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INJUNCTION TO RESTRAIN BREACH OF PERSONAL CONTRACT

The defendant, in consideration of the settlement of certain litigation, agreed not to molest the plaintiff when she came to visit plaintiff's and defendant's aged mother with whom the defendant lived. Plaintiff alleged a breach of the contract and sought an injunction to restrain defendant from molesting her when she visited their mother. *Held*: Injunction granted. Plaintiff had a property interest in the contract which equity would protect by injunction, *Reed v. Carter*, 268 Ky. 1, 103 S. W. (2d) 663, (1937).

The court treats this injunction as one to restrain a tort; and in order to bring the case under the rule of *Gee v. Prichard*,¹ it finds a property right in the contract between the plaintiff and defendant.² Since that historic decision, courts and text writers have clung to the doctrine that equity will act only to protect property interests and will not protect interests of personality as such.³ This doctrine has been severely criticized⁴ but the courts continue to talk in terms of property interests. Although the courts reiterate the doctrine, at the same time they avoid its limitations by deliberately protecting interests of personality upon finding a property interest thus broadening the definition of property beyond its traditional meaning.⁵

¹ *Gee v. Prichard*, 2 Swans. 403, 36 Eng. Rep. 670 (1818).

² By calling the right in the contract a property right the Kentucky court has apparently gone beyond existing precedents. In *I Pomeroy* (4th ed. 1918) 105, primary rights which come under the domain of equity are divided into real rights and personal rights. Under real rights only rights of property come within the scope of equity. Under personal rights the rights arising from contracts and those arising from existing relations between persons come within the scope of equity. When a contract exists the court discusses the remedy at law and the expediency of granting equitable relief but does not discuss property interests. See *Sanders v. Rodway*, 16 Beav. 207, 51 Eng. Rep. 757 (1852); *Bomeisler v. Forster* 154 N. Y. Reports 229, 58 N. E. 534, 39 L. R. A. 240, (1897); 1 *Pomeroy*, *Specific Performance of Contracts*, (3rd ed. 1926) 16-17 and 102 ff. But see *Brewer v. Cary*, 148 Mo. App. 193, 127 S. W. 685 (1910) dictum that equity will not grant specific performance of a contract unless there is a property interest involved.

³ *Joyce*, *Injunctions* (1909, 2d ed.) 116; *Bonifaci v. Thompson*, 252 Fed. 878 (1917); *Mead v. Stirling*, 62 Conn. 586, 27 Atl. 591 (1892); *Chappel v. Stewart*, 82 Md. 323, 33 Atl. 542 (1896); *Ashinsky v. Levenson*, 256 Pa. St. 14, 100 Atl. 491 (1917).

⁴ *Long*, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 *Yale L. J.* 115; *Pound*, *Equitable Relief Against Defamation* (1916) 29 *Harv. L. Rev.* 640; *Dissent in Kneidler v. Lane*, 45 Pa. 238, 338 (1863).

⁵ *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 S. Ct. 625 (1890) (one's name); *Grand International Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934) (right of seniority); *New Method Laundry Co. v. McCann*, 174 Cal. 26, 161 Pac. 990 (1916) (right to pursue a calling); *Riggs v. Smith*, 52 Idaho 43, 11 P. (2d) 358 (1932) (consortium); *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911) (one's picture); *Spiegel v. Evergreen Cem.* 186 Atl. 585 (N.J. 1905) (right to bury one's dead);

The doctrine for which *Gee v. Prichard* is most cited had already undergone modification at the time the case was decided. The defendant in that case was enjoined from publishing letters written by the plaintiff to the defendant while he was a member of her family. Lord Eldon felt bound by decisions of Lord Hardwicke and Lord Apsley to hold that the plaintiff had a property in the letters and that this interest was sufficient to warrant the protection of equity.⁶ The real interest the court was protecting was the plaintiff's personal interest in keeping her private letters from being published. Later decisions have continued this trend to protect personal interests by reiterating the rule that equity will protect only property interests and then finding that the interest they are asked to protect is a property interest, interest of substance, or quasi property interest.⁷

Equity was created to supplement the common law so that justice would not be defeated because of the defects and gaps in the common law, and to afford an adequate remedy in those cases where there was a recognized legal right but the legal remedy was inadequate to protect the right.⁸ Equity was not created to protect property or any special interest, but that it should be invoked to protect property interests almost exclusively was inevitable; for until recently the law recognized few personal rights and those were as well protected by law with civil and criminal actions as they could have been by equity.⁹ Historically, the remedy at law was considered adequate for the personal rights which were recognized, therefore, there was no need for equity to act to protect those rights.¹⁰

In the past property has held a more important position in the law than has personality. There was a complicated system of legal rights in property. With the growth of our present industrial society, courts have tended to recognize as legal rights interests in personality which were formerly no rights at all,¹¹ and the legal remedies provided for these rights of personality are sometimes inadequate.

The doctrine that equity will protect only property rights is, therefore, not a sound or just doctrine, for it is contrary to the fundamental basis of equity. There is a growing tendency to

Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907) (right to make absolute devise of property); *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1905) (right to work); *Gurtov v. Williams*, 105 S. W. (2d) 328 (Tex. Civ. App. 1937) (right to earn a living.)

⁶ *Gee v. Prichard*, 2 Swans. 403, 424, 36 Eng. Rep. 670, 678 (1818).

⁷ See cases cited *supra* note 5.

⁸ Walsh, *A Treatise on Equity* (1930) 1-13; Clark, *Principles of Equity* (2d ed. 1937) 4.

⁹ Long, *Equitable Jurisdiction to Protect Personal Rights*, (1923) 33 Yale L.J. 115; Nizer, *The Right of Privacy*, (1941) 39 Mich. L. Rev. 526; 14 A.L.R. 295.

¹⁰ Note 32 Ill. L. Rev. 496; *Angelus v. Sullivan*, 246 Fed. 54, 64 (1917).

¹¹ Nizer, *The Right of Privacy* (1941) 39 Mich. L. Rev. 526 for citations of cases where the right of privacy has been recognized.

recognize substantial interests which were traditionally not property rights or to repudiate the property doctrine entirely.¹²

The injunction issued by the Kentucky court is really for the specific performance of the negative covenant not to molest. If the court had taken the view that it was granting specific performance of the contract and not an injunction to restrain a tort, it would have been unnecessary to find a property right. The existence of a property right is not a prerequisite to specific performance. It is enough that the remedy at law is inadequate and that specific performance will be practicable and the decree enforceable under the circumstances.¹³

In this case there is a good contract and a clear legal right to the defendant's performance thereunder.¹⁴ If, however, the defendant breaches the contract, the plaintiff's remedy at law is, clearly inadequate; for money damages, guessed at by a jury, cannot be an adequate substitute for the plaintiff's right to visit her aged mother.

The wisdom and expediency of granting specific performance of the negative covenant here is questionable. While the question of impracticability is less likely to arise in the enforcement of a negative covenant,¹⁵ still the court is dealing with intimate family relations where the decree is not likely to improve the relations between the parties, and where the interference of a court of equity is of doubtful desirability.¹⁶ The problem of enforcing this decree, of determining when the defendant has not complied with the injunction and is in contempt, is no small matter for the court to have undertaken.

MARY LOUISE BARTON

FEDERAL PROCEDURE, VALIDITY OF RULE 35a REQUIRING PLAINTIFF TO SUBMIT TO A PHYSICAL EXAMINATION.

Plaintiff brought a negligence action in the District Court of Illinois to recover for personal injuries suffered in Indiana. Defendant's answer denied all the allegations and moved for an order requiring plaintiff to submit to a physical examination as provided by Federal Rule 35a. Plaintiff refused to obey the court's

¹² 14 A. L. R. 295.

¹³ Supra note 2.

¹⁴ The court makes the implication that it might have protected the plaintiff's "natural right" to visit her mother altho there had been no contract to fortify that right. This would be a protection of a relational interest. See Green, *Relational Interests*, (1934) 24 Ill. L. Rev. 460. The interest here, however, is personal in nature and not one of substance or property such as equity has traditionally protected. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, (1916) 29 Harv. L. Rev. 640.

¹⁵ Walsh, *A Treatise on Equity* (1930) 339.

¹⁶ Moreland, *Injunctive Control of Family Relations* (1930) 18 Ky. L. J. 207, 217; Simpson, *Fifty Years of American Equity* (1936) 50 Harv. L. Rev. 171, 221; Note 27 Ill. L. Rev. 440.