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Equity - Personal Service Contracts - Enforcement of Negative Covenants

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district attorney may be required to furnish a bill of particulars setting forth more specifically the nature of the offense charged. The defendant's constitutional guaranty that he shall be fully apprised of the nature and cause of the accusation is amply protected by this provision."

"It might be suggested that Article 235 of the Code of Criminal Procedure does not make it mandatory upon the court to require the State to furnish the particulars. While it is discretionary with the trial judge, yet, he cannot arbitrarily refuse to order the State to furnish essential particulars.

"This Court has upheld the short form of indictment on charges for murder, State v. Capaci, 179 La. 462, 154 So. 419; State v. Matthews, 189 La. 166, 179 So. 69; forgery, State v. Ducre, 173 La. 438, 137 So. 745; State v. Digilormo, 200 La. 895, 9 So. (2d) 221; State v. Pete, 206 La. 1078, 20 So. (2d) 368; perjury, State v. Abeny, 168 La. 1135, 123 So. 807; negligent homicide, State v. Ward, supra.

"We see no valid reason why an indictment charging the accused with the commission of aggravated rape upon a named person as provided for in Article 235 is not equally sufficient. Moreover, a defendant is amply protected when the short form is used by the provision granting him essential particulars when requested."[2]

C. C. C.

EQUITY—PERSONAL SERVICE CONTRACTS—ENFORCEMENT OF NEGATIVE COVENANTS—Defendant was the inventor of an "Atomisscope" which could be successfully employed in geophysical work. In consideration of a monthly salary and as part of a general plan to develop the device, he contracted with the plaintiff, an experienced oil man, to render exclusive services in the operation of the instrument. He also covenanted not to lend, give, sell, or demonstrate the instrument to any other person. Defendant breached his contract and rendered services to others. Plaintiff brought an injunction suit and defendant filed an exception of no cause of action. The Louisiana Supreme Court *held* the services were of a special, unique and extraordinary character, overruled the exception of no cause of action, and reinstated the temporary restraining order. *Pennington v. Drews,* 24 So. (2d) 156 (La. 1945).

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2. Id. at 671.

Courts have refused to order specific performance of personal service contracts and, until the year 1852, equity granted no relief in such cases. However, in that year the English courts of chancery in *Lumley v. Wagner*[1] enforced a negative covenant of an opera star *not* to render services to another. That decision, subject to the various interpretations placed upon it by the courts, has served as a basis for both granting and denying relief in later cases.

The practice of enforcing the negative covenant, developed as a result of this case, has generally been restricted to services which were special, unique, and extraordinary; otherwise the remedy at law would be adequate. The uniqueness required by the courts will vary with the cases and the parties involved. A comedian who was the principal attraction in a show,[2] an editorial writer of exceptional literary style,[3] and an actor receiving a large salary from the plaintiff[4] have all been termed unique; while a singer in the chorus[5] and an actor for whom a substitute could be found[6] have not had that character. An able first baseman does not have this quality,[7] although a baseball player of exceptional reputation who would be difficult to replace is considered unique.[8] No definite line can be drawn; but the cases fall in general patterns, depending to a large extent on the difficulty of substitution. In such cases the damages are unascertainable, amounting to an irreparable injury which cannot be compensated at law. Although the personal services of the defendant in the present case were ordinary, the court regarded them as inseparable from the use of the Atomiscope, hence unique. It naturally follows that substitution would be impossible and any attempt to estimate damages conjectural.

In denying specific performance of a personal service contract, perhaps the reason most often given is the difficulty of supervision. This renders enforcement infeasible for those contracts that call for continuous performance.[9] This has been

1. 1 De G., M. & G. 604, 42 Eng. Rep. 687 (1852).
2. Harry Hastings Attractions v. Howard, 119 Misc. 326, 196 N.Y. Supp. 228 (S.Ct. 1922).
3. Tribune Ass'n v. Simonds, 104 Atl. 386 (N.J. Ch. 1918).
4. Harry Rogers Theatrical Enterprises v. Comstock, 225 App. Div. 34, 232 N.Y. Supp. 1 (1st Dep't 1928).
5. Hammerstein v. Mann, 137 App. Div. 580, 122 N.Y. Supp. 276 (1st Dep't 1910).
6. Lawrence v. Dixey, 119 App. Div. 295, 104 N.Y. Supp. 516 (1st Dep't 1907).
7. Spencer v. Milton, 159 Misc. 793, 287 N.Y. Supp. 944 (S.Ct. 1936).
8. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902).
9. Snyder v. Wilder, 146 La. 811, 84 So. 104 (1919); Daily States Pub. Co. v. Uhalt, 169 La. 893, 126 So. 228 (1930); De Rivafinoli v. Corsetti, 4 Paige

given particular emphasis in construction contracts,[10] and the Louisiana courts have often denied relief on that basis.[11] This objection has no place, however, where an injunction is used simply to prevent the breach of the negative covenant and does not call for protracted supervision.

Another reason for denying relief is that the law does not deem it advisable to protract under court mandate a personal relationship which has become intolerable to one of the parties. This factor is the primary consideration where an employee sues to be retained in his employment,[12] but this is not applicable where the purpose of the injunction is not to force performance.

A fundamental consideration underlying, but not always mentioned in a denial of specific performance of personal service contracts, is the idea that such relief would amount to exacting involuntary servitude; and it is on this score that the enforcement of an incidental negative covenant has been most severely criticized.[13] The effect of a decree restraining the defendant from rendering services to another is to force him into the service of the plaintiff through economic necessity. For this reason some courts have made absurd rationalizations in their effort to point out that they were not compelling the defendant to serve the plaintiff.[14] Other courts have openly admitted that the injunction was in aid of the contract's performance.[15] Though raised in *Caldwell v. Cline*,[16] the question whether an injunction enforcing the negative covenant would issue where specific performance could not be decreed has not been squarely passed upon in Louisiana.

264, 25 Am. Dec. 532 (N.Y. 1833); Sanquirico v. Benedetti, 1 Barb. 315 (N.Y. 1847).

10. Beck v. Allison, 56 N.Y. 366, 15 Am. Rep. 430 (1874). But see Jones v. Parker, 163 Mass. 564, 40 N.E. 1044 (1895).

11. See Note (1940) 2 LOUISIANA LAW REVIEW 198.

12. Healey v. Allen, 38 La. Ann. 867 (1886); Fitzpatrick v. Michael, 177 Md. 248, 9 A. (2d) 639 (1939); Kerr S. S. Co. v. Kerr Nav. Corp., 113 Misc. 56, 184 N.Y. Supp. 646 (S.Ct. 1920).

13. Stevens, Involuntary Servitude by Injunction: The Doctrine of Lumley v. Wagner Considered (1921) 6 Corn. L. Q. 235.

14. Butternick Pub. Co. v. Rose, 141 Wis. 533, 540, 124 N.W. 647, 649 (1910), in which the defendant urged that the decree amounted to compelling him indirectly to perform a contract for personal services. The court said: "A cause of action being stated, we cannot reverse the order because the plaintiff may, by indirection or otherwise seek some relief to which he is not entitled. . . ." In Warner Brothers Pictures v. Nelson [1937] 1 K. B. 209, 219, the court said that Bette Davis, film actress, would not be driven to perform by the negative decree, "and the fact that she may be so tempted is no objection to the grant of an injunction."

15. Keith v. Kellermann, 169 Fed. 196 (C.C. N.Y. 1909); Mission Independent School Dist. v. Diserens, 188 S.W. (2d) 568 (Tex. 1945).

16. 8 Mart. (N.S.) 684 (La. 1830).

A theory exists, however, which would serve to alleviate the court's embarrassment in this regard and avoid the objection that specific performance is really being accomplished. The "separate significance" which has been advocated by Dean Pound,[17] is a justification for enforcement of the negative covenant, which can readily be appreciated. When the breach of the negative covenant causes injury, additional to that which the plaintiff sustains by breach of the affirmative, the covenant really has "separateness" and the desirability of protecting the plaintiff from further injury warrants the use of the injunction. The injunction in such a case is not being used to accomplish performance, but to prevent a separate and additional injury. Although seldom adequately treated by the courts,[18] possibly because its presence in the majority of cases has passed unnoticed, this concept provides a sound justification of negative enforcement. A recent Texas case,[19] in which this feature was conspicuously absent, serves to demonstrate the failure of the courts to give adequate attention to this detail.

In the present case the "separateness" is not as readily perceived as in the case where an actor or baseball player of peculiar merit performs for another, thereby drawing patrons from the plaintiff's theater or ball-park. Here the principal injury to the plaintiff would be the loss of profits which he reasonably expected from successful exploration for oil. Any additional injury which he would sustain by reason of defendant's employment by a competitor would exist only on the theoretical basis that the business rival would be able to "grab up" lands which the plaintiff would have discovered by normal geophysical methods. Such an injury as the basis of an injunction would probably have little appeal for the court. However, another argument could be made for separate significance. The plaintiff was also a mineral broker, presumably engaged in buying leases to re-sell to oil companies.

17. Pound, The Progress of the Law: Equity (1920) 33 Harv. L. Rev. 420, 438.

18. But see Fitzpatrick v. Michael, 177 Md. 248, 9 A. (2d) 639 (1939); American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y. Supp. 6 (S.Ct. 1914).

19. Mission Independent School Dist. v. Diserens, 186 S.W. (2d) 108 (Tex. Civ. App. 1945), reversed in 188 S.W. (2d) 568 (Tex. 1945). Defendant was a public school music teacher of exceptional ability. She breached her contract with the plaintiff and accepted a position in another school, which was not a business rival of plaintiff. The lower court recognized the fact that plaintiff would suffer no additional injury by the breach of the negative covenant and refused the injunction. On appeal the supreme court issued the injunction to enforce the affirmative promise, and expressly refused to restrict the doctrine to the case where the parties were competitors and loss of business would result from breach of negative covenant.

A record for productive mineral leases, built up through the use of the Atomiscope, would not only be broken by a subsequent loss of the instrument, but the good will and clientele thus acquired might shift to the competitor who had the use of the instrument. Thus the plaintiff would be left without a market for his leases. These considerations were not presented in the opinion, however, possibly because the arguments were not made by counsel and because this was not a decision after a final hearing on the merits.

Faced with serious objections to the enforcement of negative covenants incidental to personal service contracts some courts have arbitrarily limited this type of relief to cases where an express negative covenant was involved.[20] When the phrase "exclusive services" is used, it naturally implies that the defendant will not render services to another; but as one court has expressed it, every contract involves an implication not to do anything inconsistent therewith.[21] A few courts,[22] however, have been willing to imply the negative covenant, citing *Lumley v. Wagner*[23] as an authority, although that case is generally interpreted as involving an express negative covenant. The Louisiana Supreme Court in an early case[24] declined to imply the covenant, although it does not appear from that case that the defendant's services were unique or that the contract called for exclusive services. The present case would probably not run afoul of this controversial issue, since the services were to be exclusive, and even if the defendant had not expressly contracted to refrain from serving another, he at least had agreed not to permit others to use the instrument with which his services were so intimately connected. In conclusion, it is suggested that the present case appears to be one appropriate for equitable relief if, after a hearing on the merits, it is determined that the negative covenant has that separateness so necessary if the court is to avoid the objection that it is only doing indirectly what it could not do directly.

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20. Carlson v. Koerner, 226 Ill. 15, 80 N.E. 562 (1907); Whitwood Chem. Co. v. Hardman [1891] 2 Ch. 416; Mortimer v. Bickett, 123 L.T.R. (Eng. Ch. D.) 27 (1920).

21. Whitwood Chem. Co. v. Hardman [1891] 2 Ch. 416.

22. Essex Specialty Co. v. Bueschel, 116 N.J. Eq. 337, 173 Atl. 595 (1934) (though *Lumley v. Wagner* had an express negative covenant, the decision would have probably been the same without it); Harry Rogers Theatrical Enterprises, Inc. v. Comstock, 225 App. Div. 34, 232 N.Y. Supp. 1 (1st Dep't 1928).

23. 1 De G., M. & G. 604, 42 Eng. Rep. 687 (1852).

24. Caldwell v. Cline, 8 Mart. (N.S.) 684 (La. 1830).