

authorities now stand, therefore, it is apparent that the doctrine of an implied negative stipulation has not been rejected *in toto*. In fact it is obvious that no other position could be taken without doing violence to the cardinal principle of equity jurisprudence, that, in determining the effect of a contract, the substance, not the form, is to be considered.

9. Same subject. American cases reviewed.—The view embodied in a few American cases is the same as that applied by the English courts, viz., that, generally speaking, upon a contract affirma-

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that if you find the word 'not' in an agreement—"I will not do a thing"—as well as the word 'I will' even although the negative term might have been implied from the positive, yet the court refusing to act on the implication of the negative, will act on the expression of it. I can only say that I think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to go to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative."

This was one of the cases cited by Fry, J., in *Donnell v. Bennett* (1883) L.R. 22 Ch. Div. 835, in support of his suggestion that the tendency of recent decisions had been towards this view, "that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contains or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases." Compare also the similar remarks of the learned judge in his work on *Spec. Perf.* (3rd Ed.) p. 396, § 802. But this forecast as to the trend of judicial opinion is not sustained by the more recent decisions cited in this section and in § 8. From those decisions, it is apparent that the courts still attach a controlling importance to the fact, that the contract does or does not contain a negative stipulation.

In *Mutual Reserve Fund L. Asso. v. New York L. Ins. Co.* (C.A. 1896) 75 L.T. 528, where *Whitwood, etc., Co. v. Hardman*, *supra*, was followed, the court laid down the following rule: "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 one can see exactly the limit of the injunction to be granted." The conclusion was that from a contract by an agent to "act exclusively for" his employer a negative covenant not to do business for other employers could not be implied.