining Eisler from continuing in the employment of the competing company, nor an injunction restraining the competing company from continuing to employ him, as the plaintiffs' remedy was in damages. But he restrained Eisler during the currency of the term from being interested in the business of the defendant company or any business installing or dealing with burglar or fire alarms. *Ehrman* v. *Bartholemew*,[39] and *Chapman* v. *Westerby*,[40] were distinguished. Here, as in *Robinson (Wm) & Co. Ltd.* v. *Heuer*,[41] the court enforced a negative covenant not to compete. In addition, here being asked, the court refused to enforce an express negative covenant not to become employed by another during the currency of an agreement for service.

The following principles are deducible from the cases just reviewed:

[37] [1920] 1 Ch. 571.
[38] [1926] 1 Ch. 609.
[39] *Supra.*
[40] *Supra.*
[41] *Supra.*

(i) that the doctrine of *Lumley* v. *Wagner*[42] is in no sense impaired by them;

(ii) that a covenant or stipulation must, to be enforceable by way of injunction in conformity with the principle of *Lumley* v. *Wagner*, be definitely negative, in the sense that it must disclose a negative purpose;[43] but that it need not be absolutely and clearly negative in terms if there is a disclosed intent with relation to a definite identifiable act, to which the terms of an injunction can be directed, that such act shall not be done;[44] and in the case of an agreement for personal service, although it disclose such negative purpose and intent, a negative covenant or stipulation will not, in general, in the absence of an express covenant or stipulation, be implied;[45]

(iii) that the reasonable covenants of an employee for personal service not to compete during the agreed period of service against his employer will be enforced by injunction;[46]

(iv) that the covenant of a person employed for personal service that he will not serve another during the agreed period of service will not be enforced by injunction if the restrictive terms of the employment agreement are, as a whole, such that their enforcement will amount to practical compulsion to perform the affirmative terms of the same agreement;[47]

(v) that negative covenants and stipulations in agreements for personal service which provide generally against entering into any other employment or any other business during the agreed period of service are not within the principle of *Lumley* v. *Wagner* in that they do not relate to restraint of definite, identifiable acts to which the terms of an injunction can be directed, and such covenants and stipulations will not be enforced by injunction although they be expressly negative in terms.[48]

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[42] (1852), 1 DeG. M. & G. 604.

[43] *Whitwood Chemical Co.* v. *Hardman, supra; Star Newspaper Co. Ltd.* v. *O'Connor and Wetton, supra; Mutual Reserve Fund Life Association of New York* v. *New York Life Insurance Co., supra.*

[44] *Whitwood Chemical Co.* v. *Hardman; Star Newspaper Co. Ltd.* v. *O'Connor and Wetton; Mutual Reserve Fund Life Association of New York* v. *New York Life Insurance Co.; Ehrman* v. *Bartholemew.*

[45] *Mortimer* v. *Beckett, supra.*

[46] *Robinson (Wm.) & Co. Ltd.* v. *Heuer, supra; Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler, supra.*

[47] *Robinson (Wm.) & Co. Ltd.* v. *Heuer; Kirchner* v. *Gruban; Chapman* v. *Westerby, supra.*

[48] *Ehrman* v. *Bartholemew, supra; Chapman* v *Westerby; Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler, supra.*

Agreements Relating to Goods and Chattels

For some time before *Lumley* v. *Wagner* was decided, it was regarded as settled that an injunction might be granted to enforce negative covenants or stipulations in agreements for the sale of ordinary *goods and chattels*. The affirmative provisions of such agreements were and are as unenforceable by way of a decree for specific performance as are those of agreements to perform personal services.

In *Dietrichsen* v. *Cabburn*,[49] the defendant, a vendor of a line of goods, had agreed to sell his goods to the plaintiff at a discount of 40 per cent, and not to sell them to anyone else at a discount of over 25 per cent. Lord Cottenham L.C. granted an injunction to restrain breach of the negative provision, holding that where an agreement is so infirm that the court can decree no substantial performance of it as a whole the parties will be left to their legal remedies, but where there is a clear negative agreement by the defendant the court will not refrain from enforcing that agreement by injunction because there may be some positive stipulations which the court cannot enforce against the plaintiff. The view expressed in *Dietrichsen* v. *Cabburn* was accepted until some remarks of Jessel M.R. in *Fothergill* v. *Rowland*[50] tended to produce uncertainty as to its authority. In *Fothergill* v. *Rowland*, Jessel M.R. having "no doubt whatever on the question", declined to interfere by injunction to restrain a breach of contract for the raising and delivery of all the get of coal in a colliery at a fixed price for a term of five years. The lessee was about to sell the colliery to third persons. This was an act which would prevent him from being able to perform his contract. The Master of the Rolls, holding that the contract was one for the sale of goods of no peculiar type, obtainable in the market, ruled that damages was the proper remedy. He cited *Heathcote* v. *North Staffordshire Ry. Co.*,[51] and Lord Cottenham's query therein: "If A contract with B to deliver goods at a certain time and place will Equity interfere to prevent A from doing anything which may or can prevent him from so delivering the goods?" Jessel M.R., stating the rule with relation to the enforcement of specific performance in the case of an agreement to sell and deliver ordinary goods and chattels, assumed its application with relation to the enforcement by way of injunction, based upon the implication of a negative covenant or stipulation. Fry J., however, in *Donnell*

[49] (1846), 2 Ph. 52.
[50] (1873), L.R. 17 Eq. 132.
[51] (1850), 2 Mac. & G. 112.

v. *Bennett*,[52] followed *Dietrichsen* v. *Cabburn*,[53] wherein the court, he said, had "enforced by way of injunction a stipulation not to sell chattels except in a particular manner, and there the whole contract was one which could not have been performed specifically by the Court." Wright J. said in *Grimstone* v. *Cuningham*,[54] that until the decision in *Donnell* v. *Bennett*, the doctrine in accordance with which stipulations of a negative nature were enforced by injunction was seriously interfered with by the supposed rule that where there could be no decree for specific performance of a contract on the one side there ought to be no injunction on the other side, but that since the decision in *Donnell* v. *Bennett*, this view had been somewhat altered.

Proper conclusions from the foregoing authorities would seem to be that, in general, the court does not restrain by injunction the breach of an agreement for the sale or delivery of goods or chattels;[55] that by way of exception, established by *Dietrichsen* v. *Cabburn*, *Lumley* v. *Wagner*, and *Donnell* v. *Bennett*, the court does restrain the breach of a negative stipulation under circumstances similar to those which these cases present, and that to be enforced the applicable stipulation must be distinctly negative in purpose though not necessarily negative in terms.[56] The stipulations in the cases mentioned were express. The stipulation set up in *Fothergill* v. *Rowland*,[57] was implied. These conclusions coalesce with those reached in the personal service cases.[58]

A ship is a chattel, and a charterparty is an agreement relating to the use of the chattel, but Equity holds that a ship under a charterparty ought to be regarded as a chattel of peculiar value to the charterer, and that although Equity cannot compel specific performance of the charterparty it can and will, according to the principle expressed in *DeMattos* v. *Gibson*,[59] restrain the employment of the vessel in a different manner from that which the charterparty expressly or impliedly forbids.[60] The principle of *DeMattos* v. *Gibson*, is that where property, either immovable or movable, is disposed of, with notice of a prior

[52] (1883), 22 Ch. D. 837.
[53] *Supra*.
[54] [1894] 1 Q.B. at p. 132.
[55] *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799; *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A.C. 293 (P.C.).
[56] See *MacDonald* v. *Cassein Ltd.*, [1917] 2 W.W.R. 1132 (Can.).
[57] *Supra*.
[58] See *Mortimer* v. *Beckett*, [1920] 1 Ch. 571.
[59] (1859), 4 DeG. & J. 276.
[60] *DeMattos* v. *Gibson* (1859), 4 DeG. & J. 276 at p. 298; *Lord Strathcona Steamship Co. Ltd.* v. *The Dominion Coal Co. Ltd.*, [1926] A.C. 108 (P.C.).

contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.[61]

PART II

Injunctions Based on Expressly Negative Provisions

Taking for granted the contents of Part I, it is necessary to distinguish a negative from a positive, or affirmative, agreement or stipulation, and to consider whether the agreement or stipulation must be express or may be implied. These matters are considered in this and the next following sections.

Just what words are required in, or are of such a character or sufficiency as to amount to, a negative agreement or stipulation, for the purposes of an application for an injunction, cannot be said to be clear. It is sufficient that the agreement or stipulation be substantially negative. Phrasing and form bend to disclosed intent to covenant or stipulate that a thing shall not be done.[62] It is recognized that there can be a negatively expressed covenant or stipulation which is not an express negative covenant or stipulation. For example, if A, in an employment agreement, covenants that he shall not omit to pay to B. throughout the agreed period of service one hundred pounds every month, and not later than the last day of every month, that is really, notwithstanding the phrasing, an affirmative covenant to do a thing. On the other hand, a negative covenant is one whereby notwithstanding its phrasing the covenantor covenants that he will not do a thing or that a thing shall not be done.[63] When we consider covenants or stipulations such as that a person shall have the "sole", or the "exclusive" right to do a thing, or that he shall be the "only" person who shall have the right to do a thing, we are on debatable ground. The tendency is to regard them not as expressly negative but to imply from them, *in a proper case*, negative covenants or stipu-

[61] See *Sevin* v. *Deslandes* (1860), 3 L.T. 461; *Messageries Imperiales Co.* v. *Baines* (1863), 7 L.T. 763; *Lord Strathcona Steamship Co. Ltd.* v. *The Dominion Coal Co. Ltd.*, [1926] A.C. 108 (P.C.).

[62] *Hooper* v. *Brodrick* (1840), 11 Sim. 47; *Wolverhampton and Walsall Ry. Co.* v. *London & N. W. Ry. Co.* (1873), L.R. 16 Eq. 433 at p. 440; *London and S. W. Ry. Co.* v. *Gomm* (1882), 20 Ch. D. 562 (C.A.); *Donnell* v. *Bennett* (1883), 33 Ch. D. at p. 839; *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; *London, Chatham and Dover Ry. Co.* v. *Spiers and Pond (Ltd.)* (1916), 32 T.L.R. 493; *Winnipeg Saturday Post* v. *Couzens* (1911), 2 Man. L.R. 562; *Lord Strathcona S.S. Co. Ltd.* v. *Dominion Coal Co. Ltd.*, [1926] A.C. 108 (P.C.).

[63] *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner* v. *Gruban*, [1909] 1 Ch. 403.

lations in terms consistent with the apparent intent of the parties.[64] The negative covenants or stipulations so implied are given, *in a proper case*, the same effect as if they were express.

Among express negative stipulations which have been enforced by way of injunction have been covenants or other agreements (i) against the ringing of bells at certain hours;[65] (ii) by a playwright against writing during a defined period for any other producer than the plaintiff;[66] (iii) by authors against writing during a defined period for any other publisher than the plaintiff;[67] (iv) against building;[68] (v) by a lessee against removing machinery from a mine for six months after notice given at termination of lease;[69] (vi) against applying for an Act of Parliament;[70] (vii) by a creditor against publishing the fact of recovery of a judgment debt;[71] (viii) by wife or husband in a separation deed against molesting other spouse;[72] (ix) against giving a notice to treat;[73] (x) against increasing tolls;[74] (xi) against coming within a radius of ten miles of the house of a husband and wife while they should reside there;[75] (xii) by a tenant against making alterations.[76]

Injunctions Based on Impliedly Negative Provisions

The principle upon which terms, whether negative or otherwise, are to be implied in a contract or other agreement is stated by Kay L.J. in *Hamlyn* v. *Wood*,[77] in the following words; "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circum-

[64] See the following section, *Injunctions Based on Impliedly Negative Provisions*.

[65] *Martin* v. *Nutkin* (1724), 2 P. Wms. 266.

[66] *Morris* v. *Colman* (1812), 18 Ves. 437.

[67] *Barfield* v. *Nicholson* (1824), 2 Sim. & St. 1; *Ingram* v. *Stiff* (1859), 5 Jur. N.S. 947; *Ainsworth* v. *Bentley* (1866), 14 W.R. 630.

[68] *Rankin* v. *Huskisson* (1830), 4 Sim. 13; *Attorney-General* v. *Briggs* (1855), 1 Jr. N.S. 1084; *Lloyd* v. *London, Chatham and Dover Ry. Co.* (1865), 2 DeG. J. & Sm. 568; *Haigh* v. *Waterman*, [1867] W.N. 150; *De Nichols* v. *Abel*, [1869] W.N. 14; *Hobson* v. *Tulloch*, [1898] 1 Ch. 424; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 (C.A.).

[69] *Hamilton* v. *Dunsford* (1857), 6 Ch. R. Ir. 412.

[70] *Lancaster and Carlisle Ry. Co.* v. *North Western Ry. Co.* (1856), 2 K. & J. 293; *Telford* v. *Metropolitan Board of Works* (1872), L.R. 13 Eq. 594.

[71] *Jamieson* v. *Teague* (1857), 3 Jur. N.S. 1206.

[72] *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Cahill* v. *Cahill* (1882), 8 App. Cas. 421 (H.L.).

[73] *Beecham* v. *Lastingham and Rosedale Light Ry. Co.*, [1907] W.N. 101.

[74] *Conway Bridge Commissioners* v. *Jones* (1910), 102 L.T. 92 (C.A.).

[75] *Upton* v. *Henderson* (1912), 106 L.T. 830. And see *Denny (Trustee)* v. *Denny and Warr*, [1919] 1 K.B. 590.

[76] *Gifford* v. *Dent*, [1926] W.N. 336—mandatory, for removal of an electric sign. Compare *Joseph* v. *London County Council* (1914), 111 L.T. 276.

[77] [1891] 2 Q.B. 488 (C.A.).

stances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."[78]

Covenants and other stipulations are implied with scrupulous care.[79] Although the court has power, in a proper case, to imply any covenant or stipulation—positive or negative—to effectuate the intent of the parties or to prevent a violation of their agreement,[80] it may not import a covenant or stipulation which does not arise by necessary implication from the language of the instrument in question.[81] Covenants or other stipulations not expressed cannot be implied unless from words capable of sustaining the implication as one actually intended by the parties[82] and *necessarily* arising from the words.[83] If from all the language of the whole instrument an agreement between the parties that a thing shall be done or shall not be done appears, a covenant to do or not to do that thing has been made.[84]

Covenants or other terms of agreements of parties are implied only when, in the view of the court, the parties, as disclosed by their agreement and the circumstances, are deemed to have agreed to, but to have left unexpressed that which the court implies. Thus a covenant to do a certain act implies a further covenant or term that the covenantor shall not wilfully render himself incapable of doing that act.[85] Such a covenantor is held also to have covenanted, impliedly, not to discontinue,

[78] Quoted with approval by the Judicial Committee of the Privy Council in *Douglas* v. *Baynes*, [1908] A.C. 477 at p. 482 (P.C.).

[79] *Cescinsky* v. *George Routledge & Sons Ltd.*, [1916] 2 K.B. 329; *Barnes* v. *City of London Real Property Co.*, [1918] 2 Ch. 35.

[80] *DeMattos* v. *Gibson* (1859), 4 DeG. & J. 276 at p. 299; *Wolverhampton and Wallsall Ry. Co.* v. *North Western Ry. Co.* (1873), L.R. 16 Eq. 433; *Hudson* v. *Cripps*, [1896] 1 Ch. 265; *Doherty* v. *Allman* (1878), 3 App. Cas. 709 at p. 720 (H.L.); *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*, [1926] A.C. 108 (P.C.).

[81] *Kemp* v. *Bird* (1877), 5 Ch. D. 974; *The Moorcock* (1889), 14 P.D. 64 at p. 68; *Brigg* v. *Thornton*, [1904] 1 Ch. 386; *Attorney-General* v. *Dublin Steam Packet Co.* (1909), 25 T.L.R. 697 (H.L.); *Dick* v. *Norton* (1916), 114 L.T. 548; *Never-Stop Ry. (Wembley)* v. *British Empire Exhibition*, [1926] 1 Ch. 877; *Browning* v. *Crumlin Valley Collieries*, [1926] 1 K.B. 522 at p. 528.

[82] *Churchward* v. *Reg.* (1865), L.R. 1 Q.B. 195 at p. 211; *Midland Ry. Co.* v. *London and North Western Ry. Co.* (1866), 2 Eq. 525; *MacLean* v. *Mackay* (1873), L.R. 5 P.C. 333.

[83] *Aspdin* v. *Austin* (1844), 5 Q.B. 671; *Rashleigh* v. *South Eastern Ry. Co.* (1851), 10 C.B. 612; *James* v. *Cochrane* (1852), 7 Exch. 177; *Iven* v. *Elwes* (1854), 3 Drew. 25; *Warne* v. *Routledge* (1874), L.R. 18 Eq. 500; *Gearns* v. *Baker* (1875), L.R. 10 Ch. App. 355.

[84] *Rigby* v. *Great Western Ry. Co.* (1849), 14 M. & W. 815; *Douglas* v. *Baynes*, [1908] A.C. 482 (P.C.); *United States Shipping Board* v. *Durrell & Co.*, [1923] 2 K.B. 750.

[85] *McIntyre* v. *Belcher* (1863), 14 C.B.N.S. 654; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37 (C.A.).

of his own motion, existing conditions which are under his control and the continuance whereof is essential to the performance by him of his covenant.[86] So a covenant of one person to allow a first refusal of particular property to another person implies a negative covenant of the property owner not to sell or convey the property to a third person without giving the optionee an opportunity to acquire it,[87] and a grant of an exclusive right to sell certain goods during a certain period on certain premises implies a negative covenant not to evict from such premises, unless by virtue of an independent right, the person entitled to sell during such period,[88] nor permit others to sell like goods on such premises.[89] So one who had covenanted to carry on a business was restrained from doing or causing a thing to be done which would put it out of his power to carry on the business.[90] Likewise a covenant by a purchaser of land that he will, before commencing any building, submit plans for the approval of the vendor of land involves a negative covenant not to commence any building until plans have been submitted to and approved by the vendor.[91]

The court is not inclined to favour the implication of negative stipulations from purely affirmative expressions. In *Peto* v. *Brighton, Uckfield and Tunbridge Wells Ry. Co.*,[92] Sir W. Page Wood, V.C., observed that "If there were a distinct negative contract in this agreement . . . . . the court might fasten upon that, and separating that from the rest of the agreement might enforce specific performance of that contract; but when a plaintiff comes into this court upon an agreement which does not contain any such direct, negative clause, and where you must infer the negative from the necessity of the case, the instances in which the court has found it possible to act are few and special." In *Whitwood Chemical Co.* v. *Hardman*,[93] Kay L.J. said: "I quite agree that there have been cases—they are very few, and *DeMattos* v. *Gibson* is, perhaps, the most striking of them—in which there have been injunctions granted although there were no negative words. . . . . It is quite possible

[86] *Stirling* v. *Maitland* (1864), 5 B. & S. 840; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799; *Ogdens* v. *Nelson*, [1904] 2 K.B. 418; [1905] A.C. 109 (H.L.); *Devonold* v. *Rosser*, [1906] 2 K.B. 728; *Attorney-General* v. *Dublin Steam Packet Co.* (1909), 25 T.L.R. 697; *Lazarus* v. *Cairn Steamship Co.* (1912), 106 L.T. 378.

[87] *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, *supra*.

[88] *Holmes* v. *Eastern Counties Ry. Co.* (1857), 3 K. & J. 675.

[89] *Altman* v. *Royal Aquarium Society* (1876), 3 Ch. D. 228.

[90] *Hooper* v. *Brodrick* (1840), 11 Sim. 47.

[91] *Powell* v. *Hemsley*, [1909] 1 Ch. 687; [1909] 2 Ch. 252 (C.A.).

[92] (1863), 1 H. & M. 468.

[93] [1891] 2 Ch. 416 (C.A.)

that there may be other cases, but those cases are very rare. They are certainly to be followed with extreme caution, and I do not know with the exception of the two cases of *Webster* v. *Dillon*[94] and *Montague* v. *Flocton*[95] of any case whatever in which that very extraordinary jurisdiction of granting a partial specific performance by way of injunction where the court could not enforce the whole of the contract has ever been exercised in the case of hired servants." *Montague* v. *Flockton* and *Webster* v. *Dillon* were disapproved. The strictness with which the court applies the so called doctrine of *Lumley* v. *Wagner* in so far as it extends to implied negative covenants is well illustrated by this case.[96] The agreement was one relating to personal service. An employee had covenanted to "give his whole time" during a defined period to the plaintiff's service. The court declined to imply a covenant that he would not during that period serve another, and it refused to restrain the defendant from entering another employ. Lindley L.J. said that he thought that, looking at the matter broadly, the court would generally do more harm in such cases by attempting to decree specific performance, either directly as such or indirectly by injunction, than by leaving them alone. This attitude is supported by Lord Cairns' remarks in *Doherty* v. *Allman*[97] as applicable to cases where there is no express negative covenant. The court is free to refuse to act if it thinks that ultimately the common law remedy will best fit the circumstances, as when enforced and unwilling service is involved. Even the plaintiff's own interest may demand the refusal of his application in such a case.

Mutual Reserve Fund Life Ass'n. of New York v. *New York Life Insurance Co.*,[98] also related to a contract for personal services. The covenant was to "act exclusively for" the plaintiff as an agent, for a period of five years. Lindley L.J. admitted that "although there may not be a covenant which is absolutely and clearly negative in terms, still, if you can extract from a contract of this kind a negative covenant which is sufficiently clear and definite to enable you—as I used the expression before—to put your finger upon it and state exactly what a man is not to do, that is as good as a covenant absolutely and clearly negative in terms. The difficulty I have here is in coming to the conclusion that the implied negative covenant is sufficiently definite to warrant the court in granting an injunction as asked. Before an injunction

[94] (1857), 3 Jur. N.S. 432.
[95] (1873), L.R. 16 Eq. 189.
[96] *Whitwood Chemical Co.* v. *Hardman, supra.*
[97] *Supra.*
[98] (1896), 75 L.T. 528 (C.A.).

can be granted, in order to enforce a written contract of personal service . . . . . there must be a clear and definite negative covenant, or, if one is to be implied, which is quite possible, it must be so definite that the court can see exactly the limit of the injunction that it is to grant." The injunction was refused.[99]

The cases relating to personal service agreements which have been reviewed, afford a few instances of the court's ability to put its finger upon an interdicted act—for example competing against an employer—which, probably, fall within Lord Justice Lindley's requirements as just stated. On the other hand, in *Catt* v. *Tourle*,[1] and *Metropolitan Electric Supply Co. Ltd.* v. *Ginder*,[2] wherein the agreements did not relate to personal service, contracts wholly affirmative in form were held to be negative in intent, negative stipulations were implied and injunctions were granted. In the latter case Buckley J. said of *Whitwood Chemical Co.* v. *Hardman*,[3] that "It is quite plain, I think, that the Court of Appeal were not prepared to extend the doctrine of *Lumley* v. *Wagner* as to contracts of personal service beyond the case where there exists, as there did in *Lumley* v. *Wagner*, express negative words."

It is firmly established that a negative stipulation will not be implied from affirmative stipulations as a basis for the exercise by the court of its jurisdiction in injunction when, the affirmative stipulations being of such a nature that they cannot be specifically performed, the application is essentially one for specific performance by way of injunction.[4]

Naturally, a negative covenant will not be implied from affirmative expressions, as a basis for the exercise by the court of its jurisdiction in injunction, when to imply it would be futile, as where, after implication of the covenant, the injunctive remedy, for reasons going to the court's rules and practice, must be refused. Thus no such covenant will be implied where, if the injunction is granted, the court must superintend its execution, which the

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[99] See also *Mortimer* v. *Beckett*, [1920] 1 Ch. 571.

[1] (1869), L.R. 4 Ch. App. 654.

[2] [1901] 2 Ch. 799.

[3] *Supra*.

[4] *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604 at p. 622; *Peto* v. *Brighton, Uckfield and Tunbridge Wells Ry. Co.* (1863), 1 H. & M. 468; *Merchants Trading Co.* v. *Banner* (1871), L.R. 12 Eq. 23; *Warne* v. *Routledge* (1874), L.R. 18 Eq. 501; *Doherty* v. *Allman* (1878), 3 App. Cas. 720 (H.L.); *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416 (C.A.); *Ryan* v. *Mutual Tontine Westminster Chambers Assn.*, [1893] 1 Ch. 116 (C.A.); *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Ehrman* v. *Bartholemew*, [1898] 1 Ch. 671; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; *Mortimer* v. *Beckett*, [1920] 1 Ch. 571.

court refuses to do.[5] Likewise, in reason, if the applicant does not come into court with clean hands, or the covenant or agreement is uncertain, oppressive, illegal or against public policy, or the application is one designed to compel personal services or is otherwise inconsistent with the rules or practice of courts of equity. Finally, and this general principle, embraces much that has been discussed under the heading of impliedly negative provisions, no negative stipulation which, in the words of *Lumley* v. *Wagner*, is "against the meaning" of an agreement will be implied from affirmative expressions of such agreement.[6]

Cases of injunction based upon implied negative covenant or other negative stipulation are rare in practice for the reason that, in general, the court leans definitely against them, refusing to imply the desired stipulation except in cases which exhibit what are substantially express negative stipulations, and the court seldom implies the negative stipulation when the agreement is one relating to personal services. As lately as in 1891, Lord Justice Lindley found it necessary to utter a warning that efforts to secure the implication of negative covenants must not be strained. "Every agreement to do a particular thing," he said, "in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time I impliedly agree that I will not be anywhere else at the same time, and so on, *ad infinitum;* but it does not at all follow that because a person has agreed to do a particular thing he is, therefore, to be restrained from doing everything else which is inconsistent with it."[7]

It will be interesting at this, almost the last, stage of the present enquiry to look afresh at the reasons for judgment of *Lumley* v. *Wagner* in the light of what has happened since they were written. Lord St. Leonards said in and of that case that it was a mixed one, consisting not of two correlatives to be done, one by the plaintiff and the other by the defendant, but of an act to be done by the defendant alone, to which was superadded a negative stipulation on her part to abstain from the commission of any act which would break in upon her affirmative

[5] *Ryan* v. *Mutual Tontine Westminster Chambers Assn.*, [1893] 1 Ch. 116 (C.A.); *Kenward* v. *Cory Bros. & Co. Ltd.*, [1922] 2 Ch. 1 (C.A.).

[6] *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604. And see *DeMattos* v. *Gibson* (1859), 1 DeG. M. & G. 604; *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*, [1926] A.C. 108 (P.C.); *Cesinski* v. *George Routledge & Sons Ltd.*, [1916] 2 K.B. 329; *Barnes* v. *City of London Real Property Co.*, [1918] 2 Ch. 35.

[7] Per Lindley L.J. in *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416 (C.A.).

covenant, the one being auxiliary to, concurrent and operating with the other.[8] He said, with emphasis, that in the absence of the express negative covenant upon which the case turned he would have refused the injunction. That is to say (in view of the fact that he was not being and could not have been asked to make the defendant sing, but, instead to prevent her from singing) he would have ruled, that an agreement to sing for A at a particular theatre and during a particular period of time does not necessarily import a provision that the singer will not sing for B at any other theatre, or elsewhere, during the same period of time. The defendant, rendering to the plaintiff proper service as in terms agreed, had not restrained herself from rendering to others, as well, other service. But if she had so restrained herself, as if she had agreed *exclusively* to serve the plaintiff as a singer during the agreed period, why should not the court restrain her? Quite evidently Lord St. Leonards would, in that case, have done so. Why should he, who knew so well the substance of his own legal writings, favour an express negative covenant over one implied, when by law apart from technical "covenants by law", there can be no implied covenant except *such as, arises necessarily from apt language of the agreement*? However, in the course of time, as has been shown, it became admitted that what was called the doctrine of *Lumley* v. *Wagner* could apply to *substantially* negative stipulations, phrase and form being treated as immaterial, and that in a proper case the negative stipulation could be implied. Thus the question whether covenants to buy, sell, build, serve or sing, "only" or "exclusively", etc., were expressly negative or only impliedly so became, generally, immaterial, because, generally, such words were sufficient to establish a substantially negative stipulation. But in particular cases, notably in those concerning personal service agreements, such words came to be treated as bases for implication of negative stipulations and the court now *reserves to itself the right* in certain circumstances to refuse to imply even from such or other words, *with relation to personal service agreements,* an intent of parties to covenant negatively, although, when the stipulation involved is expressly negative and relates to something ascertainable and describable with particularity as not to be done it may be enforced by way of injunction, even in a case relating to an agreement for personal service.

[8] See also *Webster* v. *Dillon* (1857), 3 Jur. N.S. 433; *Daggett* v. *Ryman* (1868), 16 W.R. 302; *Grimston* v. *Cuningham*, [1894] 1 Q.B. 125.

In the result modern decisions conform to and confirm *Lumley* v. *Wagner*, properly read and understood. That decision proceeded upon the broad principle that equity may, in a proper case, compel by way of injunction the observance of agreements whether or not negatively expressed, concerning which it has rejected jurisdiction to decree by way of specific performance, and that on the very ground of equity upon which it had rejected jurisdiction in the one case it had accepted it in the other. The decision is fortified by citation of authorities. These cover a wide range and include a number relating to personal service. Obviously, Lord St. Leonards' intent was to show that the fact that the agreement before him related to personal service did not take it out of the operation of the general principle which he stated and applied.

Injunctions based on positive provisions

For the purposes of what is now about to be said in completion of the picture, neither the doctrine of *Lumley* v. *Wagner* nor the extent of its application to express or implied negative stipulations is material. Courts of equity accept a broad, general and largely undefined jurisdiction to hold covenantors and other contractors to their engagements, affirmative as well as negative, and this apart from that more specialized jurisdiction which depends upon the substantially negative character of covenants, agreements and stipulations. It is exercised only when the court is able to define with precision that which the defendant, in pursuance of his covenant, agreement or stipulation ought or ought not to do.[9]

Injunction being regarded as an indirect method of enforcing specific performance, equity, under its general and ordinary jurisdiction (which was not impaired, but applied, by cases such as *Dietrichsen* v. *Cabburn*,[10] concerning the enforcement of agreements relating to goods and chattels, and *Lumley* v. *Wagner*,[11] concerning the enforcement of agreements relating to personal services) does not purport to *enforce* by way of injunction any class of agreements over which it has not accepted jurisdiction in specific performance. Equity will, however, when a definite

[9] *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604; *Holmes* v. *Eastern Counties Ry. Co.* (1857), 3 K. & J. 675 at p. 680; *DeMattos* v. *Gibson* (1859), 4 DeG. & J. 276 at p. 298; *Wolverhampton and Wallsall Ry. Co.* v. *North Western Ry. Co.* (1875), L.R. 16 Eq. 433; *Doherty* v. *Allman* (1878), 3 App. Cas. 709 (H.L.); *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*, [1926] A.C. 108 (P.C.).

[10] (1846), 2 Ph. 52.

[11] (1852), 1 DeG. M. & G. 604.

decree in restraint of a definite act in breach of agreement is, in the circumstances, possible, interfere by way of injunction to prevent the commission or continuance of the act in breach, thus at times, but not necessarily always, indirectly causing specific performance of the agreement proposed to be violated by the restrained definite act. This equitable jurisdiction is exercised, *inter alia*, in cases of breach of purely affirmative agreements. In *Holmes* v. *Eastern Counties Ry. Co.*,[12] the plaintiffs had been granted the sole and exclusive licence and privilege for ten years of, *inter alia*, selling books at the defendant's railway stations and using the book stalls thereat. The defendants were restrained from proceeding with the definite act of evicting the plaintiffs from such book stalls as existed when the lease was made. The injunction was granted under the general jurisdiction of the court, and not pursuant to *Lumley* v. *Wagner*. "In matters of this kind," said Sir W. Page Wood V.C., "unless the agreement be one which ought to be specifically performed it is not the course of this court to interfere except to this extent that it will not allow one party to break any formal legal engagement into which he may have entered and then to say he will leave the other party to sue for damages with respect to that breach. Where the court can prevent such a breach of an engagement by holding the parties specifically to abstain from breaking it there the court will interfere by injunction to restrain the breach of the positive engagement so entered into."

This ordinary injunctive jurisdiction of the court necessarily overlaps in some cases that which is exemplified by *Lumley* v. *Wagner* and other decisions relating to particular principles, rules, or practices of equity. For example, *Holmes* v. *Eastern Counties Ry. Co.*,[13] might have been brought under the doctrine of *Lumley* v. *Wagner*, broadly applied, by implying from the words "sole and exclusive", relating to the licence to sell the books at the stations, a negative covenant not to do anything to prevent the plaintiff from selling the books at the stations. Since *Lumley* v. *Wagner* was decided, applications for injunctions based upon the ordinary jurisdiction of the court have naturally fallen off to a great extent, and this for compelling reasons, one whereof is disclosed by *Doherty* v. *Allman*.[14]

It seems now to be plain that when deciding *Lumley* v. *Wagner*, Lord St. Leonards did not think that he was breaking

[12] (1857), 3 K. & J. 675.
[13] *Supra*.
[14] (1878), 3 App. Cas. 709 (H.L.).

new ground. He was considering the effect of a negative stipulation in an agreement "consisting not of two correlatives to be done, one by the plaintiff and another by the defendant, but of an act to be done by the defendant alone, to which was superadded a negative stipulation on her part to abstain from the commission of any act which would break in upon her affirmative covenant, the one being auxiliary to, concurrent and operating with the other". The only difficulty, if any, which presented itself to his mind was what, if any, limitations are there to the rule of equity that where the court cannot decree specific performance of both sides of an agreement it will not decree injunction on only one side? The rule, in such a case, he seems to have decided, is limited, *in the case of agreements*, by another, *viz.*, that whenever equity can, it "operates to bind men's consciences as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give". By these words he stated no special jurisdiction but only the ancient and ordinary jurisdiction of the court, as exemplified in the case next to be cited. As he was not decreeing anything which would entail *performance* of personal services, but *abstention from performance*, it is probable that the fact that the agreement was one concerning personal services was regarded by him as quite immaterial. The negative character of the provision enforced enabled *severance* of it from that part of the agreement which he agreed that he could not enforce. But his decision, for many years, was, in more than one respect, misread and misapplied, especially, in the course of time, by common law judges. The Judicature Act, whereunder common law judges participated in the administration of equity was enacted in 1873. Not *Lumley* v. *Wagner*, but other cases, since decided, attached to injunctions based upon negative stipulations that practically non-discretionary character which has been claimed for them.

In *Wolverhampton and Wallsall Railway Co.* v. *London and North Western Railway Co.*,[15] lessees of a line of railway had affirmatively covenanted to carry over that line all traffic to be carried between certain named places. An injunction was granted to restrain the lessees from carrying the traffic over a railway line other than that leased. As the covenant was to carry *all* the freight over a particular line, Lord Selbourne L.C.,

[15] (1873), L.R. 16 Eq. 433.

who tried the case, might have adopted the expedient of implying a negative stipulation and operating under the so called "doctrine" of *Lumley* v. *Wagner*. But he, conceiving (in error) that only expressly negative covenants fell within that doctrine, treated the covenant as one expressly affirmative and applied the injunction remedy "under the ordinary jurisdiction of this court to do justice between parties by way of injunction". Discussing *Lumley* v. *Wagner*, he thought it to be the safer and better rule, to look *in all cases* to the substance and not to the form, and that if the substance of the agreement is such that it would be violated by doing the thing sought to be prevented then the question would be whether a court of equity or a court of law was the proper forum. That question (as to the proper forum) ought not to depend upon the use of a negative rather than an affirmative form of expression. If the substance of the agreement is such that the remedy should be sought at law the forum ought not to be changed by the use of a negative rather than an affirmative. However, he said, *Lumley* v. *Wagner* sought to extend, and had not restricted the ordinary jurisdiction of the court, which, in a proper case, could be exercised without regard to the affirmative or negative character of the covenant, provided the court could see its way to define that which the defendant ought or ought not to do. The injunction was granted. It will have been noted that Lord Selborne L.C. thought that *in all cases*, meaning cases which come under the doctrine of *Lumley* v. *Wagner* as well as cases which come under the ordinary injunctive jurisdiction of the court, the matter of forum — the admission of the plaintiff into equity for injunctive relief there, or the leaving of him to law for such damages as he might recover there — should be decided (as usual in cases coming under the ordinary jurisdiction of the court) upon consideration of the question of the fitness of the case upon the facts for equity's interference, and never upon the affirmative or negative character of the covenant or other agreement in question. That is to say, he did not approve of the doctrine of *Lumley* v. *Wagner, as understood by him*. He made it plain that the case before him was not being decided thereunder and that accordingly the fact that the agreement in question was one purely affirmative was immaterial.

The court, in applying its ordinary injunctive jurisdiction, which is discretionary, to an affirmative covenant, considers, *inter alia*, the nature of the application and its fitness for the court's interference, with particular regard to the balance of convenience as between the parties in cases of grant and refusal

of the injunction, respectively. In *Doherty* v. *Allman*,[16] Lord Cairns L.C., discussing and comparing the different effects of express and implied negative covenants, said : "Your Lordships will observe that the contract is an affirmative one. There are no negative terms in it. . . . . My Lords if there had been a negative covenant I apprehend, according to well settled practice, a Court of Equity would have had no discretion to exercise". Here Lord Cairns having spoken of the practically automatic effect (in general) of express negative covenants, proceeded to say : "But, my Lords, if there be not a negative covenant, but only an affirmative covenant, it appears to me that the case admits of a very different construction. I entirely admit that an affirmative covenant may be of such a character that a court of equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from and a violation of the covenant. That is a well settled and well known jurisdiction of the court of equity. But in that case, my Lords, there appears to me to come in considerations which do not occur in the case of a negative covenant. It may be that a court of equity will see that, by interposing in a case of that kind, in place of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good, and there are, as we well know, different matters which the court of equity will, under those circumstances, take into its view." The court, he said, when deciding whether or not to enforce by injunction an affirmative covenant, will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successsive suits, or could be obtained once for all.

In *Keith, Prowse & Co.* v. *National Telephone Co.*,[17] the defendants, a telephone company, supplied, under a purely affirmative agreement in writing, to the plaintiffs as lessees, the use of a telephone wire and apparatus for three years at a rent payable quarterly. The lessor, erroneously believing the lease to be terminated, proceeded to disconnect the service. An injunction was granted restraining such action. "The first question," said Kekewich J., "is whether this is a case in which the court ought to grant an injunction if the plaintiffs otherwise make out their

[16] (1878), 3 App. Cas. 709 (H.L.).
[17] [1914] 2 Ch. 147.

equity, having regard to the undoubted fact that it would be impossible for the court to decree complete specific performance of the whole of this agreement." The agreement stood partly performed in that installation was complete and only maintenance required to be performed. Said Kekewich J.: "They may not be compellable to maintain the wires and telephone apparatus—that is to say, damages might be the only remedy for non-compliance with that part of the agreement; but yet the essence of the agreement is that the wire and telephone apparatus, being there, shall be open to the use of the plaintiffs; and that seems necessarily to go to the root of the whole matter." The defendants were restrained from disconnecting. This is a well decided case coming under the ordinary jurisdiction of the court to restrain specific acts which operate as breaches of affirmative or other covenants. The fitness of the case for the court's interference, assuming that it can frame a definite and effective order, is first established. The court next asks itself—What is the substance of the agreement or part thereof said to be violated or threatened with violation and will an injunction restraining this defendant from doing the particular act sought to be restrained effectively prevent the violation or continuance of the violation of that substantial agreement or the part thereof which the plaintiff alleges has been or is about to be violated? Concluding that an injunction against disconnection of wires and apparatus will be effective in the circumstances the court so enjoins.

Lord Strathcona Steamship Co. v. *Dominion Coal Co.*[18] concerned a charterparty of a ship. There was no negative stipulation. There were none other than purely affirmative words. The transaction, however, was one which demanded performance in good faith. The plaintiff sought to enjoin a use of the ship in violation of the charterparty. He did not seek its specific performance. There were precedents for his claim, notably *DeMattos* v. *Gibson.*[19] It is a curious circumstance that charterparty injunctions, which have restrained breaches of affirmative agreements over a long period of time, have not been attributed to the exercise of the ordinary injunctive jurisdiction of Equity to restrain the commission of particular acts in violation of agreements, but have been regarded, rather, as based upon the implication of negative stipulations against commission of the restrained particular acts. It requires, to bring them under that doctrine, that very straining of the doctrine of *Lumley* v.

[18] [1926] A.C. 108 (P.C.).
[19] (1859), 4 DeG. & J. 276.

Wagner which Lindley L.J., in *Whitwood Chemical Co.* v. *Hardman*,[20] reprehended. The mere fact that an act is inconsistent with an affirmative agreement is not legal justification for implying that the agreement negatively covenants against the act. However, it being argued in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*,[21] that a remedy by way of injunction against the owners of a ship to prevent them from disposing of her in any other way than under the charterparty could not be granted because there was no covenant not to sell the ship, Lord Shaw, for the Judicial Committee of the Privy Council, made two answers. First he cited Lord Selborne's remarks in *Wolverhampton and Wallsall Ry. Co.* v. *London and North Western Ry. Co.*,[22] which go to the right of the court to restrain according to its ordinary jurisdiction, breaches of affirmative as well as negative stipulations; second, without impairing anything said by Lord Selborne as to the ordinary jurisdiction of the court, he (Lord Shaw) said that the court could act by way of injunction "if there is expressed or clearly implied a negative stipulation." This seeming approval of the oft rejected attempt to establish that a negative stipulation may be implied from its affirmative antithesis can hardly have been so intended. The terms of the charterparty were affirmative, and *not* in substance negative. The defendant, however, had, in law, impliedly covenanted not to do any particular act which would, during the period of the charterparty, render him unable to perform its terms, Selling the ship would have that effect and this, possibly, was the impliable negative stipulation which Lord Shaw had in mind. But without resort to implication, the act of selling, was for the same reason, restrainable under the ordinary jurisdiction of the court.

To sum up—What has been cited and said in the foregoing pages seems, upon examination of *Lumley* v. *Wagner*, to establish that the doctrine of *Lumley* v. *Wagner* is *not* the doctrine of *Lumley* v. *Wagner*. In the circumstances this commentator may be excused for concluding in the words with which the late Hon. Mr. Justice Russell ended one of his lectures on Equity at Dalhousie Law School, many years ago, that "having now sufficiently confused the subject he would appreciate liberty to drop it".

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[20] [1891] 2 Ch. 416 (C.A.).
[21] *Supra.*
[22] *Supra.*

The foregoing was written before Branson J. decided *Warner Bros. Pictures Inc.* v. *Nelson.*[23] This case will bear re-examination, which, likely, it will have, as it is said that there is to be an appeal. It is close to the border-line. It may be right, on the facts, but it is hard to reconcile it with some of the Appeal Court decisions in the personal service cases, unless upon the theory, seemingly new (propounded or implied by Branson J.) that the *earning capacity* of one defendant may authorize the application, as to him, of a different principle than that applicable to one of less earning capacity or of none. Some of the cases cited and relied upon by Branson J. involve covenants not to compete and so are not personal service cases at all. It should never be forgotten that in all these cases of injunction to restrain breach of contract the issue is as to forum and remedy, and not as to the justification of the defendant's conduct. Bette Davis' (Mrs. Nelson's) large earning capacity was, in itself, proof of the great value of her services and it would justify the imposition of commensurate damages, which, admittedly, she was liable to pay. This made the issue as to injunction one of balance of convenience. The case, from the defendant's standpoint, was one of agreed service for a period of years. It was for a year at least, with an option to the plaintiff to extend it (at stated increases of salary) annually, from time to time. Thus it was not a case such as *Lumley* v. *Wagner*, (which did not involve the committing to the plaintiff's keeping of the defendant's best years of earning capacity) but was a case much more nearly resembling others, some of which are cited by Branson J. (who did not discuss the point now being made) and others are cited in the preceding pages.

The contracting parties seem to have done business upon a common law basis. Bette's employers, if they decide to hold her, may do so upon "raising the ante". Or they may let her

[23] [1936] 3 All E. R. 160. In this case, the motion picture actress "Bette Davis" entered into a contract with the plaintiff company "to render her exclusive services as a motion picture actress" to the plaintiff for one year with an option to renew at a higher salary. She also agreed that she would 'not render any services for or in any other photographic, stage or motion picture production . . . . . or business of any other person . . . . . or engage in any other occupation without the written consent" of the the plaintiff. "Bette Davis" refused, after a time, to be bound by the agreement and left the United States and entered into an agreement to appear in motion pictures in England. There was no doubt that her actions constituted a breach of contract, and the main point was whether an injunction could be granted restraining her from breaking the negative covenants in her agreement. Branson J. granted an injunction restraining Miss Davis from rendering any services for or in any motion picture or stage production in England for a period of three years or during the continuance of the contract, whichever period should be the shorter.

go. Bette will be held until she loses her allure and her box office strikes a depression, and no longer. She can do nothing about it except play or pay. Such contracts are *valid*. The Bettes must pay if they break them. But ought such contracts to be enforced, substantially, by injunction? Ought not those who contemplate and engage in terms of money only to be held to settlement upon breach in terms of money only?

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