where the Courts have already done so: and that even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the Court will hereafter, except so far as it may be found by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance; that, if it be, the Court will tend to restrain acts inconsistent with it, whether there be negative words or not: that if it be not of a kind fit for specific performance, no injunction will be granted, even though negative words may be present."

This seems to be the conclusion of Hallett J., (i.e., that he is bound by existing authorities) in his decision of Marco Productions Ltd. v. Pegolo (1945) 1 KB 111. Here was a contract for personal services. The defendant agreed to act for the plaintiff company for a certain period of fixed terms. The contract contained a negative covenant stating that defendant would not act elsewhere without consent of the plaintiff during the period of engagement. In breach of that covenant the defendant acted in another locality. This was an action by the plaintiffs for an injunction restraining the breach of that covenant. Following Lumley v. Wagner, the injunction was granted, for as Hallett J. said: "The agreement to perform for the plaintiff, and during that time not to perform for anyone else is in effect one contract. The affirmative covenant by the defendant and the negative stipulations on the part to abstain from the commission of any act which will break in upon their affirmative covenant, are covenants which are ancillary and concurrent, and operate with each other."

Professor Stevens has pointed out (*) that there are three strong reasons against the direct enforcement of contracts of service; firstly, the impossibility of continual supervision by the Court; secondly, the invidiousness of keeping persons tied to each other in business relations when the tie has become odious, and thirdly, and chiefly, the undesirability of turning a contract of service into a status of servitude.

However, in Lumley v. Wagner these objections are more apparent than real. For instance, regarding the status of servitude, Miss Wagner might, without in any way contravening the injunction, have obtained other employment, quite outside the singing profession, at a salary which might keep her in ordinary comfort, though not in accordance with her usual standard of luxury.

(*) See 6 Cornell Law Quarterly, 244.

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IN RE WAIT

The dispute in In Re Wait as to whether goods, which were a definite part of a definite whole, should be called specific goods raised a double question. Were they specific or ascertained within the meaning of the Sale of Goods Act Section 52 or did the circumstances of the case create equitable rights such as a lien or assignment of the goods?

There was a contract for delivery by A to B of 1000 tons of Western White Wheat. B entered into a sub-contract with C for 500 tons out of this shipment. B became bankrupt. The trustees in bankruptcy claimed the 1000 ton shipment to pay the creditors.

C claims specific performance of the sub-contract under S 52 of the Sale of Goods Act which permits the granting of specific performance "in any action for breach of a contract to deliver 'specific' or 'ascertained'

goods" or because he had acquired, on receipt of the goods by B and on payment of the purchase price, an equitable assignment.

The majority of the court held that the goods were neither specific nor ascertained at the time of contract and that being the case, no equitable right could have arisen in favour of C.

Sargent L. J. dissented, holding that these goods apart from S 52 were so definite that an equitable assignment of them had been made.

Atkin L. J. took the definition of "specific" goods from the Code as goods identified and agreed upon at the time of the contract of sale and himself defined "ascertained" goods as those identified in accordance with the agreement after the time of sale.

These goods had never been made specific or ascertained according to these definitions since they had been described only as 500 tons out of a cargo of 1,000 tons. No definite allocation of a particular 500 tons had been made to the contract.

With respect to an equitable assignment he held that the code governed a contract. An equitable assignment might arise outside the contract but the normal contract for sale and acts in pursuance of it, without more, is regulated by the Code. An equitable assignment could hardly arise outside the contract unless the goods had been set apart so that they could be identified.

Atkin L. J. bases his judgment on the broad view of commercial needs. Equity grants specific performance primarily when damages are not an adequate remedy. Usually on this principle equity will not grant specific performance of a contract for the sale of goods which are not of any peculiar value. Under the Sale of Goods Act an exception has been made in the case of specific or ascertained goods. In following the underlying equitable principle it would be too great an extension to consider this portion of a shipment of wheat "specific goods."

But Sargent L. J. took a fundamentally different view. He cited Holroyd v. Marshall in which Lord Wetsbury states "that property which was future and unascertainable at the time of making the contract was sufficiently described if it were ascertainable when the contract came to be enforced."

He reasons that these goods are specified sufficiently to create an equitable assignment even if 500 tons have not been specifically earmarked since they are a proportion of a whole in this case, one-half. But his conception is that the 500 tons were specific. He maintains that if the particular 1000 ton cargo had not arrived the contract for the 500 tons could not have been performed and therefore the cargo being a denfiite 500 ton portion of that cargo would be specific.

But it was argued against him that this would be a failure of subject matter, to be dealt with under Taylor v. Caldwell and did not establish the goods as specific in themselves.

The reasoning of the judgment of Atkin L. J. appears more soundly based. One-half of a shipment may seem to be definite but dozens of orders might have been made from the one shipment, in which case much of the definiteness would disappear as between various contractees.