

tive in all its provisions, the execution of which could not be enforced in equity, a court of equity will not engraft a negative stipulation, and restrain its breach by injunction¹.

In some States the doctrine as to the justifiability of implying a negative stipulation has been stated in that extreme form which has now been discredited in England². But as the American courts limit the application of the doctrine to cases in which the services are special in the sense explained in § 11, *post*, their actual position is not the same as that of English judges.

10. Quality of the services, how far a material element. English authorities examined.—In one case Kekewich, J., observed, *arguendo*, that the rationale of the interference of courts of equity for the purpose of preventing a violation of their contracts by singers, actors, and other artists is, that, such employés possess special capabilities for a certain kind of work, and that it is for this reason peculiarly difficult to replace them¹. The Court of

¹ In *Burton v. Marshall* (1846) 4 Gill (Md.) 487, 14 Am. Dec. 171, the court refused either to restrain an actress from performing at another theatre, or her husband from permitting her to change her residence; or another manager from giving her employment within the term, as an actress. The court distinguished the decision in *Morris v. Colman* (1811) 18 Ves. 437, on the ground that it related to a contract containing a negative stipulation. It is interesting in a historical point of view to observe that this Maryland case was decided before *Lumley v. Wagner* (see § 6, *ante*).

A similar decision as to a danseuse was rendered in *Butler v. Galletti* (1861) 21 How. Pr. 465.

In *Mapleson v. Del Puente* (1883) 13 Abb. N.C.C. 144, the court expressed a doubt whether the plaintiff, an operatic manager, was entitled to restrain the defendant, a singer, from the commission of acts not specifically prohibited in a negative clause. But the point was not decided.

² In *Cort v. Lessard* (1887) 18 Or. 221, the court, upon the authority of *Montague v. Flockton* (§ 8, *ante*) which had not then been overruled in England, expressed the opinion that, "in the nature of things, a contract to act at a particular theatre for a specified time necessarily implies a negative against acting at any other theatre during that time. The agreement to perform at a particular theatre for a particular time of necessity involves an agreement not to perform at any other during that time."

In *Hoyt v. Fuller* (N.Y. Super. Ct. 1892) 19 N.Y. Supp. 962, 47 N.Y. S.R. 504, the court remarked: "The contract was intended to give the plaintiffs, not the divided, but exclusive services, of the defendant, and where that is apparent, a negative clause is not necessary to secure that result."

¹ *Whitwood Chemical Co. v. Hardman* (1891) 2 Ch. 416. In one passage the learned judge remarked: (p. 420): "There are also cases, of which *Lumley v. Wagner* (§ 6, *ante*) is an example, where the employé is an