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Enforcement of Affirmative Covenants in Personal Service Contracts by Prohibitory Injunction

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ferred but rather the right to remove them is.³⁹ Since the right to remove was lost by the act of the city, the tenant must be compensated for the interest he would otherwise have had.⁴⁰

Although the tenant is legally and equitably entitled to compensation, a disregard of the distinction between personal and real property would simplify and clarify the problem. Why not regard all condemned property as merely property and not as personalty or realty? Why not settle all disputes in such matters on principles of equity and justice unhampered by such classification and thus remove uncertainty, confusion, and conflict?

PHILIP A. LIMPERT.

ENFORCEMENT OF AFFIRMATIVE COVENANTS IN PERSONAL SERVICE CONTRACTS BY PROHIBITORY INJUNCTION.

Decisions on pleas for injunctions to specifically enforce contracts of personal services are excellent examples of the discretionary power of a court of equity. When these services are unique, special or extraordinary on the part of the defendant, it is plain that the principle on which equity's jurisdiction rests is the same as that which applies to agreements for the purchase of lands, or of chattels having a unique character and value. The damages for the breach of such contracts cannot be estimated with any degree of certainty, and the employer cannot, by means of any compensation, purchase the same services in the labor market.¹ But at first equity refused to enforce any contracts, irrespective of the inadequacy of damages, if they involved a continuing breach. The courts took the position that contracts which required varied and continuous acts would not be specifically enforced, because a decree in such cases would entail a continuous supervision, by the officers of the court, of the acts done by the defendant pursuant to the decree.² Gradually, however, the

³⁹ So. Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117 (1888); (sale of buildings erected by tenant is not an interest in land; not within Stat. of Frauds).

⁴⁰ *In re Matter of Buffalo*, *supra* note 6 at 376: "The City loses nothing; it simply forces the tenant to sell and steps into place and when it has extinguished both titles it has nothing but land, such property as the statute contemplates shall be taken."

¹ POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §24.

² Beck v. Allison, 56 N. Y. 366 (1874); Standard Fashion Co. v. Siegel-Cooper, 157 N. Y. 60, 51 N. E. 408 (1898). POMEROY, *supra* note 1, §22: "As a general proposition, contracts which provide for the personal affirmative acts, or the personal services of the parties, are not specifically enforced in equity, not because the legal remedy of damages is always sufficiently certain and adequate, but because the courts do not possess the means and ability of enforcing their decrees, which would necessarily be very special, and of compelling the performance which constitutes the equitable remedy."

courts relaxed the strictness of this rule; and, based on the theory of public welfare, issued mandatory injunctions ordering public service companies to provide water and gas; ordered specific performance of a contract where one railroad had agreed to permit another to use its tracks.³ Contracts to repair and build were refused enforcement because of this same objection—that equity has no means of enforcing or continuously supervising its decree. But experience in the results from a public service type of contract showed that this objection, set up by the court, did not in fact materialize; and now the rule in New York is settled, that as regards building contracts for the breach of which damages would be an inadequate remedy, equity will decree specific performance by mandatory injunction.⁴

Contracts for personal service, however, present an essentially different situation. Pomeroy says,⁵ "contracts for personal services where the acts stipulated for require special knowledge, skill, ability, experience, or the exercise of judicial discretion, integrity and like personal qualities on the part of the employees or wherever the full performance, according to the spirit of the agreement, rests on the individual *will* of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific execution; * * * such contracts may, however, according to the doctrine now universally established in the English equity courts, be negatively enforced by injunction whether they contain express negative stipulations or not." Where the subject of the contract is to build an arch under a railroad, equity can enforce the contract by issuing a decree that said railroad build the arch;⁶ but if the subject of the contract is that one man is to be the servant of another, and he refuses, the best equity can say to him is that he may not work for any other. No court can control the will of an individual; the most it can do is to attempt to persuade him to carry out his contract with the plaintiff by prohibiting him from performing similar services for his own benefit or for anyone else. In accordance with the general doctrine of the refusal of equity to decree continuing acts there are some early cases denying the right to specific performance of contracts of service because an injunction would necessitate too great supervision;⁷ although as early as 1812, in a case where the articles of agreement in a partnership contained a stipulation to the effect that all the efforts

³ *Standard Fashion Co. v. Siegel-Cooper*, *supra* note 2; *Strauss v. Estates of Long Beach*, 187 App. Div. 876, 176 N. Y. Supp. 447 (2d Dept. 1919). POMEROY, *supra* note 1, footnote (a): "An important growth in the field of equity jurisprudence, has been the extensive use of injunctions against the breach of negative agreements, both express and implied, and this is, in effect, enforcing specific performance."

⁴ *P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 152, 32 N. E. 17, 26 L. R. A. 610 (1894); *Strauss v. Estates of Long Beach*, *supra* note 3; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun 467 (N. Y. 1885).

⁵ POMEROY, *supra* note 1, §310.

⁶ *P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, *supra* note 4.

⁷ 3 WILLISTON, *CONTRACTS* (1924) §1423; *Clarke v. Price*, 2 Wil. Ch. 157 (1819); *Kemble v. Kean*, 6 Sim. 333 (1829).

of both partners in business similar to that of the concern should accrue to the benefit of the partnership, a decree was issued prohibiting one of the members carrying on in his own behalf.⁸ So that over a century ago there was a certain element of confusion as to the power of equity to decree specific performance of contracts for personal services; the courts holding that as a general rule, to enforce service from an unwilling defendant would do more harm than good, but that certain instances are exceptions and from the peculiar facts and circumstances of the case, justice might best be done through just such a decree.

In *Lumley v. Wagner*⁹ Lord St. Leonards, after an exhaustive review of all the cases up to that time, granted a decree prohibiting an opera singer from appearing at any other theatre during the term of her contract with the plaintiff. In this instance, the contract involved contained the stipulation that the defendant would not appear elsewhere. His Lordship realized that the decree prohibiting other appearances would in fact result in the defendant carrying out her entire contract, and actually performing for the plaintiff, although he based his decree on her express covenant that she would not perform at any other theatre.¹⁰ "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 contracted to the mere chance of any damages which a jury might give." Had his Lordship merely given us this thought, and let it suffice we should probably have had less conflict on this phase of the law. However, in further discussing his opinion, he says, " * * * and 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 an injunction." It is difficult to understand why his Lordship insisted on the existence of a negative covenant in the contract as a test of its enforceability, when he recognized that a decree ordering performance of the negative in fact enforces the positive element of the contract, and he expressly reversed Vice-Chancellor Shadwell in a case precisely similar,¹¹ where the objection to granting an injunction was that it would enforce the affirmative covenant. His Lordship took the position that the affirmative covenant creates a right worthy of enforcement, but beyond the reach of a court of equity; and that the negative covenant in the contract is essential as a basis on which the court may act.

⁸ *Morriss v. Colman*, 18 Ves. 437 (1812).

⁹ 1 De G. McN. & G. 604 (1852).

¹⁰ "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.*" (Italics ours.)

¹¹ *Kemble v. Kean*, *supra* note 7.

Twenty years later Sir R. Malins, Vice-Chancellor, extended this doctrine.¹² He granted an injunction restraining the defendant actor from appearances other than at the plaintiff's theatre in a case where there was no negative clause in the contract of service. Citing Vice-Chancellor Sir W. Page Wood's interpretation of Lord St. Leonard's opinion,¹³ "he fully adopts there the principle that it is not necessary to have a negative covenant in order to prevent performance at another theatre," and, relying on the decision in *Webster v. Dillon*, the learned Vice-Chancellor disregarded the necessity of an express negative stipulation, ruling that one may be implied from the positive covenant. "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 whatsoever." So that the learned Vice-Chancellor, while going a step forward from Lord St. Leonard's express negative as a basis for a decree in equity, nevertheless insists on the existence of an *implied* negative covenant by which the court of equity may lay hold of the entire contract, and, by enforcing the unwritten, bind the parties to a performance of their mutual duties.

The fallacy of this argument is recognized by Lindley, *L. J.*, and the rule expressly reversed, in *Whitwood Chemical Company v. Hardman*.¹⁴ The Lord Justice objects that, although at the time he enters the contract the defendant may be ready to work for the plaintiff, this does not mean he agrees not to work for another. Thus a leading actor might conceivably agree to perform every night in the week, and for the entire season, for a given producer; but this does not necessarily imply that he would be willing to forego the chance of possible remuneration that matinees and midnight performances could bring him; and it is not unreasonable to suppose that a producer might agree to such side performances, if it were on such grounds only that he could induce one with a tremendous drawing power to become affiliated with his cast. But this agreement for the benefit of the employee should not make the contract unenforceable. In such a case there cannot be a negative covenant not to work for anyone else because there is express permission that the employee may do precisely this. Therefore the employer would be without remedy because of the provision aiding the employee. In the above case,¹⁵ the contract on which suit was based contained the agreement that the defendant would give the *whole* of his time to the company's business, but there was no negative stipulation that he would not work for anyone else. The lower court granted an injunction restraining the defendant from giving less than

¹² *Montague v. Flocton*, L. R. 16 Eq. 189 (1873).

¹³ *Webster v. Dillon*, 3 Jur. (N. B.) 432; defendant actor agreed that he would perform at Sadler's theatre for twelve successive nights. There was no argument on the part of the defendant. Restraining injunction granted without a negative covenant.

¹⁴ L. R. 2 Ch. 416 (1891).

¹⁵ *Ibid.*

the whole of his time to the company's business. Lord Justice Lindley vacated the injunction on the ground of absence of a negative stipulation in the contract. He based his decision on the fact that such a clause would indicate some particular and specific agreement, and that, due to its absence, "there is nothing [in the contract] that shows anything definite was in the minds of these parties beyond this—that the defendant was to give the whole of his time to the plaintiff's business." But, in fact, the injunction granted here by the lower court was unconscionable because it restrained the defendant from giving *less than the whole of his time* to the company's business. The decree should have been overruled, even if it had been an attempt to enforce a *negative* covenant in the contract. Because of His Lordship's remarks, even though the injunction he vacated was unconscionable, this case has been followed in the English courts as standing squarely for the proposition that an injunction will not lie, prohibiting one from engaging in the same type of personal service with a stranger to the contract, unless such contract contains a negative stipulation specifically excluding such action.

In fact, then, this creates as the test of enforceability of personal service contracts the presence of a negative stipulation. The reason for this is the principle, discernible throughout the opinions, and noted by Pomeroy,¹⁶ that courts of equity will not order a specific performance of a positive covenant because they have no means to enforce such decree should they issue one; "and for this reason, rather than from any inherent and absolute impossibility, equity refuses to exercise its jurisdiction"¹⁷ over purely affirmative contracts.

Yet many authorities are opposed to this strict rule of the absolute necessity of express, negative covenants in a contract of personal services.

Dean Pound thinks¹⁸ in certain instances this objection is largely theoretical, and he recognizes that there is a distinction between *decreeing* specific performance of a contract and *enforcing* the contract by specific relief. He seems in favor of the proposition that in a situation where a negative stipulation in a contract can be enforced directly a contract possessing only the affirmative clause, can be indirectly enforced by a prohibitory injunction. It is also true that (as many old English cases hold) due to the particular facts and circumstances, granting a prohibitory injunction would be destructive, and would inevitably lead to much harm. Then, even with an express negative covenant in the contract, an injunction will not lie. But

¹⁶ POMEROY, *supra* note 1, §303. "This species of impracticability in granting the equitable remedy * * * assumes * * * that, through want of appropriate means and instruments, the court is unable, while pursuing its ordinary methods of administering justice, either to render a decree or to enforce the decree which it should make, and thus compel a specific performance of his agreement by the defendant."

¹⁷ *Ibid.* §307.

¹⁸ See Pound, *The Progress of the Law, Equity* (1918-19) 33 HARV. L. REV. 439.

these same instances tend to defeat the theory that the test for enforceability of contracts of personal services is the mere presence or absence of a negative stipulation. Equity, exercising its discretion, has thus refused its aid.¹⁹ In *Collins v. Plumb*²⁰ the court declined to exercise its power of preventing the commission of an act because such power could not be properly and beneficially exercised; and in *Ehrman v. Bartholomew*, where the court says,²¹ "in my opinion such a stipulation ought not be enforced; to enforce such a general negative stipulation as I find here would be, in my opinion, a dangerous extension, for the stipulation extends to business of any kind"; again in *Herbert Morris L. D. T. v. Saxelby*,²² the court declined to grant an injunction against the defendant because it regarded the terms of the contract as unconscionable; and in *Lawrence v. Dixie*,²³ the court refused an application for equitable relief because, "the plaintiff is not specially bound by the contract so that the obligations are reciprocal and enforceable." Here we have instances where even with an express negative stipulation equity looked to the *feasibility* of granting an injunction. It was not a question of *power to decree*; but rather for equity to determine the *practicability* of the resulting injunction. Would an order serve the purpose of the plaintiff, or would it merely result in hardship to all concerned? And where, in equity's discretion an injunction was not practical, the presence of a negative covenant did not force the court to grant a decree. Conversely then, why should the absence of a negative covenant prevent

¹⁹ *Clarke v. Price*, 2 Wil. Ch. 157 (1819); *Kemble v. Kean*, *supra* note 7; *Herbert Morris, Ltd. v. Saxelby*, L. R. 2 Ch. 57 (1915). In the latter case, the court thought a contract for personal services unconscionable and refused to enforce it, because the defendant, who had worked in plaintiff's employ since he was fifteen years old, had been forced to enter into this contract of service immediately on reaching his majority. In *Hepworth Manufacturing Co. v. Ryott*, L. R. 1 Ch. 1 (1920), the stipulation of a movie star, acting under an assumed name, that he would not use this assumed name for any purpose whatsoever was deemed by the court to be tyrannous, oppressive, and unreasonable, and so not such a contract as the court would enforce.

²⁰ 16 Ves. 454 (1810). "Covenant not to sell water to the prejudice of the plaintiffs, was not enforced by Lord Eldon, not because he had any doubt about the jurisdiction of the court (for on that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants whether it was or not to the damage of the plaintiffs." (Quoted in *Lumley v. Wagner*, *supra* note 9, by Lord St. Leonards.)

²¹ L. R. 1 Ch. 671 (1898). In this case the contract read: " * * * shall diligently employ himself for the purpose of selling the firm's goods * * *, to find new customers and to extend business, and shall devote the whole of his time during business hours in the transaction of the business of the firm, and shall *not* in any manner directly or indirectly employ himself in any other business * * * during the term of the agreement." The court refused an injunction because it would work great harm to the defendant and the plaintiff had an action at law for damages; since it did not appear that the services of the defendant were unique and special. (Italics ours.)

²² 119 App. Div. 295, 104 N. Y. Supp. 516 (1st Dept. 1909).

²³ L. R. 2 Ch. 57 (1915).

a decree?²⁴ The old theory was that a court would not order one man to become the servant of another. This because it had no way of enforcing its decree.²⁵ Such is the fundamental principle. Cases have repeatedly so held.²⁶ But a right exists, arising from the positive covenant in the contract. And a prohibitory injunction, in effect, enforces it.²⁷ So why not exercise the indirect where the direct is impractical? To order an actor not to work for anyone else for the term of his contract results in his working for the plaintiff. From the nature of the case it may be determined whether or not specific relief is practical; and such possibility should be the deciding factor.

In New York, the courts have followed this line of reasoning, rather than the stricter English rule. *Duff v. Russell*²⁸ is a leading New York case on the point. There the defendant had agreed to appear for two years on the plaintiff's circuit; and, relying on this contract, plaintiff had spent much money in extensively advertising defendant in many sections of the country, outfitting an entire case, leasing theatres, etc. An injunction was brought, to restrain her from appearing at any other theatre, although there was not a negative clause in the contract. The opinion stated, "the court is bound to look to the substance, and not to the form of the contract. As the defendant had agreed to appear in seven performances each week

²⁴ POMEROY, *supra* note 1, §24. "Where one person agrees to render personal services to another (requiring special skill and ability), so that, in case of default, the same services could not easily be obtained from others, *although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach.*" (Italics ours.)

²⁵ *Ibid.* §307: "The jurisdiction is declined not because it is impossible to formulate a decree which shall order everything necessary for a complete performance, *nor even because a compulsory execution of such decree is absolutely and in the nature of things impossible*; but because the enforcement of the decree would unreasonably tax the time of the court, and thereby interfere too much with its public duties toward other suitors, and in the general administration of justice." (Italics ours.)

²⁶ *Whitwood Chemical Co. v. Hardman, supra* note 14. "The principle is that the court does not decree specific performance of contracts for personal service, and the question is whether there is anything in this case which takes it out of the principle." *Wm. Robinson & Co. Ltd., v. Haur, L. R. (1898) 2 Ch. 451*, where the court did grant an injunction restraining defendant from carrying on or engaging in, as principal, servant, or agent, any trade relating to goods manufactured or sold by plaintiff. There the court exacted a promise from plaintiff not to exercise its option to compel the defendant to work for five more years after the term of the contract, and refused to allow the clause in the negative stipulation prohibiting defendant to engage *in any other business*. All this, based on the principle that "this court never will enforce an agreement by which one person undertakes to be the servant of another"; and the court, realizing that the effect of the injunction would be to compel the defendant to work for the plaintiff, was very reluctant in granting it.

²⁷ POMEROY, *supra* note 1, §22. "Wherever from the nature of the agreement, the difficulty in the way of granting relief does not exist, or can be obviated, the principles and rules of specific performance apply to contracts which stipulate for personal acts or omissions, as well as to those whose subject-matter is real or personal property."

²⁸ 14 N. Y. Supp. 134, *aff'd*, 133 N. Y. 678, 31 N. E. 622 (1891).

(exclusive of Sundays) which the plaintiff's company might 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 a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant." In *Hoyt v. Fuller*²⁹ where the services performed by the defendant were special, unique, and extraordinary, in that she had invented an attractive specialty known as the "Serpentine Dance" and through which act she had gained a great reputation, the court again dispensed with the necessity of an express negative covenant. Based on the contract for services, to run "not exceeding August 1, 1892," the court granted an injunction prohibiting other appearances. "The contract was intended to give the plaintiffs, not the divided, but the exclusive, services of the defendant, and where that is apparent a negative clause is unnecessary to secure the result."

Clearly, the court recognized a right arising out of the contract in these cases. But the agreement must be certain and definite as to the obligations imposed on the other party to the contract, before the court should imply an obligation by injunction.³⁰ However, when the contract is conscionable, a right arises from the defendant's positive covenant; and, though in England the stricter rule prevails, in New York if there is the possibility of enforcing this right *in personam* by injunction, our courts will decree one.

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CORPORATIONS—JURISDICTION—INTERFERENCE WITH THE
INTERNAL AFFAIRS OF A CORPORATION.

Despite the fact that Section 224 of the General Corporation Law provides that an action against a foreign corporation may be

²⁹ 19 N. Y. Supp. 962 (1892).

³⁰ *Epstein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922). "What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant"; *Lawrence v. Dixey*, 104 N. Y. Supp. 516 (1907), where there was no positive arrangement between the parties as to the subsequent seasons, or the salary of the defendant, the court considered an injunction inequitable. "But whether or not a court of equity will grant equitable relief in an action of this character is always addressed to the sound discretion of the court, and could never be enforced unless the parties seeking to enforce it are specifically bound by the contract, so that there are enforceable reciprocal obligations, which are definite and enforceable; *Harry Hastings Attractions v. Howard*, 119 Misc. Rep. 326, 196 N. Y. Supp. 228 (1922), where the defendant took the leading role in a burlesque performance, and his ability was such that his services were unique, special, and extraordinary, he was enjoined from performing for any person other than the plaintiff during the term of his contract. "The situation here warrants the intervention of the court."