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SPECIFIC PERFORMANCE - INJUNCTIONS TO ENFORCE NEGATIVE COVENANTS IN CONTRACTS FOR PERSONAL SERVICES

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SPECIFIC PERFORMANCE — INJUNCTIONS TO ENFORCE NEGATIVE COVENANTS IN CONTRACTS FOR PERSONAL SERVICES — Plaintiff entered into a contract with defendant in which defendant agreed to participate in a boxing match with the then heavyweight champion of the world. The contract also provided that if the defendant won the bout and himself became heavyweight champion he would render his services as a boxer in his first boxing contest thereafter, in defense of his title, under plaintiff's auspices. The contract further provided that defendant was to engage in no other boxing contests in which a decision was rendered prior to such championship bout, without the written consent of the plaintiff. Subsequently, three amendatory contracts were drawn, the last fixing June 3, 1937, as the date for defendant's world championship bout, and providing that defendant was not to engage in any other bouts prior thereto. Later, on statement by defendant that he would not perform his contract to defend his title under plaintiff's auspices, and on information that defendant had contracted to engage in a match for the heavyweight championship of the world with another boxer under rival auspices on June 22, 1937, plaintiff sought a preliminary injunction to restrain defendant from engaging in such bout. This was denied,[1] and an appeal was taken. *Held*, since there was no express negative covenant now in effect, and since even if there had been such a covenant, it could not have been enforced because defendant could not compel plaintiff to use his services, that the order denying the preliminary injunction should be affirmed. *Madison Square Garden Corp. v. Braddock*, (C. C. A. 3d, 1937) 90 F. (2d) 924.

While it seems a correct construction of the contracts in question to find that there was no express negative covenant in effect after June 3, 1937, the question still remains whether there was an implied restrictive covenant. Defendant agreed to engage in a boxing contest under plaintiff's auspices on June 3, 1937. As the court indicated in holding that a repudiation of the contract had occurred it would be impossible for the defendant to engage in championship boxing contests both for plaintiff on June 3, and for the rival on June 22. Thus it would seem to be implicit in defendant's agreement to engage in a bout for plaintiff on June 3, not to agree to engage in another bout June 22. The court did not seem to discuss this possibility, but only whether the express negative covenant in the earlier contracts had been carried over into the latest contract. Assuming that such a covenant can reasonably be implied,[2] the

[1] (D. C. N. J. 1937) 19 F. Supp. 392.

[2] The earlier English cases held that a negative covenant could be implied.

question remains whether it should be enforced. The exact basis for the court's position that if there were such a covenant it could not be enforced is not too clearly articulated. The court uses language which may mean that Lord Justice Fry's doctrine of mutuality of remedy,[3] discredited as it is,[4] was, in part, a ground of decision.[5] To deny the injunction, though complainant be otherwise entitled to relief, solely because in the hypothetical converse case the remedy would not be given to the other party, is extremely academic, and such a test for the issuance or withholding of injunctions has been largely abandoned.[6] If, however, the court meant to deny the injunction because of lack of mutuality of performance, i.e., on the ground that equity should not decree that the defendant shall perform unless performance on the part of the plaintiff can also be assured, it is on much more tenable ground.[7] However, affirmative per-

Montague v. Flockton, L. R. 16 Eq. 189 (1873); Webster v. Dillon, 3 Jur. N. S. 432 (1857). Later, however, it was held that unless there is an express negative covenant, relief will be denied. Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416. This, however, seems an unnecessarily imposed limitation, representing a reaction from the doctrine of Lumley v. Wagner, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (1852). While in many cases an injunction issued on the doctrine of Lumley v. Wagner works hardship (see Montague v. Flockton, supra, where plaintiff had hired another actor to take defendant's place, yet defendant was enjoined from acting for anyone but plaintiff, nonetheless there is no necessity to go to the other extreme and preclude the issuance of the injunction where it may be legitimately done. American cases have followed the earlier English cases. Duff v. Russell, 60 Super. 80, 14 N. Y. S. 134, affd. mem. 133 N. Y. 678, 31 N. E. 622 (1892). In American Assn. Ball Club v. Pickett, 8 Pa. Co. Ct. 232 (1890), it was said: "It was argued in this case that the decision above cited does not contain a negative clause that the player will not perform like services for any person during the time covered by the contract. . . . But this contention is wholly untenable. Every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promissor from doing the act he has engaged to do."

[3] "A contract, to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them." FRY, SPECIFIC PERFORMANCE, 6th ed., § 460 (1921).

[4] Ames, "Mutuality in Specific Performance," 3 COL. L. REV. 1 (1903); Durfee, "Mutuality in Specific Performance," 20 MICH. L. REV. 289 (1921); Cook, "The Present Status of the Lack of Mutuality Rule," 36 YALE L. J. 897 (1927).

[5] 90 F. (2d) 924 at 927, where the court quotes Rutland Marble Co. v. Ripley, 10 Wall. (77 U. S.) 339 at 359, 19 L. Ed. 955 (1870): "And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

[6] Great Lakes & St. L. T. Co. v. Scranton Coal Co., (C. C. A. 7th, 1917) 239 F. 603; Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922).

[7] Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180 (1895), where there was denied an injunction to restrain defendant actress from breaching her express covenant not to perform for anyone else on the ground that plaintiff had failed to pay defendant in the past, and would probably be unable to do so unless the season proved successful; Star Co. v. Press Publishing Co. and Dirks, 162 App. Div. 486, 147 N. Y. S.

formance by the plaintiff could be assured by issuing the injunction conditioned on plaintiff's performance,[8] or by requiring plaintiff to post a bond to secure his carrying out his part of the contract, as was done in *Madison Square Garden Corp. v. Carnera*,[9] a case with facts very like those of the instant case. The property interest for which plaintiff is seeking protection in the instant case is particularly large. It consists both in the completion of the contract, due to the pecuniary gains which will result therefrom, and in the prevention of its breach, regardles of its performance, since if the assumed implied negative covenant is breached there will be diversion of the sponsorship of the bout to the competitor, entailing great loss to plaintiff.[10] Further, no amount of damages will enable plaintiff to get another world's champion under contract for the scheduled bout. In view of these considerations, the court's argument that plaintiff's hardship will be mitigated by the receipt of $5,000 under a liquidated damage clause seems largely a makeweight. The only possibility of hardship to the defendant lies in the fact that, even though plaintiff's performance is assured, if the defendant does not choose to comply with his affirmative covenant he will be forced to remain idle, and without income, since the injunction, if issued, will prevent him from boxing for others, at least for a time. The contract provides for a lump sum to be paid defendant for performing the whole contract, and the court would probably not, nor could hardly be expected to, award the defendant part of the consideration for compliance with the injunction requiring him to comply with the negative part of the contract.[11] However, since this hardship could

579 (1914), where an injunction against defendant Dirks, contributor of "a series of horrible but apparently popular drawings representing suppositious experiences in varying surroundings of certain nondescripts known as the Katzenjammer Kids," was denied on the ground that the contract provided if Dirks "failed for but a single week to furnish drawings satisfactory to the plaintiff," the latter could refuse to purchase any of the series. See also, 5 POMEROY, EQUITY JURISPRUDENCE, 2d ed., § 2192 (1919). This is probably the sense in which the court used the term "mutuality of performance," since the court is apparently looking to the possibility of forcing plaintiff's performance at the time of the decree, not at the time the contract was made.

[8] United States Fidelity & Guaranty Co. v. Traveler's Ins. Co., 188 Ky. 841, 224 S. W. 496 (1920); 14 R. C. L. 326 (1916).

[9] Madison Square Garden v. Carnera, (C. C. A. 2d, 1931) 52 F. (2d) 47; see also, Cincinnati Exhibition Co. v. Marsans, (D. C. Mo. 1914) 216 F. 269.

[10] See, for example, the comment in 30 TIME 24 (July 5, 1937): "Champion Braddock's net return from his share of last week's $715,000 gross receipts, ninth largest in ring history, was some $60,000, far less than he was offered as a guarantee for fighting Challenger Schmeling. But Champion Braddock's loss was trifling compared to Madison Square Garden's. After last week's fight, Promoter Jacobs signed a five year contract for Champion Louis's exclusive services. Since a condition of fighting Joe Louis will doubtless be for all challengers a similar contract with promoter Jacobs, Louis' victory last week gave Promoter Jacobs a virtual monopoly on all really large-scale pugilistic enterprise in the future, set up a new promoting partnership which may eventually make the biggest Dempsey-Richard coups look like small beans."

[11] No case has been found where the court apportioned the consideration for the parties. Applications for injunction have been denied, however, on the basis that to issue the injunction would subject the defendant to too much hardship. See Ehrman

be overcome by boxing for the plaintiff, defendant is not in a position to complain too loudly that he is prevented from earning his livelihood by the decree. The ultimate problem would seem to resolve itself into a weighing of the relative hardships. An injunction should not be denied merely in a reaction to the doctrine of *Lumley v. Wagner*,[12] if substantial injury would result to the plaintiff from its denial, and comparatively small injury to the defendant if it were issued. While the case is admittedly a close one, it is submitted that the injunction should have been granted.

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& Sons v. Bartholomew, [1898] 1 Ch. 671, 78 L. T. R. (Ch.) 646, 67 L. J. (N. S.) (Ch.) 319, where an injunction to restrain D from breaching a covenant not to engage in any other business, but devote the whole of his time to plaintiff's business was denied on the ground that such a stipulation was unreasonable. See also, Clark, "Implications of Lumley v. Wagner," 17 COL. L. REV. 687 at 696 (1917).

[12] 1 De G., M. & G. 604, 42 Eng. Rep. 687 (1852).