

which it was originally propounded, that doctrine is now obsolete. As will be shown in a subsequent section, the development of judicial opinion with respect to the jurisdiction of courts of equity to enforce such a stipulation has in the United States proceeded along lines essentially different from those indicated by the English decisions.

8. Absence of express negative stipulation, to what extent a bar to exercise of equitable jurisdiction. English cases reviewed.—In one case the principle upon which Lord Eldon proceeded in refusing an injunction to restrain the breach of a contract which contained no negative stipulation was, that, "it would be against the meaning of the agreement to affix to it a negative quality and import a covenant into it by implication"¹. In a leading decision the effect of which has been stated in § 6, *ante*, this principle was explicitly approved by Lord St. Leonards². But, in spite of this clear expression of his opinion, some remarks made by him in another part of his judgment were subsequently construed as indicating that he considered it to be permissible for a court under some circumstances to read into a contract an implied negative stipulation, and to grant relief on the same footing as if the defendant had expressly bound himself not to render services to other persons. The doctrine embodied in the decisions which were based upon the assumption that this was the correct construction of his language may apparently be stated in some such form as this: For the purpose of laying a foundation for

against an opera singer was refused, the court relied upon *Hamblin v. Dinnesford* and *Kemble v. Kean*.

In *Burton v. Marshall* (1849) 4 Gill. (Md.) 487, the court referred to the decisions in *Kemble v. Kean* and *Kimberley v. Jennings*, as furnishing as a *fortiori* ground for declining to enforce a contract which did not contain a negative stipulation.

¹ In *Lumley v. Wagner* (see below), this was said to be the rationale of *Clarke v. Price* (1820) 2 Wils. 157, (defendant violated his agreement to take notes of cases in the Court of Exchequer, and compose reports for the plaintiff).

² *Lumley v. Wagner* (1852) 1 De G. M. & G. 604. At p. 622, the learned judge said: "I may at once declare that if I had only to deal with the affirmative covenant of the defendant, J. Wagner, that she would perform at Her Majesty's Theatre, I should not have granted any injunction."