Canada Law Journal.

VOL. XLIII. MARCH 1. NO. 5.

THE LAW OF CONTRACTS.

EQUITABLE JURISDICTION IN REGARD TO CONTRACTS OF EMPLOYMENT.

1. Scope of Article.
2. Subject considered with reference to the general principles which define the limits of equitable jurisdiction.
3. General rule that equity will not specifically enforce contracts of service.
4. Rationale of this rule.
5. Qualification of the general rule where the applicant for relief is in the employment of a body of trustees.
6. Enforcement of stipulations by employés not to perform services for any other persons than their employers. English cases reviewed.
7. Same subject. American cases reviewed.
8. Absence of express negative stipulation, to what extent a bar to exercise of equitable jurisdiction. English cases reviewed.
9. Same subject. American cases reviewed.
10. Quality of the services, how far a material element. English authorities examined.
11. Same subject. American doctrine.

---

1. Scope of Article.—In this article it is proposed to consider the extent of the jurisdiction of courts of equity merely with reference of the enforcement of the two main obligations arising out of a contract of employment, viz., the obligation of the employer to retain the employé, and the obligation of the employé to remain in the service, until the termination of the agreed period. The exercise of that jurisdiction in cases involving obligations arising out of the fiduciary relations of the parties will not be discussed.

2. Subject considered with reference to the general principles which define the limits of equitable jurisdiction.—Where an equitable remedy is sought for the purpose of enforcing a contract of service, there is always a preliminary question to be settled, viz., whether the court, having regard merely to the operation of the general principles which define the circumstances under which a remedy of this description is granted, and leaving out of account the special considerations which will be dealt with in the following sections, should entertain jurisdiction of the suit. A discussion of the subject, therefore, may be appropriately commenced with a statement of the effect of the cases in which the rights of the parties have been determined with reference to those general principles.

In this point of view it is clear that an application for equitable relief must fail, if the allegations in the plaintiff's bill disclose one or more of the following predicaments.

(*a*) That no action at law can be maintained upon the contract which it is sought to enforce [1].

[1] In *De Francesco* v. *Barnum* (1889) 59 L.J. Ch. 151, 43 Ch. D. 165, 62 L.T. 40, 38 W.R. 187, 54 J.P. 420, Chitty, J., on the ground that no action could be maintained against an infant on his covenant in a deed of apprenticeship, (*Gylbert* v. *Fletcher*, [1629] Cro. Car. 179), held that, apart from any question whether the contract was for his benefit or not, an infant apprentice could not be enjoined from violating a covenant to the effect that he could neither contract professional engagements nor accept such unless with the full written permission of his master. "The right to an injunction," said the learned judge, "depends upon the legal right to sue, and if there is no legal right to sue, which appears to be the result of the authority which I have cited, there can be no right to an injunction." This statement was approved by Fry, L.J., in the subsequent trial of the action for damages. See 45 Ch. D. 165.

The principle that "before the court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement, it must be satisfied that there is not a reasonable ground for contending that the agreement is illegal or against the policy of the law," was also recognized in *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) 3 DeG. M. & G. 914. One of the clauses of the agreement there under discussion provided that the plaintiffs were at all times during the term of the contract to run and work all the trains of the railway company, and to provide for the purposes of the contract a sufficient number of efficient foremen, mechanics, engine drivers, firemen, etc. On the ground that the effect of this provision was to devolve the traffic business of the company upon persons whom the Legislature had not intrusted with it, and on whom it had not attached the same responsibility as it had attached upon the company, two of the Lords Justices (Turner and Kay) entertained doubts as to its legality. But the decision of the court proceeded upon another ground stated *post* (§ 3, note 1, *post*).

(*b*) That the contract is lacking in mutuality [2]. As a servant cannot be compelled to perform his duties against his will, this consideration is of itself sufficient to prevent a servant from obtaining from a court of equity a decree requiring his master to retain him in the employment [3]. See § 3, *post*.

(*c*) That the contract is not reasonably certain and definite in its terms [4].

In *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, Aff'd. 1 Bosw. 227, Hoffman, J., refused to grant an injunction *pendente lite* to restrain the alleged breach of a stipulation not to perform in any theatre but that of the plaintiff, the ground assigned being that the rights of the plaintiff and the co-defendant of the actor to his services were equal.

[2] In *Philadelphia Ball Club* v. *Lajoie* (1902) 210, where the contract was for the exclusive services of a professional base-ball player, the court thus replied to the argument of counsel that the reservation by the plaintiff of a right to terminate the contract upon ten days' notice destroyed the mutuality of the remedy. "The defendant has the possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask; furthermore, owing to the peculiar nature and circumstances of the business, the reservation upon the part of the plaintiff to terminate upon short notice, does not make the whole contract inequitable."

[3] In *Johnson* v. *Shrewsbury, etc., R. Co.* (1853) 3 De G. M. & G. 914, Knight Bruce, L.J. (p. 927), thus distinguished the situation in the case before him from that presented in *Lumley* v. *Wagner* (§ 6, *post*): "There all, the obligations on the part of the plaintiff could have been satisfied by the payment of money, but not so those of the defendant. Here the parties are reversed. Here all the obligations of the defendants can be satisfied by paying money; but not so the obligations of the plaintiffs, who come here for the purpose in effect of compelling the defendants, by a prohibitory or mandatory injunction, to do or abstain from doing certain acts, while the correlative acts are such as the plaintiffs could not be compelled to do."

The text is also supported by *Pickering* v. *Bishop* (1843) 2 Y. & C. C. C. 266; *Millican* v. *Sulivan* (1888) 4 Times L.R. 203.

[4] In *Mapleson* v. *Bentham* (1871) 20 W.R. 176, one of the grounds on which Wickens, V.C., refused to enjoin an opera singer from breaking his contract to sing during the whole London season, and nowhere else in Great Britain "*pendant l'année* 1871," without the consent of his employer, was, that it was uncertain whether the restrictive clause applied to the period between the close of the season and the end of the year. This point was not adverted to by the Court of Appeal in its affirming judgment; (see p. 177 of the report).

A contract for the services of a baseball player for one year at a fixed salary for that year, and reserving an option on the services of such employé for the following year at a salary of not less than a certain sum, but not providing any fixed salary or definite terms and conditions for the second year, was held to be, as to the second year, so far lacking in definiteness that the employé would not be restrained by an injunction *pendente lite* from making another contract for the second year.

(*d*) That the contract constitutes a "hard bargain," that is to say, one which may properly be described by such epithets as "unreasonable," "unconscionable," "oppressive," and the like[5].

Metropolitan Exhibition Co. v. *Ewing* (1890) 7 L.R.A. 331, 24 Abb. N. Cas. 419, 42 Fed. 198. "The effect of these provisions," said the court, "is that, when the club has exercised its privilege of reservation, no other club is permitted to negotiate with the player; but the club which has placed him upon the reserved list, and no other, is then at liberty to enter into a contract with him to obtain his services for an ensuing year. Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the other clubs to enter into a contract securing the player's services for another reason. . . . As a coercive condition which places the player practically, or at least measureably, in a situation where he must contract with the club that has reserved him, or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But, as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense, it is merely a contract to make a contract if the parties can agree." The court also held that there was no necessity to particularize in such a contract the conditions or characteristics of the option if, when the contract was made, the term "reserve" had a well-understood definition.

A similar decision was rendered with regard to a similar contract in *Metropolitan Exhibition Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393.

[5] By an apprenticeship deed between an infant, her parent, and the plaintiff, the infant was bound apprentice to the plaintiff for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements in this country and in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with the defendant B., the plaintiff brought an action against B., the infant, and her parent, to enforce the provisions of the deed and for damages for breach of it. *Held*, that the provisions of the deed were unreasonable, and could not be enforced against the infant or her parent; and consequently that no action would lie against B. for enticing her away from the plaintiff's employment. *De Francesco* v. *Barnum* (1890) 43 Ch. D. 165, 45 Ch. Div. 430.

In the first case reported under the caption, *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162, Chitty, J., granted an injunction to restr. lady from accepting an engagement as a ballet dancer, in breach of a ulation not to perform for any other person than the plaintiff, her ins. for, for a period of six weeks. Referring to his own decision in *Francesco v. Barnum*, *supra*, the learned judge said that the "slavery argument" had no application to the case. He also remarked that the "starvation argu-

(e) That the plaintiff has not come into court with clean hands[6].

---

ment" was purely rhetorical in this instance, as such an engagement only occupied a small part of the defendant's time, and she had many hours available for other honest ways of obtaining a livelihood.

In the second case under the same caption, the same judge granted an injunction to restrain a lady of twenty-two from violating a stipulation in a six years' contract of apprenticeship, entered into with the same teacher of dancing, that she would not enter the service of any other person during the specified period without her teacher's permission. He considered that a six years' term was not too long for a person of the defendant's age, and also held that it was not unfair either to reserve one-third of her earnings as remuneration for the instruction given or to reserve control over her engagements.

A traveller for a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business, or transact any business with any other person or persons than the plaintiffs for a term of ten years. *Held*, that these negative stipulations in this contract were unreasonable. *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671, 78 Law T. Rep. 646, 67 L. J. Ch. N.S. 319. After stating the effect of the sweeping provisions of the contract, Romer, J., observed: "The court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable and ought not to be enforced by the court. . . . To enforce such a general stipulation as I find here would be in my opinion a dangerous extension, [*i.e.*, of the cases in which negative stipulations have been enforced], for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as *Lumley* v. *Wagner*, 5 De G. M. & Sm. 485, 1 D. M. & G. 604 (§ 6, *post*), were confined to special services."

There is nothing unreasonable in a contract the effect of which is that, so long as the servant is in the master's employ, he is not to work for anybody else or engage in any other business. Lindley, M.R., in *Robinson* v. *Hener* (1898) 2 Ch. 451 (455).

In *Kimberley* v. *Jennings* (1835) 6 Sim. 340, Shadwell, V.C., held that an agreement drawn in such terms, that if, from illness or any other cause over which the defendant could have no control, he should become incapable of serving the plaintiffs, they should have the option either of discharging him, or discontinuing the payment of his salary, and insisting that, for the remainder of the six years, he should not engage in the service of any other individual, in the same capacity, or in any other trade, business, profession or employment whatsoever, without the written consent of the plaintiffs, or the survivor of them, was a hard bargain, considering that parties to it were a young man and a firm of wealthy merchants. Accordingly he refused to enjoin the employé from violating the negative stipulations.

A restrictive covenant prohibiting an actress from appearing in any other theatre from the date of the contract, and not from the commencement of the season, was held not to be inequitable, in a case where she was shown to have considerable experience and business capacity. *Daly* v. *Smith* (1874) 38 N.Y. Supr. Ct. 158.

A contract with a singer to appear in such operas as the employer shall produce in a certain season will not be pronounced inequitable for the mere reason that it provides that two weeks' notice of the termination

(*f*) That, at the time of the institution of the suit, the plaintiff is already in default as regards the performance of the contract on his side, or is in such a position that he will probably be unable to perform it, if the defendant carries out his agreement[f].

---

of the season might be given by the plaintiff. *Duff* v. *Russell* (1891) 14 N.Y. Supp. 134. This decision was affirmed by the Supreme Court without an opinion in 16 N.Y. Supp. 958, and by the Court of Appeals in 133 N.Y. 678. The lower court seems to have based its conclusion in the notion, that such a contract should be placed in a different class from those by which the right of terminating the employment by a specified notice is vested in the employer alone. Yet in another New York case, decided about the same time, it was expressly held that a contract between an actress and the owner of a theatre, by which she gives him the exclusive right to her services, with the option in him alone to terminate the contract at any time, is not unconscionable. *Hoyt* v. *Fullen* (1892) 19 N.Y. Supp. 962.

[e] Where an author who has undertaken to write tales for a magazine for a year, ceases writing and enter into engagements elsewhere in violation of the stipulations of his contract, the mere fact that the employer has, upon the abandonment of the contract by the author, procured the services of another writer to wind up the work properly, is not such a breach of the contract as will disable him from obtaining relief on the ground that he does not come into court with clean hands. *Stiff* v. *Cassell* (1856) 2 Jur. N.S. 348.

In *Duff* v. *Russell* (1891) 14 N.Y. Supp. 134, the court rejected the contention of the defendant, a well-known opera singer, that she was justified in breaking her contract with the plaintiff because the plaintiff had refused to substitute a more healthful costume for the tights in which the defendant had appeared in a certain opera, and which she objected to wear on the ground of danger to her health. The conclusion arrived at by the court, after an examination of all the facts, was that the plaintiff had not "so unreasonably insisted upon his rights under the contract to the detriment of the health of the defendant that, in equity and good conscience, she was justified in breaking off her engagement."

A mere general allegation, without any particulars, that the intention of a theatrical manager in entering into a contract with an actress was to prevent her from appearing on the stage, and thus injure her professional standing, is no defense to a suit for an injunction to restrain her from violating her covenant not to appear in any other theatre but that of her employer. *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150.

[f] In *Fechter* v. *Montgomery* (1863) 33 Beav. 22, an injunction to restrain an actor from entering into another engagement was refused on the ground that the employer had not allowed him such opportunities for the display of his talents as it must be supposed were contemplated by him when he made the contract, and were his inducement in making it.

In *Daly* v. *Smith* (1874) 49 How. Pr. 150, 38 N.Y. Super. Ct. 158, the court, distinguishing the above case held that the fact of the plaintiff's not having allowed the defendant, an actress, sufficient opportunities for displaying her talents during a previous engagement did not preclude the plaintiff from obtaining an injunction to restrain her from breaking her contract. The fact that the season had been closed before the time expected, thus depriving her of a prospective benefit, was also held not to be

(*g*) That no present damage will accrue to the plaintiff by reason of the breach of the contract. Under some circumstances this may be ground for denying equitable relief[8]. But it is apprehended that, even if the decision in the case cited be accepted as correct, no general rule can be laid down under this head, and that cases may arise in which the certainty of future

---

a defence to the suit, as she had an adequate legal remedy for the injury complained of. But the correctness of the latter of these rulings seems to be open to question. If the actress had a legal right of action, then, *ex hypothesi*, the employer must have been chargeable with a breach of the contract on his side.

Merely hiring another actor to take the place of the defendant in one of the stipulated pieces after he absented himself, and declining to dismiss the substitute, while that piece is running, is not such a breach of the manager's part of the contract as will preclude him from obtaining an injunction. *Montague* v. *Flockton* (1873) L.R. 16 Eq. 189.

One who has employed an opera singer under a contract that she will not render services except at those places under his management is not entitled to an injunction restraining her from so doing, where he has failed to pay her for services rendered under a previous engagement, and it is apparent from the evidence that he will be unable to pay the stipulated salary, unless the season proves to be successful. The court said that the defendant ought not to be subjected to this contingency, and laid down the general principle that a negative covenant should not be enforced, where, if the court has the power, it would not enforce an affirmative covenant. *Rice* v. *D'Arville* (1895) 162 Mass. 559, 39 N.E. 180. It was further held that the fact that the plaintiff at the hearing offered a bond for the performance of his contract made no difference, both for the reason that it had been offered after the defendant had, for good cause, refused to continue with the plaintiff, and had entered into other engagements, and for the reason that a bond is not an assurance that the money will be paid when due according to the terms of the contract, but an agreement which usually has to be enforced by a lawsuit.

[8] In *De Pol* v. *Sohlke* (1867) 7 Rob. 280, one of the grounds on which an injunction to prevent a danseuse from violating a covenant not to render personal services as such to any person other than the plaintiff, was denied was that, as the only way in which the defendant's breach of contract could produce damage was by the withdrawal of custom, and the plaintiffs' had no establishment in active operation when the suit was brought, and were not likely to have one for some time, no damages were then resulting, or would for an appreciable period result, from the act which it was sought to enjoin. The conclusion drawn was that the circumstances did not supply the necessary foundation for invoking the exercise of an equitable jurisdiction of which the rationale was, that it was impossible to measure the damages which would follow from the breach of a restrictive provision like the one in question. This reasoning is not altogether satisfactory. It would seem that damages, both tangible and incapable of exact measurement, might fairly be said to be the natural consequence of the defendants exhibiting her accomplishments at other establishments, and thus satisfying the curiosity of a certain number of the persons who would probably have visited the plaintiffs' establishment, as soon as it was in operation.

damage, as a result of the defendant's renunciation of his obligations, will justify the issuance of an injunction.

(*h*) That the time for commencing the performance of the contract has not yet arrived, when the application for relief is made[9]. But in this instance also it is submitted that no general rule can be laid down. If at the time when the suit is brought the defendant has absolutely repudiated the contract, or has placed himself in such a position that he will be unable to carry it out, it is difficult to see why the legal right, which under such circumstances may be asserted in an action for damages[10], should not be an appropriate subject for the protection of a court of equity.

(*i*) That the defendant's breach of the contract will not cause any irreparable injury to the plaintiff[11]. Under this head

[9] In *De Rivafinoli* v. *Corsetti* (1833) 4 Paige Ch. 264, Walworth, Ch., thus stated his conclusions with regard to application for the assistance of the court in enforcing the contract of an operatic singer, who, as was alleged, was about to leave New York: "From the terms of the agreement as stated in the bill, it is evident that there can be no breach thereof until the 1st of November next, when the engagement of the defendant was to commence. Even when that time arrives, the complainant will not be entitled to the defendant's services until he shall have paid or tendered to him a half month's salary in advance. A specific performance cannot be decreed upon the present bill, because at the time it was filed the complainant had no right of action against the defendant, either at law or in equity. And I believe this court has never yet gone so far as to sustain a bill *quia timet*, because the complainant apprehended that the defendant might not be willing to perform an engagement for personal services, and where, from the peculiar nature of those services, they could not be performed until a future day. The writ of *ne exeat* is in the nature of equitable bail; and to entitle the complainant to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity. The writ in this case, therefore, was prematurely granted; and the rule to discharge it must be made absolute."

[10] *Hochster* v. *De La Tour* (1853) 2 El. & Bl. 678. The principle embodied in this decision was apparently not considered by the judge who decided the New York case just cited. Otherwise he would scarcely have laid it down without qualification that there could be no breach of the defendant's contract until the arrival of the time when the actual performance of the contract was to begin. But it is to be observed that the principle referred to had not been clearly defined and established at the date when the New York case was decided.

[11] In *Mapleson* v. *Bentham* (1871) 20 Weekl. Rep. 176, involving a contract the effect of which has been stated in note 4, *supra*, one of the grounds upon which the Court of Chancery and the Court of Appeal based their refusal to grant an injunction or an interlocutory application was, that there was no evidence of any irreparable injury likely to result to the plaintiff.

may be noticed the rule, that the court will usually refrain from interference, where it is expressly provided that a certain sum shall be paid as liquidated damages, if the contract is violated [12].

See also *Mapleson* v. *Del Puente*, cited in the next note. The court there referred to the unreputed case of *Mapleson* v. *Lablache* (1883) in the Superior Court of New York, where an injunction *pendente lite*, restraining defendant from singing for others, in violation of her contract to sing for the plaintiff, was denied, as the complaint did not aver that plaintiff would suffer irreparable injury from defendant's refusal to sing for him, nor that he could not easily have procured an artist competent to fill defendant's place.

In *De Pol* v. *Sohlke* (1867) 7 Rob. (N.Y.) 280, a temporary injunction restraining a danseuse from violating a covenant not to render her services to persons other than the plaintiff, was dissolved, for the reason that there was nothing to show that such a remedy was necessary to prevent irreparable damage to the plaintiffs.

[12] In *Hahn* v. *Concordia Soc.* (1875) 42 Md. 460, an actor's contract, by which he agreed not to give his services elsewhere without the permission of the employer, contained a stipulation to the effect that, if he should break his engagement, he was to pay to the company a fine of $200 and then provided that "this sum was already forfeited by any violation of the contract, and required no particular legal proceedings for its execution." The court refused to enjoin the defendant from performing at another theatre, saying: "Having by their own contract, made presumably with full knowledge of the means and ability of the defendant, and having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition, and having indicated as clearly as if so stated in terms, that the only form in which they could seek redress and recover the stipulated penalty or forfeiture, was a court of law the complainants are precluded from now resorting to a court of equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in irreparable damage and injury to them."

In *Mapleson* v. *Del Puente* (1883) 13 Abb. N.C. 144, defendant agreed to sing for plaintiff, in theatres and concerts, between specified dates, a certain number of times in each week, and not to sing "in public or private concerts," during his engagement, without plaintiff's permission; and in case of failure to fulfil his contract, he agreed to pay to plaintiff, "for damages and expenses, the fixed penalty of fifteen thousand francs." In an action for specific performance, and to enjoin defendant from singing for another manager, and on motion to continue *pendente lite* a temporary injunction before granted, wherein it appeared that defendant, by written notice of his refusal to fulfil his engagement, had given plaintiff ample time to secure a substitute, and that plaintiff had done so, and that defendant had tendered the amount of the "fixed penalty" in open court, it was held that the motion should be denied, and the injunction should be dissolved. The court said: "There is no evidence that plaintiff is exposed to irreparable injury by reason of defendant's failure to sing for him. His theatre is now engaged in the performance of operas, in which the place which would have been filled by the defendant is filled by another artist. . . . I am disposed to regard the sum as 'liquidated damages'; and if that be so, the defendant having tendered the amount to the plaintiff in open court, he has complied with that obligation of the contract. This tender also is important as to the question of the inability of the defendant to pay damages to the plaintiff if a judgment for damages were rendered against him."

But a specification of a penalty, designed merely to secure a performance of the contract, and not intended as the price or equivalent to be paid for its non-performance, will not be construed as a provision for stipulated damages, nor prevent the court from granting relief [13].

(*j*) That the applicant has an adequate legal remedy [14].

3. General rule that equity will not specifically enforce contracts of service.—The general rule applicable to all classes of cases, except those reviewed in §§ 5-11, *post*, is, that a contract of service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or by an injunction restraining him from violating it[1].

---

[13] *M'Caull* v. *Braham* (1883) 16 Fed. 37. There a contract for the exclusive services of a singer in opera provided for "the forfeiture of a week's salary, or the termination of the engagement at the manager's option, without debarring him from enforcing the contract as he might see fit." That the clause respecting the forfeiture was in the nature of a penalty, and designed solely to secure the observance of the contract, was held to be manifest both from the general nature of the employment and the requirements of a manager of opera, and from the express language of the clause; because (1) the stipulation was not for the payment of a certain sum as liquidated damages, but only for the forfeiture of a week's salary; (2) it gave an option to the plaintiff, instead of such forfeiture, to annul the engagement; (3) it declared that such forfeiture should not debar the plaintiff from enforcing the fulfillment of this contract in such a manner as he should think fit, *i.e.*, by any available legal or equitable remedy.

[14] In *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) De G. M. & G. 914. This was one of the grounds assigned for refusing to enjoin the defendant from determining a contract, the provisions of which are stated in § 3. note 1, *post*.

See also *Bronk* v. *Riley* (1888) 50 Hun. 489, where the decision was partially based on a similar ground.

[1] For statements of the rule in general terms see *Whitwood Chemical Co.* (1891) 2 Ch. 416, L.J. (p. 426); *Robinson* v. *Heuer* (1898) 2 Ch. Div. 451 (456); *Rolfe* v. *Rolfe* (1846) 15 Sim. 88; *Chinnock* v. *Samsbury* (1861) 30 L.J. Ch. 409; *Webb* v. *England* (1860) 29 Beav. 44 (45); *Haight* v. *Badgeley* (1853) 15 Barb. 499; *Hamblin* v. *Dinneford* (1835) 2 Edw. Ch. 529; *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

(*a*) *Illustrative cases in which the applicant for relief was the employer.*—In *Rolfe* v. *Rolfe* (1846) 15 Sim. 88, it was declared by Shadwell, V.C., that the court certainly would not enforce a provision in a contract by the defendant who undertook to work as a tailor's cutter.

In *Radford* v. *Campbell* (1890) 6 Times L.R. 488, the Court of Appeal approved the decision of North, J., refusing an injunction to restrain a salaried professional football player from breaking an agreement to play

In cases where the party seeking the assistance of the court is the employé, the mere fact that the reputation of the employé

---

solely for the plaintiff, a football club, during a certain season. Lord Esher remarked that there was no question of character, or of property involved, except that it was alleged that there would be a diminution of the gate money. The real point was the pride of the employing club who wanted to win games; and it was not fitting that the solemn machinery of the court in granting an injunction should be invoked in order to satisfy that pride. This decision is in conflict with the American cases in which prohibitory injunctions have been issued against professional base-ball players on the ground of the unique character of the services. See § 11, *note* 8, *post*.

In *Wèlty* v. *Jacobs* (1898) 171 Ill. 624-30, aff'g 64 Ill. App. 285, the manager of a theatrical company was refused an injunction to restrain the proprietor of a theatre from refusing to furnish his theatre, stage hands, music, etc., according to the terms of a contract for the appearance of the company on a certain date, and from letting the theatre to another company at that time.

The rule that one person cannot be compelled to serve another against his will was also recognized in *Boyer* v. *Western U. Tel. Co.* (1904) 124 Fed. 246.

In Louisiana, bound servants and apprentices and their master may be compelled to the specific performance of their respective engagements. La. Civ. Code (1889) Art. 170 (164).

(*b*) *Illustrative cases in which the applicant for relief was the employé.*—A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice. *Held*, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-obedience to impracticable instructions. *Johnson* v. *Shrewsbury & B. R. Co.* (1853) 3 De G. M. & G. 914. Distinguishing the case of *Lumley* v. *Wagner* (see § 6, *post*), Turner, L.J., said: "In that case the court was called upon to prevent a singer who had been engaged by the plaintiff from singing for hire for other persons. The object of the plaintiff was to restrain the defendant from hiring herself to other persons; but, in this case, what the plaintiffs ask is to restrain the defendants from not employing them as their contractors. In that case it was possible to enforce the contract as against the defendant, while in this case it is not."

On the ground that an injunction could not be issued in favour of an employé entitled only to a month's notice, Wills, J., refused an injunction to restrain a school board from dismissing a master who had been charged with assaulting a girl, but had been acquitted a few days after the dismissal. *Kemp* v. *School Board of Caddington* (1893) 9 Times L.R. 301.

In *Brett* v. *East India & London Shipp. Co.* (1864) 2 H. & M. 404, Page Wood, V.C., (afterwards Lord Chancellor Hatherley), refused specific performance of an agreement to employ the plaintiff as a ship broker, one of the stipulations being that the plaintiff's name should appear jointly with that of the secretary of the defendant's company in all advertisements of the company.

In *Ryan* v. *Mutual, etc., Assoc. L. R.* (1892) 1 Ch. Div. 116, the court refused to grant relief, on the ground that a contract between the lessees and the lessor of a block of buildings, whereby the latter had stipulated that the premises should be in charge of a resident porter who was to act as

may suffer in consequence of his being dismissed is not deemed to constitute a sufficient ground for equitable interference. If such an injury should result, he has an adequate remedy open to him at law [2]. Nor does he entitle himself to relief by showing that he has paid money for the privilege of being adopted to the place in question [3]. Nor is an employé of a corporation who holds a considerable portion of the stock in any better position than one who hold no interest [4].

---

the servant of the lessees, and to be constantly in attendance for the performance of certain services, was an entire contract.

On the ground that the duties of the agent of a limited company are in the nature of personal service, the court refused to restrain the directors from acting upon or enforcing the resignation of A. whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association. *Mair* v. *Himalaya Tea Co.* (1865) L.R. 1 Eq. 411.

In *Seiler* v. *Faries* (1871) 23 La. Ann. 397, where the owner of a plantation had contracted with the plaintiff to take charge of his plantation for a term of eight years, to reside thereon with his family, and to have exclusive control and direction of all the business affairs appertaining thereto during said term, the court refused to enjoin the defendant from superseding and forcibly dispossessing him, and removing his family.

In *Healy* v. *Allen* (1886) 38 La. Ann. 867, the court in refusing to enjoin the dismissal of a sexton of a cemetery said: "From no point of view, under the evidence in this case, can the relation between the parties herein be regarded as other than a contract for personal service. Plaintiff is not the owner nor the lessee of the cemeteries; he is simply charged with certain duties in the administration thereof, for the proper performance of which he is necessarily answerable to his superior. The position of sexton is not a franchise which can only emanate from governmental authority; nor is it a public office, which must have a like origin."

In *Healey* v. *Dillon* (1886) 30 La. Ann. 503, 2 So. 49, the court refused to enjoin the appointment of a successor to the same plaintiff.

Other cases in which the rule in the text was applied or recognized are, *Stocker* v. *Brokelbank*, 3 Mac. & Gord. 250, 20 L.J. Ch. 401; *Boyer* v. *Western U. Tel. Co.*, 124 Fed. 246; *Kennicott* v. *Leavitt* (1810) 37 Ill. App. 435 (manager of theatre); *Miller* v. *Warner* (1899) 42 App. Div. 208, 59 N.Y. Supp. 956 (court refused to enjoin dismissal of superintendent of police telegraph system of a city, the ground of the refusal being that he was a mere employé, and not a public officer); *Bronk* v. *Riley* (1888) 50 Hun. 489, 20 N.Y. S.R. 401 (court refused an injunction to compel a person to continue a business in which he had engaged the plaintiff's services for a specific period); *Stone Cleaning & Pointing Union* v. *Russell* (1902) 77 N.Y. Supp. 1049, 38 Misc. Rep. 513 (breach of contract to employ members of a certain labour union will not be enjoined).

[2] Knight Bruce, L.J., in *Johnson* v. *Shrewsbury & B. R. Co.* (1853) 3 De G. M. & G. 914 (930).

[3] *Healy* v. *Allen* (1886) 38 La. Ann. 867 (sexton of cemetery by whom money had been paid in consideration of certain incidental advantages accruing to him in his trade as marble cutter).

[4] *Stewart* v. *Pierce* (Iowa Sup. Ct. 1902) 89 N.W. 234 (court refused to order continuance of the plaintiff's employment after the expiration of his

4. Rationale of this rule.—An examination of the language used by judges shows that this rule has been referred to two distinct considerations:—

(*a*) That it is, as some of the authorities put it, inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services[1]. Either

---

contract, although he owned a half interest, and was a party to a contract with the owners of the remaining stock, which provided for equal control of the stock and equal services).

See also *Reid Ice Cream Co.* v. *Stephens* (1895) 62 Ill. App. 334 (where a part of an agreement made by a corporation in taking over the plaintiff's business was that he was to receive a monthly salary for services to be rendered); *Mills* v. *United States Printing Co.* (1904) 99 App. 605, 91 N.Y. Supp. 185 (court refused to enjoin the defendant from discharging the plaintiff on the ground that he had declined to join a labour union, and from carrying out contracts with unions which embraced a stipulation to employ only union workmen).

[1] "The nature of the contract is not one which requires the performance of some definite act, such as this court has been in the habit of requiring to be performed by way of administering superior justice rather than leave the parties to their rights and remedies at law. It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour or for hiring and service, it would require a series of orders and a general superintendence which could not conveniently be undertaken by any courts of justice; and therefore contracts of that sort have been ordinarily left to their operation at law." Lord Selborne in *Wolverhampton & W. R. Co.* v. *London, etc., R. Co.* (1873) 00 L.R. 16 Eq. 438 (440).

In *Millican* v. *Sulivan* (1888) 4 Times L.R. 203, Fry, L.J., observed that enormous "inconvenience" would be occasioned, if courts of equity were to enforce the continuance of strictly personal relations, under penalty of imprisonment for contempt of court, and that it was on the ground that such a course would be too gross an interference with the liberty of the subject, that courts of equity had refused to enforce such relations.

See also *Ryan* v. *Mutual, etc., Asso.* (1892) 1 Ch. D. 116, where equitable relief was refused on the ground that it would require continuous supervision by the court.

In *Kemble* v. *Kean* (1829) 6 Sim. 333, Shadwell, V.C., argued as follows: "Supposing Mr. Kean should resist, how is such an agreement to be performed by the court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an agreement to act at a theatre by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this court is enabled to issue."

In *Hamblin* v. *Dinneford* (1835) 2 Edw. Ch. 529, a similar case, the court argued thus: "The difficulty is how to compel specific performance. The court cannot oblige Mr. Ingersoll to go to the Bowery Theatre and there perform particular characters. Imprisonment for a contempt would be the

extreme inconvenience or actual impossibility would doubtless constitute a sufficient ground for refusing to undertake to enforce specific performance. But the predicament encountered in this instance would seem to be more accurately referred to the category of things "impossible" than to that of things "inconvenient." Even imprisonment for contempt of court is ineffectual to overcome stubborn contumacy [2].

(*b*) That in view of the peculiar personal relations which result from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically [3]. The cases in which this consideration

---

consequences of his refusal, and this would defeat the very performance sought to be enforced."

In *Whitwood Chem. Co.* v. *Hardman* (1891) 2 Ch. 416, Kekewich, J., remarked, *arguendo*: "It would be quite impossible to make a man work, and therefore the court never attempts to do it."

"A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service." *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

In one case we find the somewhat guarded statement, that the difficulty if not the utter impracticability, of compelling the performance of such an agreement, is a conclusive reason why a court of equity should refuse to interfere. *Sanquirico* v. *Benedetti* (1847) 1 Barb. 315.

[2] It is apparent that, under no social system of which we have any record, has the sovereign authority been able to put into motion a coercive machinery for the purpose of overcoming the determined passive resistance of an employer to a judicial decree ordering him to retain an employé. In states where slavery exists an effectual means of compelling an employé to fulfill his contract is available. But this consideration is of no practical importance in any country with which we are concerned in the present treatise.

[3] In *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) 3 De G. M. & G. 914 (924), Knight Bruce, L.J., observed with regard to a contract the effect of which is stated in § 3, note 1, *ante*: "There is here an agreement, the effect of which is that the plaintiffs are to be the confidential servants of the defendants in most important particulars, in which, not only for the sake of the persons immediately concerned but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of co-operation between the contracting parties. How is this possible to prevail in the position in which (I assume for the purpose of the argument by the default of the defendants) the defendants have placed themselves? We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not

most naturally suggests itself as a factor of controlling importance are those which relate to employments of a distinctly confidential character[4]. But its applicability, as one of the bases

agree, and good people do not always agree, enormous mischief may be done. A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while on the one hand all that the servant requires or wishes (and that reasonably enough) is money, you are on the other hand to destroy the comfort of man's existence for a period of years, by compelling him to have constantly about him in a confidential situation one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties —duties to society—as are incumbent upon the directors of a company like this I think that by interfering in the present case there would be no equality." The remarks of Turner, L.J., at p. 930, are to the same effect: "The inconvenience and mischief to the defendants, to say nothing of the interest of society at large, would be greater if the court should interfere than anything that could possibly happen to the plaintiffs by declining to interfere."

In *Francesco* v. *Barnum* (1890) 45 Ch. D. 430 (438), Fry, L.J., said: "For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and, therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner."

In *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416, Lindley, L.J., after stating that he looked upon *Lumley* v. *Wagner* (§ 6, *post*), "as an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend," proceeded thus: "I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more ha by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appeals to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction."

[4] In *Pickering* v. *Bishop of Ely* (1843) 2 Y. & C. C. 249, Shadwell, V.C., in refusing an injunction to restrain the defendant from obstructing in his office the plaintiff, a solicitor who had a right to prepare all the leases of lands owned by the See of Ely remarked: "The closest knowledge of all his temporal concerns connected with his See being the necessary consequence of what the plaintiff asserts, it is obvious that it is of the highest importance to the safety of the temporal interests of the bishop for the time being, and his ordinary comfort, that the person invested with such powers should be a man not merely respected by him, not merely worthy of trust, but also personally acceptable to him. To force upon him in such characters a person however estimable, however professionally eminent,

of the general rule, is not restricted to such cases. The element of inexpediency is clearly involved whether it be a question of constraining a person to retain a manager of his business or a groom.

5. Qualification of the general rule where the applicant for relief is in the employment of a body of trustees.—In the exercise of its general jurisdiction over the administration of trusts, a court of equity has in some instances enjoined the trustees of charity schools from dismissing the master, this remedy being granted on the ground that the trustees had abused or exceeded the powers conferred upon them by the express terms of the regulating instrument[1]. But it would seem to be a general rule, that in cases

---

who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard; and, sitting in a court of equity, I do not feel any inclination to do it." . . . "I consider it more fit for a court of equity to leave the plaintiff to obtain redress by damages or otherwise in a court of law than to exercise its peculiar jurisdiction by compelling the bishop specifically to submit to the practical exercise of such rights, if rights they are."

This case was cited in a later one where the court refused an injunction to restrain the managing committee of a hospital from interfering with the plaintiff in the performance of his duties as medical officer by suspending him. *Millican* v. *Sulivan* (1888) C.A., 4 Times L.R. 203.

[1] In *Dummer* v. *Chippenham* (1807) 14 Ves. 245, the power of the court to restrain a municipal corporation from abusing its power of dismissing the master of a charity school administered by it, as trustee, was asserted.

In *Willis* v. *Child* (1851) 13 Beav. 117, 20 L.J. Ch. 113, by a scheme of the Court of Chancery for the regulation of a grammar school, authority had been given to the trustees "upon such grounds as they should, at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just," to remove the master at once and confirm it at a subsequent special meeting. The trustees having grounds of complaint against the master, referred the matter, without his knowledge, to a committee, who investigated the case in his absence and without his knowledge, and reported against him. The trustees, without communicating the report or hearing him, confirmed it in his absence, and resolved to remove him; and they summoned a second meeting to confirm the resolution. The master then attended and was heard, and the removal was confirmed without any other hearing or inquiry in his presence. The court held, first, that the regulation did not confer upon the trustees an arbitrary power to dismiss the master, upon any grounds which they might deem just, free from any control of the court; and, secondly, that the master had had no proper opportunity afforded him of defending himself—no sufficient means of explanation and no means of proving his defence. The trustees were accordingly restrained by Lord Langdale, M.R., from enforcing the dismissal and ejecting the master. The conclusion of the learned judge with regard to the extent of the powers of the trustees was based upon the considerations,

where the abuse or excess of definite powers is not involved, a court of equity will not examine into the right of such a functionary to be retained in his position, unless his interest in the money which constitutes his appointed stipend is of such a nature as to render him the *cestui que trust* of the body controlling the school and the fund from which that stipend is derived[2].

---

that the word "trusts" in the clause quoted above was added to the word "powers," for the purpose of keeping in view, that it was a trust for the execution of which the court was providing, and that the employment of the word "trust," especially when viewed with reference to the direction to preserve a statement of the grounds of removal, had the effect of restricting the large meaning of the word "discretion," contained in the earlier part of the clause. He distinguished two earlier cases. In one, *R.* v. *Darlington School* (1844) 6 Q.B. 682, where the governors had power to remove the master and appoint another, "according to their sound discretion," it was held, that the trustees might remove the master as they pleased, and that their discretion was not to be restricted by any opinion which the court might form of the reasons on which they might have been induced to exert it. In the other, *In re Fremington School* (1846) 10 Jur. 512, where the trustees were empowered by the will of the founder of the School, to displace the master, "upon any neglect or misbehaviour in such master or other just cause, for which they or the greater number of them should agree upon and think fit to displace such master," and place another there, Knight Bruce, V.C., held, that the court was to consider, whether there was neglect, misbehaviour or other just cause; that it was not enough for them to say that there was some cause or reason for which they might agree upon and think fit.

[2] In *Whiston* v. *Dean, etc., of Rochester* (1849) 7 Hare 532, it was held that the person appointed by the Dean and Chapter of a Cathedral Church to the mastership of a grammar school which, by the statutes imposed by the founder, was directed to be established and maintained from the endowments of such church which were held in frankalmoigne, was not a *cestui que trust* of the stipend and emolument of the office, but only an officer of the Cathedral Church, appointed to perform one of the duties imposed upon it by the statutes, and that, in such a case, whoever might be visitor—whatever might be the interest of such visitor in the matter in dispute,—or whatever might be the right of the schoolmaster to a mandamus or prohibition at law,—the Court of Chancery could not, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office. Wigram, V.C., said: "If the appointment of the plaintiff as schoolmaster gave him a right to the stipends prescribed by the statutes as a *cestui que trust* against his trustees, there is no question whatever that the mere circumstance of the Dean and Chapter being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the court. . . . For the purpose of the argument, the founder is considered as saying, that there shall be certain funds, and certain officers payable out of those funds, such as a schoolmaster, choristers, and others, who fill various offices, and perform various duties. All these persons apparently fall within the same category in point of description, although they are unequally paid, and their duties are not of equal importance. Unless it is to be argued that the janitor, for instance, on being discharged, may come to this court and allege a trust in his favour, and call upon the court to decree

6. Enforcement of stipulations by employés not to perform services for any other persons than their employers. English cases reviewed.—In two of the earlier English cases which bear upon this subject, the *ratio decidendi* was that, where a contract of employment embraces both a positive stipulation to serve the employer and a negative stipulation not to serve anyone else, the inability of the court to enforce the contract as a whole by decreeing performance of the positive stipulation was a sufficient reason for refusing to decree performance of the negative stipulation also[1]. But in another case decided in the same year as those referred to this doctrine was declared to be erroneous[2]; and the propriety of

---

accordingly, it may be difficult to say that the master, if he be within the same category, has a right to come to the court and allege such a trust."

In *Pottle* v. *Sharp* (C.A. 1896) 75 L.T. 265, the plaintiff was appointed, under a contract terminable at three months' notice, schoolmistress of a school established under a deed of trust. At the time of the appointment all the original trustees were dead, and no successors had taken their places on the board, except the vicar of the parish, who was a trustee *ex-officio*, and who had made the appointment in conjunction with a committee of management who under the trust deed had no right to act. On the ground that the only questions involved were, with whom had the plaintiff contracted, and from whom was she to receive the stipulated notice, the court declined to grant an injunction restraining the committee of management from dismissing her. Her contention that she could not be removed until new trustees had been appointed was rejected. "If," observed Chitty, J., in the lower court, "she was there as the schoolmistress appointed by the manager of the school, the matter resolves itself into a question of personal service."

[1] In *Kemble* v. *Kean* (1829) 6 Sim. 333, where the agreement was, that the defendant should act at Covent Garden Theatre a certain number of nights in the season of 1830-31, and that, in the meantime he should not act elsewhere, an *ex parte* injunction restraining him from acting at Drury Lane Theatre or any other place in London, until he should have completed his engagement with the plaintiff, was dissolved by Shadwell, V.C.

In *Kimberley* v. *Jennings* (1836) 6 Sun. 340, the same judge admitted that a negative covenant might be enforced in a court of equity, if nothing but that covenant remained to be executed, but refused to grant the relief asked on grounds thus stated: "Here the negative covenant does not stand by itself; it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership . . this agreement cannot be performed in the whole, and, therefore, this court cannot perform any part of it."

[2] In *Dietrichsen* v. *Cabburn* (1845) 2 Phill. Ch. 511 (not a contract of service), Lord Cottenham reversed a judgment of the Vice-Chancellor, based upon the ground, that "the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement." The doctrine adopted was, that the jurisdiction of the court to restrain by injunction an act which the defendant is by

granting or refusing relief in cases which involve the violation of negative stipulations in contracts of services is now determined with reference solely to the general principle of equity jurisprudence, that the court may in the exercise of its discretion enforce by injunction stipulations of this description, which it deems sound and reasonable[3]. That is to say, upon the general rule, that specific performance of a contract of service will not be decreed, there has been engrafted the exception, that, "where a person has engaged not to serve any other master, . . . the court can lay hold of that, and restrain him from so doing"[4]. This doctrine was established in England by the leading case of *Lumley* v. *Wagner*[5], in which Lord St. Leonards, examined at considerable length all the previous decisions bearing upon the question[6]. His conclusion was that an injunction should be

contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a court of equity has not the means of enforcing.

[3] Chitty in *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162.
Compare the following observation of the same judge in *De Francesco* v. *Barnum* (1889) 43 Ch. D. 165: "Injunctions in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause; and, secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there can be no right to an injunction." This statement was approved by Fry, L.J., in 45 Ch. D. 165.
In Story, Eq. Jurispr. § 1343, the effect of the English cases is thus stated: "The violation of contracts for personal services may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible." But this statement is wanting in precision, as it does not advert to the materiality of the insertion or non-insertion of a negative stipulation in the contract.

[4] Lindley, L.J., in *Whitwood Chemical Co.* (1891) 2 Ch. 416.

[5] (1852) 1 De G. M. & G. 604.

[6] The earliest relevant case, that of *Morris* v. *Colman* (1841) 18 Ves. 437, was thus commented upon by the Chancellor: "There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket; he did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre

granted to restrain the defendant, an operatic singer, from violating an agreement not to sing elsewhere than at the plaintiff's theatre during the period covered by her contract with him. As the basis of this conclusion, he adopted categorically the position, that the court might interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract, and rejected the contention of the defendant's counsel, that a court "ought not to grant an injunction except in cases connected with specific performance, or where, the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted"[7].

---

than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the Bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in the case of *Dietrichsen* v. *Cabburn* (1846) 2 Phill. 52, when he said that Lord Eldon had not decided *Morris* v. *Colman*, 18 Ves. 437, on the ground of there being a partnership. I agree that the observations which fell from Lord Eldon in the subsequent case of *Clarke* v. *Price*, 2 Wils. 157, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground." He expressed his disapproval of the interpretation put upon this case by Vice-Chancellor Shadwell in *Kemble* v. *Kean* (see last section). He stated that *Clarke* v. *Price* (1820) 2 Wils. 157, was not really a case in point, as the contract there under review did not contain any negative stipulation, a circumstance which was clearly fatal to the claim of the plaintiff to the assistance of the court (see, however, section 8, *post*). Finally he expressed the opinion that both *Kemble* v. *Kean* and *Kimberley* v. *Jennings* (see note 1, *supra*), had been wrongfully decided.

[7] The following additional extract from the judgment in this important case may with advantage be quoted: "At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefits, and that the prohibition operated upon a concluded contract, and that, therefore, the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle; it is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and, therefore, that the injunction cannot be required or applied for before that period. The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants which state of facts may have and in some cases has introduced a very important difference,—but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will

The opinion has recently been expressed by a very eminent judge that *Lumley* v. *Wagner* is "rather an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend"[8]. But its authority still remains unimpugned in England, so far as regards the actual decision; and it has been followed more than once where the effect of similar contracts was in question[9].

---

break in upon her affirmative covenant—the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of the opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this court has not proper jurisdiction to enforce specific performance, 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. . . . It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement."

[8] Lindley, L.J., in *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416 (428).

[9] In *Stiff* v. *Cassell* (1856) 2 Jur. N.S. 348, it was held that a *primâ facie* case was made out for enforcing by injunction an agreement of an author employed to compose tales for a weekly newspaper, that he would write only for publications of a specified class within the period covered by the contract.

That a stipulation by an actor not to act at any other theatre than that of his employer, without permission, may be enforced by injuncion, was held in *Grimston* v. *Cunningham* (1894) 1 Q.B. 125.

See also the two cases reported under the caption, *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162. The facts are stated in § 1, note 5, *supra*.

In *Donnell* v. *Bennett* (1883) 22 L.R. Ch. Div. 835 (a case relating to the sale of chattels), Fry, J., after referring to certain earlier decisions, remarked: "They appear to me to shew that in cases of this description

It is now settled that the principle of *Lumley* v. *Wagner* ought not to be applied to an agreement which, though negative in form, is affirmative in substance [18].

7. Same subject. American cases reviewed.—In some of the earlier American cases the courts applied or recognized the doctrine, that an injunction should not be granted to restrain the breach of a negative stipulation in a contract of service [1]. In the form in

---

where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract." He declined to attach any importance to the point made by counsel, that in all those cases the negative contract enforced was but a part of a larger contract,—was a separable part of that larger contract, and that those cases did not apply to a case like the one before the court, in which the negative contract was co-extensive with the positive contract. He considered that the positive and negative stipulations in *Lumley* v. *Wagner*, *supra*, were substantially co-extensive, and pointed out that Lord St. Leonards did not dwell on the distinction which it was now sought to draw, and that, so far as he was aware, no trace of it was to be found in the earlier authorities.

[18] *Davis* v. *Foreman* (1894) 3 Ch. 654. There an agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement and the service created thereby, and the manager brought an action for an injunction to restrain the employer from acting on the notice. *Held* that the clause above mentioned was equivalent to a stipulation by the employer that he would retain the manager in his employ, and that an injunction ought not to be granted. Kekewich, J., laid it down as settled law, that an agreement for personal service cannot be enforced otherwise than by an action for damages, except in certain cases where there is a strictly negative stipulation. But in view of the remarks of Lord Selborne and Lindley, L.J., referred to in § 8, *post*, this statement is evidently wanting in precision.

[1] In *Hamblin* v. *Dinneford* (1835) 2 Edward's Ch. 529, a preliminary injunction to restrain the breach of a provision binding an actor not to perform during a certain period at any other theatre than that of the plaintiff was denied, on the grounds, that the controversy was a matter merely between employer and employé, which should be left to a court of law, that the imprisonment of the defendant for contempt, the only means of enforcing the injunction would defeat the very object aimed at by the plaintiff, and that the only relief that could be given would be restrictive in its nature and leave the positive part untouched. This decision was rendered before *Kemble* v. *Kean* (see last section), but the court took the same view of the effect of *Morris* v. *Colman* (1811) 18 Ves. 437, as was taken by Shadwell, V.C., in that case, viz.: that its actual *ratio decidendi* was the existence of a partnership between the plaintiff and defendant;—a theory which, as has been shown in the preceding section has been repudiated in England.

In *Sanquirico* v. *Benedetti* (1847) 1 Barb. 315, where an injunction

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. Leonards[2]. 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. *Dinneford* 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."

the exercise of equitable jurisdiction, a negative stipulation may be implied, whenever it is a reasonable inference from the terms of the affirmative portion of the agreement, that the parties contracted on the understanding, that the employé was not to render service to anyone except the employer. Such an inference might, it was held, be properly drawn, where the employé had bound himself to give his whole time to the employer, or to work exclusively for the employer, or to render certain definite services on specified premises [3].

[3] In *Montague* v. *Flockton* (1873) L.R. 16 Eq. 189, Malins, V.C., stated his conclusions and the reasons therefor in the following terms: "It appears to me, on the plainest ground, that an engagement to perform for nine months at Theatre A. is a contract not to perform at Theatre B., or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract." The learned judge relied upon two other cases in which the same view, that an engagement to act at one theatre is an implied prohibition against acting at any other, had been taken, viz., *Webster* v. *Dillon* (1857) 3 Jur. N.S. 432 (a decision rendered by Page-Wood, V.C. (afterwards Lord Hatherley), upon the assumption that he was sustained by the authority of Lord St. Leonards, and *Fechter* v. *Montgomery* (1863) 33 Beav. 227, a decision by Lord Romilly, who construed a contract in which there was no negative stipulation, as importing an agreement on the part of the plaintiff to employ the defendant to act at a certain theatre, and on the part of the defendant to perform nowhere else without the plaintiff's consent, but refused to enforce the latter agreement on the ground that the plaintiff had kept the defendant idle for five months (see §3, note 7, *ante*).

See also *Jackson* v. *Astley* (1883) 1 C. & E. 181, where Pollock, B., observed, with regard to a contract to serve the plaintiff for a specified term, as the manager of his business, that, under appropriate circumstances, its breach might have been enjoined, although it contained no express negative covenants. But he declined under the circumstance to exercise his discretionary power.

In view of the explicit and categorical statement of Lord St. Leonards already referred to in the preceding note, it is difficult to understand how the theory as to the effect of *Lumley* v. *Wagner* which these cases embody can have originated. In *Montague* v. *Flockton*, *supra*, Malins, V.C., said that he relied chiefly upon the following passage of the Lord Chancellor's judgment: "In all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." Another passage which has some bearing upon the point is that in which the Lord Chancellor observed that the

The cases decided upon this footing have been overruled by the Court of Appeal, which declared them to have been based upon a misapprehension as to the meaning of the words of Lord St. Leonards[4]. But in estimating the actual position taken by

defendant would have violated her agreement by singing elsewhere, even if there had been no negative stipulation. But, as Kay, L.J., remarked in the case cited in the next note, neither of these passages can reasonably be regarded as susceptible of the construction put upon them. Having regard to the explicit declaration of Lord St. Leonards above referred to, it is clear that his statement that, even the absence of an express negative stipulation, a violation of the contract on the defendant's would have been predicable, could not have been intended to bear the meaning, that this breach was a proper subject for equitable interference.

[4] *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. (C.A.) 428. There the manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business." The judgment of Kekewich, J., who granted an injunction, proceeded upon the ground that, having regard to the terms of the contract, it was a case in which a negative stipulation was expressed, and that it was not necessary to deal with the rights of the parties on the hypothesis that such a stipulation, if it was to be read into the contract must be a matter of implication. In the higher court it was held, that, (whatever other remedies the company might have), in the absence of any negative stipulation in that behalf, they were not entitled to an injunction to restrain the manager from giving during the term, part of his time to a rival company. Lindley, L.J., said: "The first point to observe is, that there is no negative covenant at all, in terms contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley* v. *Wagner*, 1 De G. M. & G. 604. and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. Now every agreement to do a particular thing 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. The court has never gone that length, and I do not suppose that it ever will. . . . What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner*, and every case except *Montague* v. *Flockton*, Law Rep. 16 Eq. 189. The principle is that the court does not decree

that court, it is important to note that, although the broad theory, that an affirmative agreement to perform certain services for a specified person or on specified premises during a stated period always involves by implication a negative stipulation not to perform similar services for any other person during that period, was emphatically repudiated, Lindley, L.J., expressed his concurrence with the remarks of Lord Selborne in a somewhat earlier case, to the effect that "the principle (applied in *Lumley* v. *Wagner*) does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other,—some specific thing upon which you can put your finger"[5]. As the English

specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is." Referring to *Montague* v. *Flockton*, upon which reliance had been placed, he added: "I cannot read the decision of Malins, V.C., without seeing that he was under the impression that Lord St. Leonards in *Lumley* v. *Wagner* would have granted the injunction, even if the negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject." Kay, L.J., said: "What strikes me in this case is that, if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it be possibly argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any other case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bonâ fide*, for that purpose, but it is wanted to prevent him from setting up a rival business which he has not contracted not to do."

[5] This statement is intended to express the essence of a passage in Lord Selborne's judgment in *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* (1873) L.R. 16 Eq. 433 (440). After referring to the case of *Lumley* v. *Wagner*, he proceeded thus: "It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend to it an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made

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-

---

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, § 862. 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.

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 injunction [1].

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 England [2]. 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 them [1]. 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

Appeal reversed the decision of the learned judge, asserting the right of the employer to enjoin the employé, (see § 8, *ante*), but did not make any comment upon this explanation of the decisions referred to by him. The precise scope of his remarks is not entirely clear. But if they are to be construed as embodying the theory that the special quality of the services to be rendered is a determinative element, in the sense that the jurisdiction of courts of equity is dependent upon its presence, his view is not borne out by the authorities. In the first place, a theory which would attach to this element a differentiating effect of this description is quite inconsistent with the rationale of later cases in which the court has enjoined or refused to enjoin the breach of negative stipulations in contracts for services which did not demand any special capacity[2]. In the second place it is to be observed that, neither in the decision particularly mentioned by Kekewich, J., nor in any other, has any language been used which can fairly be interpreted as indicative of an adoption of his view. All the judgments of the courts have been rendered with reference solely to the consideration, that the given contract did, or did not, embrace a negative stipulation, express or implied[3].

---

artist, having special knowledge, special powers, or special abilities, which he or she has engaged to give up and use for the benefit of the employer. That is the foundation of such cases as *Lumley* v. *Wagner*. It is because the defendant in a case of that kind is an artist who cannot easily be replaced that such an action is brought." In another place (p. 423) he approved the decision in *Montague* v. *Flockton* (§ 8, *ante*), on the ground that "an actor is also an artist a man with special powers, special abilities."

[2] In *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162, 165, a teacher of ballet-dancing was held by Chitty, J., to be entitled to enjoin two of her pupils from violating a negative stipulation (see § 2, note 5, and § 6, note 8, *ante*).

In *De Francesco* v. *Barnum* (1890) 43 Ch. D. 165, 45 Ch. D. 430, an injunction in a similar case was refused by the same judge, but simply on the ground that the contract was unfair. See § 2, note 5, *ante*.

[3] The very general language in which Chitty, J., in the cases cited in last note, summed up the effect of the authorities has already been stated. See § 6, *ante*.

The following remarks as to the extent of the jurisdiction of courts of equity with regard to the enforcement of negative stipulations are also extremely significant in the present connection, although the contracts involved did not relate to service.

"If the bill states a right or title in the plaintiff to the benefit of the

11. Same subject. American doctrine.—(*a*) *Generally*—The theory of which, as stated in the preceding section, Kekewich, J., seems to be the sole exponent in England has taken firm root in the United States. In a large number of cases it has been held that, where the assistance of equity is sought to restrain an employé from entering into engagements with a third person, an injunction should be granted or refused, according as the stipulated services do, or do not belong to a category indicated by such descriptive phraseology as this: "unique"[1]; "special, unique, and extraordinary"[2]; "unique, individual, and peculiar"[3]; "individual and peculiar, because of their special merit or unique character"[4]; "requiring and presupposing a special knowledge, skill, and ability in the employé"[5]. The effect of the decisions rendered with reference to this doctrine is stated below[6].

---

negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, I conceive, material whether the right be at law, or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity." Lord Cottenham in *Dietrichsen* v. *Cabburn* (1846) 2 Phill. Ch. 52 (58).

"If there is a negative covenant, the court has no discretion to exercise. If the 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 the thing shall not be done." Lord Cairns, in *Doherty* v. *Alman* (1876) 3 App. C. 720.

[1] *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210.

[2] *Bronk* v. *Riley* (1888) 50 Hun. 489; *Strobridge Lith. Co.* v. *Crane* (1890) 58 Hun. 611 (memo.), 35 N.Y.S.R. 473, 12 N.Y. Supp. 898; *Hoyt* v. *Fuller* (N.Y. Super. Ct. 1892), 19 N.Y. Supp. 962, 47 N.Y.S.R. 504; *Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

All the courts which have used this particular combination of words seem to have derived it from the following passage in 4 Pomeroy Eq. Jurispr., § 1343: "Where a contract stipulates for special, unique, or extraordinary, personal services or acts, or for such services or acts to be rendered or done by a party having special unique and extraordinary qualifications, . . . the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person."

[3] *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432.

[4] *Burney* v. *Ryle* (1893) 91 Ga. 707.

[5] Pomeroy, Spec. Perf. (2nd Ed.) § 24, adopted in *Universal Talking-Mach. Co.* v. *English* (1891) 34 Misc. 342, 69 N.Y. Supp. 813; *Philadelphia Ball Co.* v. *Lajoie* (1902) 202 Pa. 210.

[6] (*a*) *Injunction granted.*—In *Hayes* v. *Willio* (1871) 11 Abb. (N.Y.) Pr. N.S. 167, where an actor was enjoined from violating a stipulation not

If the views which the present writer has propounded in the preceding section with regard to the rationale of the English

---

to perform elsewhere, the court argued thus: "It is indisputable, that when theatrical managers with large capital invested in their business, making contracts with performers of attractive talents, and relying upon such contracts to carry on the business of their theatres, are suddenly deserted by the performers in the middle of their season, the resort to actions at law for damages must fail to afford adequate compensation. It is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him an injury. It is as much his right, if he have a contract to that effect, that no other establishment shall have the services of his performers, as that he shall have them himself. There is no hardship to the actors in preventing the breach of the negative part of their contract, for every man has the right to expect to be held to his agreement when it was entered into without fraud, and he receives the consideration he demands, and his contract entitles him to." This decision was reversed (1872) 4 Daly 259; on the ground that the plaintiff, being merely the assignee of the rights of the party with whom the defendant had made a contract under which he was to go to any place of amusement to which that party might send him, had no right to maintain the suit. The remarks of the lower court, so far as they are relevant to the present subject, were in nowise impugned.

In *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150, the defendant who had agreed among other things to act on the stage of plaintiff's theatre, during three seasons, all such parts and characters as the plaintiff might direct, and that without the plaintiff's consent, she would not act at any other place in the city of New York during the period covered by the contract was enjoined from accepting an engagement to play during the ensuing season at another New York theatre. The decision was put upon the ground that, under the circumstances there was no adequate remedy at law, where attractive public performers suddenly desert their employers in the middle of their season, since they increase the rivalry against him by joining other establishments. The remarks of Daly, J., to this effect in *Hayes* v. *Willio*, *ubi supra.*, were approved.

This case was relied upon in *M'Caull* v. *Braham* (1883) 16 Fed. 37, where the court formulated the following rule: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity."

In *Canary* v. *Russell* (1894) 9 Misc. 558, 61 N.Y.S.R. 665, 30 N.Y. Supp. 122, the court, remarking that the jurisdiction of a court of equity to enforce negative stipulations in the case of actors was well established, granted an injunction to restrain an operatic singer from performing for another manager during the second of two seasons during which the plaintiff was entitled to command the defendants' services, upon exercising the option given by the contract. It was, however, held that the restriction was not applicable to the summer months intervening between the two seasons.

In *Philadelphia Ball Club* v. *Lajoie*, 51 Atl. 973, 202 Pa. 210, the court thus stated its reasons for granting an injunction to restrain a professional base-ball player who had sold his services to the plaintiff for a certain period

decisions, be correct, it is manifest that the doctrine discussed in this section indicates a severance of the currents of English and

---

from accepting employment from another club. "The evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution, that their loss will produce irreparable injury, in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case therefore properly calls for the aid of equity, in negatively enforcing the performance of the contract, by enjoining against its breach."

In *Metropolitan Exhibition Co.* v. *Ewing* (1890) 42 Fed. 198, where a base-ball player was restrained from violating a negative promise, the court stated it was applying the "generally recognized doctrine" that "while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise."

In *Metropolitan Exh. Co.* v. *Ward* (1890) App. D. 9 N.Y. Supp. 779, 24 Abb. N.C. 393, the power of the court to enforce a restrictive provision against a base-ball player was asserted; but the circumstances were held not to justify a preliminary injunction.

In *Daly* v. *Smith*, *supra*, a special point was raised by the fact, that it was expressly stipulated in the contract that if the defendant should refuse to fulfil her part, and should attempt to perform at any other theatre before the termination of her agreement with the plaintiff, the plaintiff might by legal process or otherwise, restrain her from so performing, on payment to her, during such restraint, of a sum equal to one-quarter of the salary to be paid to her under the contract, in lieu of her salary. The court, referring to the general rule that parties cannot confer jurisdiction by stipulation, refused to interfere with this arrangement for the reason that, as the jurisdiction existed wholly irrespective of the clause, it was competent for the parties to agree upon the terms of restraint in a proper case, like the one under review.

(*b*) *Injunction refused.*—In *Rogers* v. *Rogers* (1890) 58 Conn. 356, 20 Atl. 467, the defendant agreed that he would serve the plaintiffs for twenty-five years under the direction of their general manager, travelling for them as directed, and rendering such services in the capacity of a secretary or other officer as they might desire; and that he would not be engaged, or allow his name to be used, in any other hardware or cutlery business, either as manufacturer or seller, but would give his entire time and services to the interests of the plaintiffs. In a suit for an injunction against the defendant's leaving the employment of the plaintiffs and engaging in any other hardware or cutlery business, or allowing his name to be used in any such other business, in which the plaintiffs set out the defendant's contract and averred that his services had, by his familiarity with their business and customers, become of special value to them, that he was negotiating with certain rival manufacturers to go into their service and to allow his name to be used as a stamp upon their wares, and intended to use for their advantage his knowledge of the plaintiffs' business, and that his doing so would cause irreparable damage to the business of the plaintiffs, the court refused to grant the relief asked for, saying: "These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary

American authority. Yet it seems impossible to draw from the language used by most of the American courts which have adopted the doctrine any other inference than that they supposed themselves to be following the English precedents[7].

(*b*) *To what descriptions of services the doctrine is applicable.*—In some of the cases in which this doctrine has been applied or recognized, the view has been advanced that the only

---

intelligence and fair learning." The other points decided were (1) that it did not appear that the plaintiffs had a right to the defendant's name as a trade-mark, and that if they had, they could have no difficulty in protecting their ownership of it; and (2) that it did not appear that the use of the defendant's name by other manufacturers would do the plaintiffs any injury beyond what might grow out of a lawful business rivalry; and that if, by reason of extraneous facts, such use would be wrongful or specially injurious, such facts ought to have been set out, so that the court might pass upon them.

In *Burney* v. *Ryle* (1893) 91 Ga. 701, the defendant had assigned to a firm his interest in a certain contract of agency for an insurance company, and in the assignment covenanted to remain with the firm as special agent in a named State for one year, and to give his entire time and attention to the business of that company by procuring for it applications for insurance. *Held*, that an injunction would not be granted at the instance of the firm to restrain the assignor from soliciting insurance or transacting business for a rival company,—the assignment containing no express covenant that he would not do so, and it not appearing that he was specially skillful, successful, or expert, insurance agent whose place could not be readily supplied by another equally competent to attend to the business for which his services had been engaged.

For other cases in which an injunction was refused see *W. L. Johnson Co.* v. *Hunt* (1892) 66 Hun. 504, 50 N.Y.S.R. 104, 21 N.Y. Supp. 314 (advertising solicitor: Barrett, J., dissented on the ground that defendant had by his long connection with plaintiff acquired a special knowledge of the business); *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, (jewelers' travelling salesman).

[7] In *Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356, the authority cited for the refusal of an injunction in a case where the services were not of a special character was *Lumley* v. *Wagner* (see § 6, *ante*).

A similar misapprehension as to the rationale of this decision is traceable in *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150, where the court professed to follow it, although the quality of the services was the controlling factor.

For other cases in which that decision was cited, but in which the courts determined the rights of the parties with reference to the quality of the services, see *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566; *Bronk* v. *Riley* (489) 50 Hun. 489; *Metropolitan Exch. Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393; *Cort* v. *Lassard* (1887) 18 Or. 221.

In *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, it was observed that the doctrine of *Lumley* v. *Wagner* had received only a qualified indorsement in the United States. So far as the present writer is aware, this is the only remark in any of the reports which indicates an appreciation of the fact that the positions of the courts in England and America are different.

services to which it can properly be deemed applicable are those which are wholly or principally concerned with the exercise of the intellectual faculties[8]. But there is manifestly no satisfactory ground upon which this method of classification can be sustained. The damage arising from the desertion of such an employé as a highly skilful dancer or acrobat may well be, and, as a matter of fact, frequently is, as irreparable as the damage caused by the abandonment of their contracts by authors, artists, or actors[9]. The preferable conception is that the appropriate criterion for determining the category to which the services belong is supplied by the answer to the question, "whether a substitute for the employé can readily be obtained, and whether such substitute will substantially answer the purpose of the contract . . . since where a proper substitute can readily be secured, and the service demands no exclusive individuality, the

[8] *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, 571; *Butler* v. *Galletti* (1861) 21 How. Pr. 466; *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 000; *Burney* v. *Ryle* (1893) 91 Ga. 701.

[9] In *Metropolitan Exch. Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393, the court said: "Between an actor of great histrionic ability and a professional base-ball player, of peculiar fitness and skill to fill a particular position, no substantial distinction in applying the rule laid down in the cases cited can be made. Each is sought for his particular and peculiar fitness, each performs in public for compensation, and each possesses for the manager a means of attracting an audience. The refusal of either to perform according to contract must result in loss to the manager, which is increased in cases where such services are rendered to a rival."

The power of the court to grant injunctions against base-ball players was also asserted in *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210, 51 Atl. 973; *Metropolitan Exhibition Co.* v. *Ward* (Sup. Ct.) (1890) 24 Abb. N. Cas. 393, 9 N.Y. Supp. 779.

In *Cort* v. *Lassard* (1887) 18 Or. 221, where an acrobat was concerned, the court repudiated the criterion suggested in *Fredericks* v. *Mayer* and *Butler* v. *Galletti*, *supra*.

The doctrine that cases in which the services are intellectual constitute merely one class among several in which equitable interference is proper is also distinctly embodied in the following passage: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages." *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356 (364).

In *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, the court observed that the doctrine is applicable both to services of an intellectual character, and to those of a mechanical nature which require special skill.

reason for this exceptional departure from common-law principles fails, and the parties should be left to their ordinary remedies'' [10].

By the adoption of this criterion the main doctrine is limited to this extent, that the fact that a defaulting employé possesses special knowledge will not entitle his employer to an injunction, unless it is affirmatively shown by the employer that such skill cannot be supplied by others [11].

In some of the cases under this head that phase of ''irreparability'' which is referred to the conception of the impossibility of estimating with reasonable precision the damage which the breach of contract will produce, is adverted to as one of the grounds of the equitable jurisdiction exercised. [12]. As that impossibility is predicable in almost every instance in which the services are special and unique, it will ordinarily constitute merely a cumulative reason for issuing an injunction. But it has been held that, if the services are not of that character, the fact that the damages cannot be computed upon any accurate footing will not of itself justify such relief [13].

(c) *Doctrine applicable, whether the contract does or does not embrace a negative stipulation.*—In what appear to be the

---

[10] *Strobridge Lithographing Co.* v. *Crane* (1890) 12 N.Y. Supp. 898 (court refused to issue an injunction against a somewhat talented young lithographic sketcher).

"One who has engaged a great actor can procure no substitute, if the actor breaks his engagement and performed elsewhere; while if a salesman leaves his employer it will be easy to supply his place." *Bronk* v. *Riley* (1888) 50 Hun. 489.

The impossibility or extreme difficulty of procuring substitutes for persons of unique talents is also adverted to in *Duff* v. *Russell* (1891) 28 Jones & Sp. 80, 14 N.Y. Supp. 134; *Cort* v. *Lassard & Lucifer* (1889) 18 Or. 221; *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210, (citing Pomeroy, Spec. Perf. p. 31); *Burney* v. *Ryle* (1893) 91 Ga. 701 (citing Beach Mod. Eq. Jurispr., § 772); *Edwards* v. *Fitzgerald* (N.Y. Sup. Ct. 1895) 9 Nat. Corp. Rep. 455.

[11] *Universal Talking Mach. Co.* v. *English* (1901) 69 N.Y. Supp. 813, 34 Misc. Rep. 342, the court declined to the breach of his contract by a man employed to develop and perfect improved processes for recording and reproducing sound.

[12] See, for example, *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566; *Burney* v. *Ryle* (1893) 91 Ga. 703.

[13] Such was the situation in *Kessler* v. *Chappelle* (1902) 73 App. D. 447, 77 N.Y. Supp. 285 (see note 16, *infra*).

earliest cases in which the quality of the services is adverted to as one of the material elements for consideration, the contracts embraced negative stipulations, and this circumstance is reflected in the language of the doctrinal statements of the courts [14]. Such a stipulation is also found in many of the contracts discussed in the more recent cases which have been decided with reference to that factor [15].

But there is nothing in the language or reasoning of the courts to indicate that the propriety of interfering in a given case was to be determined with reference to the inclusion or non-inclusion of a provision of this kind. The conclusion to which this negative evidence as to their views may reasonably be said to point is also supported by several decisions which distinctly embody the motion, that the ultimately differentiating factor is the quality of the services, and not the question, whether the employé has or has not bound himself to abstain from rendering services to a third person [16].

[14] See *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, aff'd 1 Bosw. 227; *Butler* v. *Galletti* (1861) 21 How. Pr. 465. In the later case Hoffman, J., observed: "I do not think I am bound by the cases to hold, that where there are clear and absolute negative stipulations . . . upon a subject involving in part the exercise of intellectual qualities, and a special case of the impossibility or great difficulty of measuring damages is present, that the jurisdiction to forbid the violation of such covenants does not exist."

[15] See note 6, *supra*.

[16] In *Duff* v. *Russell* (Super. Ct. N.Y. 1891) 28 Jones & S. 80, 14 N.Y. Supp. 134, 39 N.Y.S.R. 266, it was held that, as the defendant, a singer, had agreed to appear in seven performances in each week, (exclusive of Sundays), which the plaintiff company was to give in New York, it was not possible for her to perform elsewhere in New York without a violation of her contract with the plaintiff, and that a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant. It was also held that, as it had been arranged between the parties, but without prejudice to the rights of either, that the defendant, upon giving an undertaking to pay a certain sum as liquidated damages in case it should be finally determined that the plaintiff was entitled to an injunction might go on and fulfil her contract at the Casino, the fact that the plaintiff's contract with the defendant had since then expired would not preclude the court from determining the plaintiff's original right to relief by means of an injunction. This decision was affirmed (without any opinion), by the Supreme Court in 16 N.Y. Supp. 958, and by the Court of Appeals in 133 N.Y. 678, 31 N.E. 622, 45 N.Y.S.R. 931.

In *Hoyt* v. *Fuller* (N.Y. Super. Ct. 1892) 19 N.Y. Supp. 962, 47 N.Y. S.R. 504, defendant, an actress and danseuse, performing the "Serpentine Dance," a specialty which she had invented and composed, and as she

asserted could be performed by her alone, agreed with plaintiff to perform for him during "the run" at his theatre, and on the termination of the run to "go on the road," and "for a run in Boston," not exceeding August 1, 1892, the option of terminating the contract being left with plaintiff. *Held*, that the contract, though there was no negative clause in it, gave plaintiff the exclusive right to defendant's service, and that she could not, during her leisure time, perform at other theatres. "The court took the broad ground that equity will not interfere to prevent the violation of such contracts, except where the services are special, unique, and extraordinary.

In *Strobridge Lith. Co.* v. *Crane* (1890) 58 Hun. 611 (memo.) 35 N.Y. S.R. 473, 12 N.Y. Supp. 898, the sole reason assigned for refusing an injunction was, that the services were not special or unique (lithographic sketches).

In *Kessler* v. *Chappelle* (1902) 77 N.Y. Supp. 285, 73 App. Div. 447, the court proceeded upon the ground that, where the services are not of that character, the practical impossibility of determining the damages which will result from a breach of the contract does not of itself constitute a sufficient ground for the interference of equity. The court refused to enjoin the breach of a negative stipulation by a salesman in the employ of agents for a French firm of winemakers, the evidence being that the plaintiffs employed a large number of other persons to perform similar duties.

In the headnote written by the court for *Burney* v. *Ryle* (1893) 91 Ga. 701, it is explicitly laid down that, "unless personal services are individual and peculiar because of their special merit or unique character, a negative covenant (even when express), not to render them to others than the plaintiff, will not be enforced by injunction in order that the plaintiff may have the incidental benefit of an affirmative covenant to serve him exclusively for a specified time."

In *Edwards* v. *Fitzgerald* (N.Y. Sup. Ct. 1895) 9 Nat, Corp. Rep. 455, a dancer of exceptional talent was enjoined from performing for other employers, although her contract did not embrace a negative stipulation. Barrett, J., took the position, that "an agreement to play for a season, or for a tour, with a particular manager imports exclusive service," and consequently an implied negative covenant. In support of this doctrine he cited *Montague* v. *Flockton*, being apparently not aware that this case has been overruled in England. See § 8, *ante*.

C. B. LABATT.

LONG ADDRESSES AT THE BAR IN ROME.

We are apt sometimes to regard the weakness for lengthy addresses at the Bar as an indication of modern deterioration; but if the pages of history are searched, it can be ascertained that, even contemporaneously with the most brilliant forensic orators of Rome, many members of the Bar prided themselves upon the length of their speeches. In the time of Cicero the duration of counsel's speeches was left to the discretion of the judge. Pompey framed a regulation that the accused should be

entitled to engage the Court in criminal matters for a period half as long again as that taken by the accuser. A water-clock was utilized by the Court (clepsydra) for the purpose of measuring time, and if the judge, in the exercise of his discretion, gave a hearing beyond that prescribed he was said dare aquam—to give water.

An amusing instance of "giving water" occurred when Julius Gallicus, a Roman advocate, was pleading before the Emperor Claudius. Having given offence to the Emperor, he was ordered to be thrown into the Tiber; but whether the Imperial irritation was due to undue verbosity or not, history does not, apparently relate. Regulus was a great offender with wearisome orations, and Quintilian tells us that many advocates were proud of their lengthy addresses. Pliny on many occasions spoke at great length. In opening the case at the trial of Marcus Priscus, before the Senate, he spoke for five hours. There are, however, among the profession to-day those who would in point of time have "given him points" on this occasion; but as the worst offenders in this respect are the most intolerant of an identical weakness in others, there are, I think, few who would have been prepared to exercise the patience he displayed when fulfilling the functions of judge himself. "As for myself," said he (Pliny, Ep. vi, 2), "whenever I sit upon the Bench—which in much oftener than I appear at the Bar—I always give the advocates as much water as they require; for I look upon it as the height of presumption to pretend to guess, before a cause is heard, what time it would require, and to set limits to an affair before one is acquainted with its extent, especially as the first and most sacred duty of a judge is patience, which, indeed, is itself a very considerable part of justice. But the advocate will say many things that are useless. Granted. Yet, is it not better to hear too much than not to hear enough? Besides, how can you know that the things are useless till you have heard them? What a model!

—*South African Law Review.*

REVIEW OF CURRENT ENGLISH CASES.

APPEAL TO KING IN COUNCIL—OMISSION OF APPELLANT TO MOVE FOR NEW TRIAL WITHIN TIME PRESCRIBED BY COLONIAL ACT—CONTRACT—CONSTRUCTION.

Emery Co. v. *Wells* (1906) A.C. 515 was an appeal from the Supreme Court of Honduras in which the Judicial Committee of the Privy Council (Lord Davey and Sir A. Wilson and Sir A. Wills), hold that where the appellant had failed to move for a new trial within the time prescribed by the statute of Honduras the Judicial Committee had no power to relax or dispense with the provisions of such statute. Consequently no grounds were open to the appellant in such a case except whether or not, upon the facts as found, the judgment entered was right. The Judicial Committee also held that where a case turns upon the proper construction of a written document a judge is justified in deciding that himself and not submitting it to a jury.

PRACTICE—APPEAL—TIME FOR APPEALING ALLOWED TO EXPIRE OWING TO MISTAKE OF COUNSEL—LEAVE TO APPEAL—DISCRETION OF COURT.

In re Coles and Ravenshear (1907) 1 K.B. 1. An order had been made by a Divisional Court setting aside an award. At the time the order was made the counsel for the unsuccessful party expressed the opinion that the order was final, and that therefore his client would have three months to appeal; relying on this opinion the solicitor omitted to give notice of appeal until after the lapse of fourteen days, within which time the appeal should have been brought, the order not being made in an action, a fact which had been overlooked, an application was therefore made to extend the time for appealing, but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) refused the application, considering themselves bound by the cases of *Re Helsby* (1894) 1 Q.B. 742, and *International Financial Society* v. *Moscow Gas Co.* (1877) 7 Ch. D. 241. We may observe that a more liberal rule prevails in the Ontario Divisional Courts. And in this case the Master of the Rolls said: "If the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended."

LANDLORD AND TENANT—COVENANT TO PAY RENT IN ADVANCE—ANTECEDENT AGREEMENT TO TAKE BILL FOR RENT—CONTRACT—VARIATION OF CONTRACT—EVIDENCE—COLLATERAL AGREEMENT.

In *Henderson* v. *Arthur* (1907) 1 K.B. 10 the plaintiff, a landlord, sued upon a covenant in the lease for the payment of rent, and the defendant set up that by a parol agreement made with the plaintiff before the execution of the lease the plaintiff agreed that he would accept a bill of exchange payable at three months for the rent as it became due. Lord Alverstone, C.J., who tried the case admitted evidence of this agreement and gave judgment for the defendant; but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) overruled his decision, and held that the evidence was clearly inadmissible as violating the first principles of the law of evidence, because it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject matter. That the agreement could not be regarded as an independent collateral agreement because it purported to provide in another, and contradictory manner, what was subsequently provided for in the lease. The Court also holds that a covenant to pay means to pay in cash, unless otherwise expressed.

CRIMINAL OFFENCE—AIDING AND ABETTING—SUMMARY JURISDICTION ACT (1848) 11 & 12 VICT. C. 43), S. 5—AIDER AND ABETTOR CONVICTED AS PRINCIPAL—(CR. CODE, S. 61 (B) (C)).

Du Cros v. *Lambourne* (1907) 1 K.B. 40 was an appeal from a conviction for driving a motor car at an unlawful speed. The evidence was that the appellant owned the car and was sitting in the front seat with a lady, who was driving it, and that it was going at the rate of fifty miles an hour, which was dangerous to the public. The Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.) held that the conviction was right and that the appellant was aiding and abetting the offence, and as such might properly be convicted as himself doing the unlawful act complained of, and that it was not necessary to charge him expressly with aiding and abetting.

LOTTERY—KEEPING A PLACE FOR A LOTTERY—USE ON ONE OCCASION ONLY—GAMING ACT, 1802 (42 GEO. 3, C. 119) S. 2.

Martin v. *Benjamin* (1907) 1 K.B. 64 was a case stated by a

magistrate. The appellant laid an information against the respondents charging that they did keep a certain place, to wit, the temporary reading room of the Furnishing Trades Exhibition, holden at the Royal Agricultural Hall, for the purpose of exercising therein a lottery. The evidence shewed that the respondents were concerned in carrying on an exhibition in aid of the Furniture Trades Provident and Benevolent Association, and that a ticket was sold by one of them to the appellant, for a lottery which was subsequently held in one of the rooms of the building in which the exhibition was held. The magistrate doubted whether the mere use of the room for a few minutes on one occasion for the purpose of a draw for various articles was keeping an office or place for the purpose of exercising therein a lottery within the meaning of 42 Geo. III. c. 119, s. 2. The question whether the particular transaction was in fact "a lottery" was not argued. The Divisional Court (Ridley and Darling, JJ.) were of the opinion that though possibly an offence might have been committed of selling lottery tickets under 4 Geo. IV. c. 60, s. 41, or of keeping a lottery under 10 & 11 Wm. III. c. 17, s. 2, yet that the use of the room once only did not constitute the offence of keeping an office or place within the 42 Geo. III. c. 119, s. 2, and that the magistrate was right in refusing to convict.

PRACTICE—PAYMENT INTO COURT WITH DENIAL OF LIABILITY—RECOVERY FOR LESS THAN PAID IN—COSTS—PAYMENT OUT OF MONEYS PAID IN BY DEFENDANT, OF AMOUNT RECOVERED.

In *Powell* v. *Vickers* (1907) 1 K.B. 71 the plaintiff sued for unliquidated damages, and the defendants denied liability, but paid into Court £2,500, a reference was ordered with the result that the plaintiff recovered an award for £2,265 8s. 6d., he then applied for judgment, and a master ordered that judgment be entered for the defendants in pursuance of the award, and for their costs of action, reference and award, and for plaintiff for the costs of the issues decided in his favour by the award, and he ordered the money in Court to abide further order. This order was affirmed by Bucknill, J., and the plaintiff appealed, contending that the defendant's right to the general costs of the action, was subject to the right of the plaintiff to the costs of the action up to the payment in of the money; and also that the order should have ordered the amount actually recovered by the plaintiff to be paid out of Court to him, and on both grounds the Court of Appeal (Collins, M.R., and Far-

well, L.J.) allowed the appeal. As to the question of payment out, the Court held that there was a discretion, but primâ facie the plaintiff was entitled to payment out of sufficient to satisfy his claim, and that the onus was on the defendants to give some good reason why that money should remain in Court, and this they had not done.

HIGHWAY—MINE UNDER HIGHWAY—SUBSIDENCE OF HIGHWAY CAUSED BY MINE OWNER—REPAIR OF HIGHWAY—MEASURE OF DAMAGES.

Wednesbury v. *The Lodge Holes Colliery* (1907) 1 K.B. 78 was an action by a municipal authority to recover damages by reason of the defendants having caused a subsidence of a highway vested in the plaintiffs and which they were under a statutory obligation to keep in repair. The subsidence had been caused by the working of a mine beneath the highway. The plaintiffs in repairing the road had restored it to its former level. The defendants contended that the repairs were unnecessarily extensive, and that it would have sufficed at much less expense for plaintiffs to have made the road reasonably commodious for the public; but it appearing that the restoration of the road to its former level had been bonâ fide made, and there being no evidence that the plaintiffs had acted unreasonably the Court of Appeal (Collins, M.R., Cozens-Hardy and Farwell, L.JJ.) held, overruling Jelf, J., that the plaintiffs were not restricted to merely making the road commodious for the public, but were entitled, as against wrongdoers, to restore it to its former condition.

PRACTICE—JOINDER OF CAUSES OF ACTION—ACTION OF TORT—JOINT TORT—ALTERNATIVE CLAIM OF SEPARATE TORTS—COSTS.

Bullock v. *London General Omnibus Co.* (1907) 1 K.B. 246 was an action brought by the plaintiff against two companies. The statement of claim alleged that the plaintiff had suffered personal injuries by the joint negligence of both companies and alternatively that she had suffered such injuries by the separate negligence of each company. In the result the plaintiff recovered judgment against one company and the action was dismissed with costs as against the other. The plaintiff asked that the costs payable by her to the successful defendants should be

added to her own costs and ordered to be paid by the unsuccessful defendant, and Bray, J., who tried the action so ordered, and on appeal the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.), held that the order was right, and after trial it was too late to object that there had been a misjoinder of parties, and that the joinder of the defendants in this case was proper under the Rules as amended after the case of *Smurthwaite* v. *Harmay* (1894), A.C. 494, the Rules as amended including cases of tort as well as of contract.

CHARGING ORDER FOR COSTS ON PROPERTY PRESERVED—SOLICITORS ACT, 1860 (23 & 24 VICT. C. 127) S. 28—ONT. RULE 1129—CHARGE ON SHIP GRANTED EX PARTE.

The Birnam Wood (1907) P. 1 was an action in rem against a ship to recover wages and disbursements, in which the plaintiff was partially successful, and after the release of the ship from arrest, and after its transfer to a limited company, the solicitors of the original owners, who were defendants, applied ex parte, and obtained a charging order for their costs under the Solicitors Act, 1860, s. 28 (Ont. Rule 1129), and, for the enforcement of it, they subsequently obtained, on notice to certain mortgagees of the ship, the appointment of a receiver of freight, and conditionally, an order for sale. Both orders were subsequently set aside on the application of the mortgagees of which application the limited company were notified. The solicitors admitted the orders were properly set aside as against the mortgagees, but appealed so far as they were also set aside as against the owners, the limited company, but on the appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) held that the charging order, and subsequent order, were both wrong in substance and in form, because (1) the charging order was granted ex parte; (2) after the vessel had ceased to be under the control of the Court; (3) against the whole vessel whereas the clients had, at best, only a partial interest therein; (4) that knowledge of the solicitors' claim could not be imputed to the company who were therefore bonâ fide purchasers without notice; (5) the jurisdiction to grant charging orders is discretional and the judge had improperly exercised his discretion.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [Dec. 11, 1906.

HAMILTON BRASS MFG. CO. *v.* BARR CASH & PACKAGE CARRIER CO.

Account—Statute of Limitations—Agents or partners—Reference.

By agreement between them, the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture, net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

Held, reversing the judgment of the Court of Appeal, Girouard and Davies, JJ., dissenting, that the accounts should be taken for the six years preceding the action only.

On a reference to the master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

Appeal allowed with costs.

Lynch-Staunton, K.C., for appellants. *Gamble* and *Dunn*, for respondents.

N. S.] WOOD *v.* ROCKWELL [Dec. 15, 1906.

Jury trial—Judge's charge—Practical withdrawal of case—Evidence—New trial.

On trial of an action against a surety the defence was that he had been discharged by the plaintiff's dealings with his prin-

cipal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability, they could find for defendant he knew of no such evidence and it was not to be found in the case.

Held, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial.

Roscoe, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Ex.] [Dec. 26, 1906.

ST. JOHN PILOT COMMISSIONERS *v.* CUMBERLAND RY. & COAL CO.

Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coalbarges towed—R.S.C. c. 80, ss. 58, 59.

Coal barges towed by steamers or tugs between the ports of Parsboro, N.S., and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships.

Judgment appealed from, 37 N.B. Rep. 436, affirmed.

McAlpine, K.C., and *Coster*, K.C., for appellants. *McLean*, K. C., for respondents.

N. S.] [Dec. 26, 1906.

UNION BANK OF HALIFAX *v.* SPINNEY.

Banks—Security of goods—Sale by assignor—Bank's right to proceeds.

C. obtaining advances from a bank to enable him to pay for goods to be used in manufacture, assigned such goods to the bank under s. 74 of the Bank Act, 1890. A cargo having arrived, when the bank notified C. that further advances would be refused, he induced the manager by promise of customer's paper as collateral to give him the sum necessary to pay for it, and immediately after went to S. who had indorsed for him and was liable on a note for $2,800 and gave him a statement of his affairs and agreed to hand him the notes he would receive on selling the

goods, which he did, and S. collected said notes. The bank sued for the amount so collected.

Held, that S. had knowledge, or it would in law be imputed to him, of the bank's claim, and they could recover. Appeal allowed with costs.

Harris, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Jan. 21.

MONARCH LIFE ASSURANCE CO. *v.* BROPHY.

Company—Provisional directors—Powers of—Ultra vires.

Appeal from the judgment of ANGLIN, J. By the Act incorporating the plaintiff company certain persons were declared to be provisional directors of the company, who, it was enacted, "may forthwith open stock books, procure subscriptions of stock for the undertaking, make calls on the stock subscribed and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received on account of stock subscribed or otherwise received by them on account of the company, and may do generally what is necessary to organize the company."

Held, that while it was doubtless within the power of the provisional directors to accept applications for shares and receive payments on account, they had no right to enter into a arrangement or agreement by which, in order to induce a person to subscribe for shares, they were to advance out of the funds of the company to the intending subscriber moneys required to enable him to make payments on the shares; and consequently a contract containing provisions of that nature could not be enforced by the company.

Wilson, K.C., for plaintiffs. *Masten*, for defendant.

Full Court.] STEPHENS *v.* TORONTO RY. CO. [Feb. 5.

Costs—Scale of—Payment of money into Court with defence—Acceptance in satisfaction—Amount within jurisdiction of inferior Court.

Where money is paid into Court by defendant with his de-

fence, and taken out by plaintiff in satisfaction of all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court. Construction of Con. Rules 425, 1132, 1133.

Babcock v. *Standish* (1900) 19 P.R. 195, and *McSheffrey* v. *Lanagan* (1887) 20 L.R. Ir. 528, approved.

Order of a Divisional Court affirmed.

D.L. McCarthy, for defendants, appellants. *Parmenter*, for plaintiff, respondent.

HIGH COURT OF JUSTICE.

Magee, J.—Trial.] CARTER *v.* HUNTER. [Jan. 23.

Tax sale—Invalidity—Lands not in list of lands liable to sale—Vague description—Non-compliance with Act—Lien for purchase money—Lien for subsequent taxes—Interest—Rents and profits—Improvements.

A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 2 in block B. on the east side of Gladstone Avenue on plan 396, in the City of Toronto, for the arrears of taxes thereon for the years 1893 to 1898, inclusive, were set aside, for the direct breach of sec. 176 of the Assessment Act, R.S.O. 1897, c. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January, or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under sec. 152; and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act; See secs. 13, 29, 34.

The assessments being invalid, the defendant was not entitled to a lien under sec. 218 for the amount of purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessment for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc.

Fenton v. *McWain* (1877) 41 U.C.R. 239, and *Wildman* v. *Tait* (1900-1) 32 O.R. 274, 2 O.L.R. 307, followed.

Worrell, K.C., and *Gwynne*, for plaintiff. *St. John* and *Chisholm*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 22, 1906.

HALIFAX HOTEL CO. *v.* CANADIAN FIRE ENGINE CO.

Principal and agent—Application of O. 47, r. 6—Words "doing business."

Defendant company through the firm of A. Bros., negotiated with the City of Halifax for the sale to the city of a fire engine, and ultimately entered into a contract with the city for that purpose. The business carried on by defendant through the firm of A. Bros. appeared to have been confined to this one transaction, the agent being employed for that purpose alone and so far as the evidence went no further or other business was contemplated.

Held, that this did not constitute "doing business" within the province so as to bring defendant within the provisions of O. 47, r. 6, enabling proceedings to be taken against the company as in case of absent or absconding debtors.

O'Connor and *Terrell*, for appellants. *Mellish*, K.C., for respondent.

Full Court.] [Dec. 22, 1906.

COURTNEY *v.* PROVINCIAL EXHIBITION COMMISSION.

Contract to construct track—Plans and specifications—Deviation—Engineer made sole judge—Authority—Placing stakes—Word "location"—Findings set aside.

M. & S. contracted with defendants for the construction of a half mile track on the Provincial Exhibition Grounds at Halifax under the contract. Under the terms of the contract, of

which certain plans and specifications were made a part, the track was to be located as nearly as possible on the lines shewn on the plan and the exact location was to be staked out by the engineer or his assistant.

Held, that the word "location" referred only to the horizontal location of the track and had no reference to the grading or sub-grades.

It was required by the specifications that the track should be finished to the required grades in every particular and that the decision of the engineer on any matter connected with the grading or lines should be final. Also that no deviation should be allowed from the plans and specifications unless directed by the engineer in writing.

Held, 1. The construction of the track a foot lower than as shewn in the plans was a deviation, and that the placing of stakes by the engineer or his assistant, assuming it to have been done, was not equivalent to written instructions making a change in the terms of the contract.

2. The height and width of the track, grades, etc., being fixed by the plans and specifications and the only duty of the engineer being to see that the contractors built accordingly the finding of the jury that the contractors were misled by stakes placed by the engineer or his assistant was irrelevant.

3. The engineer being the sole judge as to whether the contract was completed to his satisfaction or not, a finding of the jury that it was "practically completed" was irrelevant and must be set aside.

4. It was not an acceptance of the work for defendants to take possession under a provision of the contract enabling them to do so in the event of the contract not being completed within the time specified.

H. Mellish, K.C., for appellants, defendants. *W. B. A. Ritchie,* K.C., and *W. F. O'Connor,* for respondent.

Full Court.] [Dec. 22, 1906.

THOMPSON *v.* CAMERON.

Sale of goods—Implied warranty as to quality—Damages.

A cash register ordered by defendant from plaintiff was found on delivery not to contain a device which defendant had regarded as essential in ordering it and to be defective and un-

reliable in its operation. Defendant wrote a letter to plaintiff's agent the day after the machine was received informing him that the article delivered was not the one ordered and was not in a workable condition and in a letter written some days later he requested the agent to remove the register from his shop and notified him that he would not accept another machine in performance of the contract. The machine was not removed as requested by defendant but remained on the counter of his shop from the time of delivery in December, 1904, until March, 1906, during which time it was in use as a cash box or money drawer but not as a cash register.

Held, that defendant could not use the machine as shewn by the evidence and at the same time claim the right to reject it as not fulfilling the contract, but that as plaintiff's contract was broken he could only recover the actual value of the article sold and that as there was no data for assessing the value of the machine there must be a new trial for that purpose.

W. F. O'Connor, for appellant. *G. H. Parsons*, for respondent.

Full Court.] [Dec. 22, 1906.

OGILVIE v. GRANT.

Deed—Description—Agreement for division of land—Ineffective to pass title—Conventional line.

Plaintiff claimed land in dispute under a deed from P.O. of one full half or moiety of the farm lot on which he resided and also one full half or moiety of all the woods, etc., thereunto in anywise belonging or appertaining. The land in dispute was a wood lot situated about two miles from the farm lot and separated from it by the lands of other properties and upon which P.O. was shewn to have got wood and lumber from time to time but as to which there was no general user as part and parcel of the farm, there being another wood lot connected with the farm which was generally used for that purpose.

Held, that in order to pass under the words used the land claimed must be an integral part of the farm itself.

There being ambiguity in this case as to what was included in the words "farm lot" and as to what was appurtenant thereto.

Held, 1. There was no objection to evidence of user to enable the Court to interpret the language used, but that the trial judge

erred in allowing evidence to be given of declarations made by the grantor as to what he meant to convey or thought he had conveyed.

2. Plaintiff having no title to the lot in dispute an agreement made between him and a grantee under P.O. for the division of the lot was ineffective to pass title and the doctrine of conventional agreement for the settlement of questions of disputed boundary had no application.

3. In the absence of evidence of twenty years' continuous and exclusive enjoyment by plaintiff occasional acts of cutting could only be regarded as acts of trespass or, at the highest, as having been done by permission of the owners.

W. B. A. Ritchie, K.C., for appellants. *F. H. Bell* and *R. T. Macilreith*, for respondent.

Longley, J.] [Dec. 24, 1906.

R. *v.* DONOVAN.

Canada Temperance Act—Conviction for violation—Application for habeas corpus refused—Warrant of conviction.

The refusal of the justice before whom a person is convicted of an offence against the Canada Temperance Act to allow inspection of certain documents is not of itself ground for discharge under habeas corpus in the case of a legal conviction and a good warrant. Where in the minute of conviction given to defendant the costs are stated to be $6.00 and in the warrant of commitment the amount is placed at $5.50 (the correct amount) this is not such a variance as would vitiate a legal conviction or justify release under habeas corpus.

Where the papers shewed that on Nov. 27 1906, defendant was convicted of an offence committed on the 25th,

Held, well within the three months' limit fixed by the Act and that it was not essential to shew on the face of the warrant the date of the information.

It was admitted that the warrant of conviction was regular, but it was claimed that the punishment awarded in the conviction (a fine of $50 and costs and in default to be imprisoned for two months), was capable of being read as in the alternative.

Held, under the authority of *The Queen* v. *Van Tassel*, 34 N.S.R. that the warrant was the essential paper and as the con-

viction could be read consistently with the warrant of commitment the application for the prisoner's discharge must be refused.

W. B. A. Ritchie, K.C., for application. *W. F. O'Connor*, contra.

Longley, J.] [Dec. 27, 1906.

SMITH *v.* BOUTILIER.

Trespass by cattle—Failure to maintain lawful fence.

Plaintiff claimed damages for injuries done to her field and garden by defendant's cattle trespassing thereon. Plaintiff's land was situated on a road along which cattle were sent to a common used by the proprietors of other lots as a general pasture lot. The district was not a closed one under the statute and the lands on the road were fenced against cattle. The defendant's cattle entered plaintiff's land through a gate the fastening of which was defective and permitted the gate to open at a slight touch.

Held, that under the facts stated the gate did not fulfil the conditions of a lawful fence and that plaintiff could not recover.

J. L. Barnhill, for plaintiff. *J. B. Kenny*, for defendant.

Longley, J.] [Dec. 27, 1906.

CHISHOLM *v.* CHISHOLM.

Parent and child—Contract for transfer of custody—Illegality.

Plaintiff sought to recover a sum of money from defendant under a contract in writing the basis of which was that plaintiff should consent to defendant being appointed guardian of plaintiff's child. Plaintiff gave the consent required and the appointment was made. Defendant paid the amount agreed for a time and then declined to pay further, whereupon the action was brought.

Held, that the contract being one based solely on the transfer of the custody and care of the child from plaintiff, the mother, to defendant, the guardian, was contrary to law and in the absence of other consideration plaintiff could not recover.

H. B. Stairs, for plaintiff. *Drysdale*, K.C., A.-G., and *H. McInnes*, for defendant.

Townshend, J., Graham, E.J., Longley, J.] [Jan. 26.

FRASER *v.* WATTERS.

Canada Temperance Act—Seizure of liquors—Costs—Judge's discretion.

Defendants under a search warrant against S. under the Canada Temperance Act seized a quantity of liquors which were found in a locked room in the hotel of which S. was proprietor. S. had shortly before been fined under the Act for keeping liquors for sale. There was uncontradicted evidence of both plaintiff and S. that the liquors seized were the property of plaintiff and not of S., having been sold by S. to plaintiff and paid by him partly in cash and partly by an account against S. The trial judge accepted this evidence as true, and gave judgment in plaintiff's favour, but deprived him of costs, assigning as his reason for so doing an inference that the liquors were intended to be used and were used in violation of the Act.

Held, that the circumstances justified him in so doing and that his discretion should not be interfered with.

Per TOWNSHEND, J., dissenting, that the trial judge having felt compelled to accept plaintiff's testimony as true, and having no evidence before him to warrant him in deciding adversely to plaintiff was bound to give him his full legal rights.

J. U. Ross and *J. J. Power,* for plaintiff, appellant. *W. F. O'Connor* and *H. S. McKay,* for defendants, respondents.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., Russell, J.] [Jan. 26.

THE KING *v.* LOVETT.

Bank Act—Indictment for making false and deceptive returns—Non-direction.

The defendant as president of the Bank of Yarmouth was indicted and tried for having wilfully made a false and deceptive return to the Government respecting the affairs of the bank. On the trial other returns made both before and after that in respect to which the indictment was laid were received in evidence without the jury having been cautioned that they were not to be influenced by such other returns in coming to a conclusion on the main issue respecting the offence charged.

Held, per TOWNSHEND, J., and GRAHAM, E.J., that there must be a new trial on this ground.

Per WEATHERBE, C.J., and MEAGHER, J., on the facts, that there was no evidence of guilty knowledge and that the case should have been withdrawn from the jury.

Per RUSSELL, J. (who concurred that there was no evidence to warrant a conviction), that there were matters as to which it was open to the jury to draw a conclusion and that the case therefore was one which could not be withdrawn from them.

Attorney-General and *T. R. Robertson*, for Crown. *Pelton*, K.C., and *E. H. Armstrong*, for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] MOORE *v.* SCOTT [Dec. 17, 1906.

Promissory note—Holder in due course—Bills of Exchange Act, 1890, *s.* 29—*Rescission of contract—Plea of fraud—Amendment asking for rescission—Restitutio in integrum.*

Plaintiff sued as indorsee of a promissory note which was one of several notes signed by the defendants for the purchase price of a stallion sold to them by the agent of McLaughlin Bros. The note was dated October 27, 1902, and was payable Dec. 1, 1904, "with interest at seven per cent. per annum, payable annually." The plaintiff did not become the holder of the note until October, 1904, and he then knew that the defendants had not paid the interest that fell due in October, 1903.

Held, that plaintiff was not a holder of the note in due course as defined by s. 29 of the Bills of Exchange Act, 1890, as it had been dishonoured by the non-payment of the instalment of interest and plaintiff had notice of that, and that the defences of fraud and misrepresentation on the part of McLaughlin Bros. set up by the defendants were available to them as against the plaintiff in this action. *Jennings* v. *Napanee Co.*, 4 C.L.J. 595, followed.

The trial judge found as a fact that a gross fraud had been perpetrated upon the defendants by McLaughlin Bros. in selling

them for $3,500 a horse thirteen years old under false representation that it was a pedigreed animal only six years old. The horse actually delivered was of little value, had attacks of illness from time to time and finally died in September, 1904. As early as the spring of 1903, defendants had reason to suspect that the horse was an old one and that they had been defrauded; but, according to the finding of fact, they did not know it for certain until after the death of the horse.

Held, 1. Defendants were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action. *Morrison* v. *Universal Ins. Co.*, L.R. 8 Ex. 204, followed.

2. Defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part. *Head* v. *Tattersall*, L.R. 7 Ex. 9, followed.

3. The plea of fraud in this case was defective, as it did not allege that, upon discovering the fraud the defendants rescinded the contract and restored the horse, or—in this case—that, before discovery of the fraud, the horse had died from natural disease without the defendants' fault and that restitution had therefore become impossible, but that the defendants should be allowed to amend their pleading in this respect, as the whole question of rescission and restitution had been fully gone into in the evidence.

Wilson and *J. F. Fisher*, for plaintiff. *Andrews* and *Burbidge*, for defendants.

Macdonald, J.] [Dec. 19, 1906.

PATTON *v.* PIONEER NAVIGATION CO.

Injunction—Riparian proprietor—Extracting sand from bed of river.

Motion to continue an interlocutory injunction restraining the defendants from taking sand out of the bed of the Assiniboine River, opposite plaintiff's property. Plaintiff's affidavits shewed that the removal of the sand was causing a subsidence of the river bank, and if allowed to continue would in no long time cause a large part of the bank to fall into the river to the irreparable damage of the plaintiff's property. Besides denying that the alleged subsidence had been caused by the dredging

operations of the defendants, they filed affidavits to shew the benefit derived by the public from the use of the river sand and the loss to contractors and the public if it could not be procured.

Held, that inconvenience to the public cannot be set up as against private rights and that, as plaintiff had made out a fair primâ facie case, he was entitled to a continuance of the injunction.

Aikins, K.C., and *Blackwood*, for plaintiff. *Hillyard Leech* and *O'Connor*, for defendants.

Macdonald, J.] [Dec. 19, 1906.

WICHER *v.* CANADIAN PACIFIC RY. CO.

Railway company—Lands entered upon by company before expropriation proceedings taken.

The statement of claim alleged that the defendants by their servants, agents and workmen wrongfully and unlawfully entered upon the plaintiff's land and laid down a line of railway over it without any notice to or the permission of the plaintiff. Defendants claimed that, having filed a plan, profile and book of reference as required by the Railway Act, 1903, shewing that the land in question was taken by them for the railway, the plaintiff's remedy was limited to an arbitration to determine the compensation to be paid, and moved to dismiss the action on that ground. Defendants had not served any notice on the plaintiff in pursuance of sec. 54 of the Act, or taken any further steps for expropriation of the land required from the plaintiff.

Held, that defendants were mere trespassers, that the plaintiff was not limited to the remedy provided by the Act, and that the motion should be dismissed with costs.

Elliott, for plaintiff. *Blackwood*, for defendants.

Mathers, J.] FRASER *v.* DOUGLAS. [Dec. 22, 1906.

Guaranty—Offer and acceptance—Right of guarantor to recover from debtor the amount paid to creditor under guaranty.

This was an action to recover money paid by plaintiff upon a guaranty given by him at defendant's request for the price of a quantity of goods ordered by defendant from G. and Co., of Mon-

treal, for whom the plaintiff was western agent. G. and Co. at first refused to fill the order unless the plaintiff would guarantee the account for his ordinary commission. After considerable delay and correspondence G. and Co. wrote plaintiff that they would allow 2½% extra commission for his guarantee, to which plaintiff replied that he would guarantee the account for that season only. G. and Co. then shipped the goods to defendant, but did not notify plaintiff that they had done so until about four months afterwards.

The main defence was that plaintiff was not bound by his guaranty, as he had not received notice of acceptance of it until after the defendant got into financial difficulties, and that, therefore, his payment of the amount was merely voluntary and he could not recover from defendant: *Sleigh* v. *Sleigh*, 5 Ex. 574.

Held, that this case was different from those in which the offer of a guaranty emanated from the guarantor, and the person to whom it was made acted upon it without notifying the guarantor that he was doing so, for here there was an offer by G. and Co. to fill the order if the plaintiff would guarantee payment and an acceptance of that offer by the plaintiff; that such offer and acceptance constituted a binding contract between G. and Co. and the plaintiff, and no further notice to the plaintiff was necessary, and that plaintiff did not pay as a volunteer, but was legally bound to do so, and was therefore entitled to recover from defendant.

Brandt on Suretyship, para. 213, and *Nelson* v. *Shrene*, 68 S.W.R. 376, followed.

Another objection was that plaintiff was not bound by his guaranty because it was limited to "this season only," whereas a note for the amount was taken from defendant at four months, which would carry the time beyond that season; but this objection was overruled because the evidence shewed that the plaintiff had himself agreed to the terms of the sale which were "four months or 5% off 30 days."

Daly, K.C., and *Crichton*, for plaintiff. *Pitblado*, K.C., and *McKerchar*. for defendant.

Mathers, J.] [Jan. 15.

GRIFFITHS *v.* WINNIPEG ELECTRIC RY. CO.

Jury trial—Action for damages for consequences of negligence—Loss of limb—King's Bench Act, R.S.M. 1902, *c.* 40, *s.* 59.

Application under sec. 59 of the King's Bench Act to have

this action tried by a jury granted in the exercise of judicial discretion for the following reasons: —

1. The plaintiff lost an arm in consequence of being run over by a car of the defendants and a jury would be more likely to assess the proper damages in such case than a judge, if defendants should be found liable.

Woollacott v. *Winnipeg Electric, etc., Co.*, 10 M.R. 482, discussed and distinguished.

2. The principal issues to be tried were issues of fact, viz., whether the car was going at excessive speed, whether the gong was rung and whether the car should have had a fender in front of it or not; plaintiff alleging and defendants denying negligence in all these respects.

Cardinal v. *Cardinal*, 25 Ch. D. at p. 777; *Case* v. *Laird*, 8 M.R. at p. 463, and *Sheppard* v. *Gilmore*, 34 Ch. D. 179, followed.

Manahan, for plaintiff. *Laird*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court] [Dec. 21, 1906.

ESQUIMALT WATER WORKS COMPANY *v.* THE CORPORATION OF THE CITY OF VICTORIA.

Watercourses—Prior rights—English law relating to riparian rights—Introduction of into British Columbia—Appropriation of waters—Authorization of user of water by records or grants—Statutes, construction of.

By s. 9 of the plaintiff company's charter of 1885, they were empowered to survey, set out and ascertain such parts of the land within a prescribed area as they might require for the purposes of their undertaking, to divert and appropriate the waters of Thetis Lake and Deadman's River and its tributaries as they should judge suitable and proper, and to acquire any interests in the said lands or waters, viz.: Thetis Lake and Deadman's River, or any privileges that might be required for the purposes of the company. By s. 10 of the same Act, "The lands, privi-

leges and waters which shall be ascertained, set out, or appropriated by the company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the company."

By an amending Act of 1892, passed April 23, 1892, the provisions of the principal Act as to appropriation and diversion (but not vesting) were extended so as to embrace Goldstream River and its tributaries, except that there is no vesting clause similar to that contained in said s. 10. It is also provided that the power to divert and appropriate water from this river and its tributaries is to be subject "to any grant of rights, privileges or powers arising under the provisions of the corporation of Victoria Water Works Act, 1873"; and by s. 9, that nothing in the Act is to be construed as in any way limiting or derogating from any grant or privilege accorded to the city under the provisions of the said Act. By s. 10 it is stated that the powers as to Goldstream are conferred only on the condition that the company will supply, on terms which are specified, a maximum quantity of 5,000,000 gallons per diem to the city if so required.

The company in 1892 commenced operations on Goldstream River by clearing the banks, and building dams for the purpose of making reservoirs, and making other improvements. In 1897 the Water Clauses Consolidation Act was passed, by which all unrecorded and appropriated water and water-power, declared by the Water Privileges Act, 1892, to be vested in the Crown, were brought under one comprehensive code for administrative purposes. Between 1892 and 1898 the company had purchased from various owners the lands along the Goldstream River and contended in the action that it had thus become entitled to the riparian rights of such owners.

Held, that the Water Privileges Act, 1892, vested in the Crown the right to the use of all the water in Goldstream River. The company Act of 1892, merely gave it a right to take what was necessary for its purposes, and by taking possession of the source of the river it could not claim the exclusive use of the water from the source of the river to its mouth. The Water Clauses Consolidation Act, 1897, was intended to control the acquisition and use of waters not appropriated on or before June 1, 1897, and prescribed a method by which the right to use such waters, as well recorded as unrecorded, could be obtained. The Act intended that existing companies should be limited strictly to their corporate powers.

The purchase of lands by the company gave it no greater right than the owners possessed, viz.: a right to the uninter-

rupted, undiminished and unpolluted flow of the water past their lands for the purposes incidental to their ownership. The company purchased those lands solely by virtue of the limited authority given it by its Act of incorporation, and for the purposes only of that Act.

Under the provisions of the Water Clauses Consolidation Act, 1897, the city have a right to the waste or unrecorded waters of Goldstream River, and under the Corporation of Victoria Water Works Act, 1873, they have a right to the compulsory acquisition of the whole of the interests of the company on the said river.

Per HUNTER, C.J., dissentiente:—The Legislature, having regard to the nature of the company's undertaking and the conditions it imposed, when it conferred the right "from time to time, and at all times hereafter," to divert and appropriate the waters of Goldstream, granted an exclusive license subject only to the rights conferred on the city by its Act of 1873, and amending Acts; and that the interest or right having sprung into existence, was not intended to be prejudiced by any subsequent legislation.

Per DUFF, J., at the trial:—The enactments dealing with the introduction into the colonies of British Columbia and Vancouver Island, of the general body of English law, clearly do not amount to a declaration of the non-existence of the law regulating riparian rights in those colonies.

Judgment of Duff, J., reversed.

W. J. Taylor, K.C., and *Bodwell*, K.C., for the corporation, appellants.

Luxton, K.C., *Peters*, K.C., and *R. T. Elliott*, for the company.

Martin, Co. J.] [Jan. 9.

BOW MCLACHLAN & CO. v. SS. CAMOSOIN.

Admiralty law—Rule 63, scope of to include an equitable set-off —Evidence—Trial, balance of convenience.

In an action in the Exchequer Court of Canada (admiralty jurisdiction), for the price of a ship, where the circumstances entitle the defendant to a reduction of the amount claimed, if such claim can be substantiated, the Court will not exclude the proposed set-off.

Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience if in favour of trying any disputes concerning those repairs at the place where the ship is, rather than at the place where she was built.

Bond, for plaintiff. *Davis,* K.C., for defendant.

Irving, J.] ATTORNEY-GENERAL *v.* RUFFNER. [Jan. 9.

*Costs—Action by Attorney-General—Payment of costs by relator or Attorney-General—*18 & 19 *Vict. c.* 90, (*Imp.*), *whether in force in British Columbia.*

In an action by the Attorney-General at the relation of a private individual, the Crown sues as parens patriæ, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs.

The Act, 18 & 19 Vict. c. 90 (Imperial), is not in force in British Columbia, and the machinery by which the Act is to be marked out could not be applied here.

A. D. Taylor, for Attorney-General. *Bloomfield,* for relator. *Peters,* K.C., and *Belyea,* K.C., for defendant Ruffner. *Bodwell,* K.C., for defendant Blunck.

Full Court.] [Jan. 21.

EMPIRE MANUFACTURING CO. *v.* LEVY.

Discovery—Affidavit—Documents not disclosed in—Further affidavit—Marginal rule 237.

In an action on a guarantee, plaintiffs applied for an affidavit of documents which was filed. This, however, not being considered sufficient, application was made for further information.

Held, affirming the order of FORIN, Co. J., IRVING, J., dissenting, that under marginal rule 237 of the County Court Rules, there is discretionary power in the judge to order further discovery if it is deemed that discovery already made is unsatisfactory or insufficient.

Per MARTIN, J.—The order appealed from is supportable to shew, by the production of the ordinary business books of the

firm, who are really its members by disclosing the manner in which they had dealt with each other.

J. A. Macdonald, K.C., for appellants (defendants). *MacNeill*, K.C., for respondents (plaintiffs).

Full Court.] MACCRIMMON *v.* SMITH. [Jan. 21.

Crown lands patent (Dominion)—Reservation of timber—Mortgage by patentee—Subsequent Order in Council rescinding reservation—Rights of mortgagee in timber—Accretion—Estoppel.

The plaintiff MacCrimmon was the owner and the plaintiffs Pelly the mortgagees of a lot in the district of New Westminster under mortgage dated 5th August, 1893, securing the payment of $1,500. The plaintiff MacCrimmon entered into an agreement with the defendants Johnson and Cook, by which the timber on the land was sold to the latter, who in turn sold to defendant Smith. The plaintiffs' mortgagees claimed to be the owners of the land, and that defendants in cutting and removing the timber under the authority of the agreement with the plaintiff mortgagor, were trespassers; and this action was brought for an injunction and damages in respect of the trespasses. The rights of the parties turned upon the question as to whether the property in the timber had passed to the mortgagees. The mortgagor acquired title under a grant from the Dominion of Canada, issued under the authority of R.S.C. ch. 56, relating to lands in the railway belt in British Columbia. Pursuant to secs. 14 and 15 of the Dominion Land Regulations, ch. 100, of the Consolidated Orders in Council, the grant contained a reservation of all merchantable timber. Subsequently, on 3rd July, 1899, an Order in Council was passed by which the reservation established by these sections was rescinded, and it was provided that all persons who had received, etc., prior to the date of the Order in Council, should be entitled to the timber on their homestead free of duties.

At the trial, DUFF, J., came to the conclusion that by the combined effect of secs. 14 and 15 of the Dominion Land Regulations, and the provisions of the Crown grant under which the lands were held, the property in the merchantable timber on the land comprised in the mortgage deed was reserved to the Crown, subject to

the provisions of those sections, and that, therefore, the rule under which the mortgagee gets the benefit of any accretion to the security did not apply.

Held, on appeal, *per* HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting, reversing the decision of DUFF, J., that there was no estate of any kind reserved out of the land itself, but that the expression "merchantable timber" is to be understood in the sense that a lumberman would understand it, *e.g.*, as not including the roots or stumps which would be left in the ordinary course of logging, and therefore that the reservation was nothing more than a reservation of a profit a prendre in gross, which the Crown could have granted over in fee or for any lesser estate either to the owner of the land or to any other person as it saw fit: that the cancellation of the reserve operated either as a release or a grant of the right in gross to the owner of the land, and that from either point of view when this event happened the owner became possessed of both the land and the profit which issued out of it and therefore the profit became extinct and the timber fell into the inheritance, becoming in law what it had always been in fact, part of the land which had been pledged to the mortgagees: *Herlakunden's Case*, 2 Coke's Reports 443; also Leake's Usage and Profit of Land (1888), p. 359. The reserve mentioned in the Crown grant was merely a license to enter and cut, and not a reservation such as that in *Stanley* v. *White* (1881) 14 East. 343.

Reid, for appellants (plaintiffs). *Macdonell*, for respondents (defendants).

Book Reviews.

We have received the first volume of the new series of the Lawyers' Reports, Annotated, a publication which, from its inherent excellence, is taking a leading place in the literature of case law. This excellence consists in the selection of the cases to be reported and noted, in the treatment of this material and in the convenient and systematic way in which the result is laid before the reader. The L.R.A. seem to have succeeded in blending the good points of reports, digests and text books into one series, so as to make as far as possible an all-comprehensive and convenient library of the law. These volumes are in

fact a library of case law covering a careful selection of judgments delivered in the Courts of the United States with some from England and Canada. But it is the aim of the editors that no case shall be reported that does not give judicial form to some new principle of jurisprudence, or apply an old principle to new conditions, or give a valuable discussion on some important point of law.

Every practitioner will at once see what time and brain fog all this will save him, especially in these days when of reported cases there is no end. And here, by the way, is it not time that some effort should be made by those in authority at the more careful selection of cases so that a much less number should go into print. To the benefits already referred to must be added another most important feature, viz., that the editors aim at the complete exhaustion of all the reported decisions in the countries named which can throw light on the subject under discussion. The lawyer who reads the note knows that further search into the great prairie fields of case law is useless, for he has the whole of the law before him in these pages.

Each volume consists of about 1280 pages, of which nearly one-third is notes. This annotated matter represents editorial work of a very high order of merit, and we doubt if in any other set of annotated reports the editorial work is quite up to the standard maintained in the volume before us.

It may be said that this series of reports approaches gradually to a completely analyzed and indexed library of law; being an encyclopedia of principles practically illustrated by cases. By the system adopted this series does not become obsolete, though, of course, requiring extension, but not revision, except so far as subsequent cases are affected by statutory changes, or by the slower drift of judge-made law.

In conclusion the all-important matter of where to find your law is not forgotten. The systematic digests and indices which are supplied, satisfy all needs in this regard. The publishers of this journal, The Canada Law Book Co., are agents for the publishers of these reports and will give further information regarding them.

It would greatly add to the value of this work in Canada if more attention were paid by the editors in their notes to Canadian leading cases, which are quite as instructive as many of those quoted from the United States reports. It would be well also to have a separate index of English and Canadian cases cited in the notes.