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Roy Mitchell Moreland
University of Kentucky

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INJUNCTIVE CONTROL OF FAMILY RELATIONS.

This paper is a discussion of the use of the injunction to regulate and control family relations, involving husband and wife and infants. This includes among other things, the more basic problem as to whether equity has jurisdiction to protect purely personal rights by injunction in the absence of any "property rights" upon which to base the relief. First, the leading cases will be examined at some length. Then a constructive analysis of the several questions involved will be attempted.

I. WHERE RELATIONS BETWEEN HUSBAND AND WIFE ARE INVOLVED.

The leading case of Vanderbilt v. Mitchell, while insisting that the technical basis of an injunction given by the court against the use of a fraudulent birth certificate was the protection of property rights, goes far by way of persuasive dictum in recognizing the fact that an individual has rights other than property rights, which a court of equity should protect.

In that case the defendant, the wife of plaintiff, was living in adultery with a third person, and as a result of such adulterous intercourse, a child was born. She had fraudulently induced a physician to believe that plaintiff was the father of the child, and caused him to insert such fraudulent statement in the birth certificate required by the laws of New Jersey. The certificate had been recorded, and under a statute a certified

1 The following citations will be found helpful in a consideration of this problem: Equitable Jurisdiction to Protect Personal Rights, Long, 33 Yale L. J. 115, 126; Equitable Relief Against Defamation and Injuries to Personality, Pound, 29 Har. L. Rev. 640, 668; The Progress of the Law, Equitable Relief Against Torts, Chafee, 34 Har. L. Rev. 388, 407 et seq.; Principles of Equity, Clark, sec. 241; The Change in the Meaning of Consortium, Evans Holbrook, 22 Mich. L. Rev. 1; Pomeroy's Equity Jurisprudence (4th ed.), sec. 99.

2 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304 (1907); 21 Har. L. Rev. 54.
The court, in granting the prayer of the plaintiff, insisted that the technical basis of the jurisdiction it was exercising was the protection of property rights. Because of the fraudulent certificate, plaintiff would be prima facie liable for the support and maintenance of the infant. At his death the certificate would become evidence upon the question as to who should inherit his property. If it became impossible, for several reasons, to rebut this prima facie liability, it would become fixed. These reasons furnish sufficient grounds upon which to base the holding in the case.

But the court seized the opportunity to utter a dictum. In addition to the threatened property damage there was an injury to the plaintiff’s personality. The use of his name by a bastard child, the usurpation of the status which a legitimate son would occupy—these constituted serious personal injuries, as well as injuries to property. The court signified its willingness to give relief for these personal injuries, as such, had it been necessary, saying:

“If it appeared in this case that only the complainant’s status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion. And we should declare that the complainant was entitled to relief. . . . In many cases courts have striven to uphold the equitable jurisdiction upon the ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights, and to that end to lay hold of slight circumstances tending to show a technical property right.”

However, in the end the court insisted that the technical basis of the decision was the protection of property rights, and expressly said that whether the bill might not have rested on personal rights alone was not decided, since the case presented

*Ibid. 100.*
The property feature sufficiently to rest the decision wholly on that.

The case is a good illustration of one method of growth of the law. The case rests solely and wholly on precedent, but persuasive dictum is inserted indicating the path for future decisions. This, if worthy, exerts a powerful influence on subsequent decisions. That was the result of the dictum in the instant case.

A leading case involving the jurisdiction of equity to protect an individual interest in a domestic relation is *Ex parte Warfield.* In that case a husband sued for damages for partial alienation of his wife's affections and asked the court to enjoin the defendant from future association with her. The court granted the injunction and the defendant having violated it, was committed for contempt and brought a *habeas corpus* proceeding, claiming that the court had not had jurisdiction to grant the injunction. It was held that the court had such jurisdiction, both under the inherent power of the court of equity and under the broad Texas statute relating to injunctions. The right to services and consortium are mentioned, but it is difficult to determine just how much these factors influenced the decision. Of course these were sufficient to ground an injunction upon, as upon the protection of a property right, but apparently the court was willing to and did in this case, protect personal rights as such. This conclusion is based upon the language of the opinion in various places, as for example the following:

"The growth of the principles of equity in this regard have been greatly enlarged, so that it may be said that where a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon some personal act or conduct, the court will grant the writ. In such case, it cannot be said that the court lacks the power, although in doubtful cases it may refrain from the exercise of such power."3

The statute, which the court construed as giving wide power to equity courts in granting injunctions, weakens this decision, but the language of the opinion indicates that the court considered it would have reached a like result in the

40 Tex. Crim. App. 413, 50 S. W. 933 (1899).

absence of statute, the court saying, "this would be so under the liberal rules of equity, as now practiced in the courts," but more so under the provisions of the Texas statute. So we conclude, that although the court had both the protection of property rights and the provisions of a broad statute as a basis for the injunction, it was willing to protect the personal rights involved, as such.

Two cases which have several common features and reach a similar result will now be examined. These cases, Hodecker v. Stricker and Snedaker v. King represent a more conservative attitude than is apparent in Ex parte Warfield. In these cases injunctions were refused. In Ex parte Warfield one was granted.

In Hodecker v. Stricker, the plaintiff was the wife of Hodecker. The defendant was living with Hodecker in immoral and meretricious relations, and had appropriated his surname, which prejudiced plaintiff's standing in the community. There was no allegation of slander or libel, nor was it charged that the defendant had alienated from the plaintiff the affections of her husband. Apparently then, the plaintiff did not intend to allege any damage to property as such, but based her action solely upon the charge that the defendant had usurped the name, which the plaintiff alone, as Hodecker's wife, was entitled to bear, and that this was an "assault upon the identity and individuality of the plaintiff, distressing to her." The court considered that the case rested upon the pleadings, upon injury to personality. An injury to property could have been found, but the court considered that the plaintiff alleged an injury to personality alone. The question therefore was directly raised in the opinion of the court, as to whether the court would protect personality as such. The court refused to do so and suggested that the proper mode of relief for the plaintiff was by way of the divorce court. That would remove from her the name of Hodecker, and the distressing and humiliating gossip which the defendant's use of that name entailed.

In Snedaker v. King, decided twenty years after Hodecker v. Stricker, and in another jurisdiction, a wife again was pro-

* 39 N. Y. Sup. 515 (1896).
† 111 Ohio 225, 145 N. E. 15 (1924). See comments on case in 38 Har. L. Rev. 396; 34 Yale L. J. 327; 9 Minn. L. Rev. 253; 1 Cin. L. Rev. 101.
ceeding against her husband's paramour. This time she asked that the defendant be restrained from associating with, going near, or communicating with her husband. It is at once apparent that the property right to a husband's consortium, which was no longer desired in the Hodecker case, was directly raised in the Snedaker case. In addition, the plaintiff alleged that the defendant was attempting to take away from the wife her husband's support. On such allegations, it would have been easy, had the court thought it expedient, to have found an injury to property upon which to base an injunction. However, the court refused to do so. The following excerpt from the per curiam opinion illustrates the attitude of the court and its reasons for refusing to affirm the injunction granted by the lower court:

"The decree in this case is an extreme instance of government by injunction. It attempts to govern, control, and direct personal relations and domestic affairs. Among other restrictions placed upon the defendant by this decree is that of remaining away from any place where plaintiff's husband may be, and from interfering with plaintiff's efforts to communicate with her husband, and with her efforts to regain his love, esteem, support and conjugal relation. It would be only a little more extreme if the husband had been made a party defendant, and a mandatory injunction decreed requiring him to discharge all the duties of companionship, affection, love and all other duties, legal and moral, assumed by him when he entered the conjugal relation."

Manifestly, the result in the Snedaker case is based upon a conclusion that it would be inexpedient or ineffective for a court of equity, assuming that it had the power, to attempt to control and enforce conjugal relations by the use of an injunction. The court considered that even if it could enforce its decree, which was doubtful, it was just as doubtful if any beneficial results could be effected.

In Bauman v. Bauman 8 the plaintiff's husband had obtained a purported divorce from her in Mexico and had subsequently married the defendant, Ray Starr Einstein, in Connecticut. The plaintiff obtained a declaratory judgment establishing her status as lawful wife of Bauman and declaring the Mexican divorce and Connecticut marriage null and void. Plaintiff also sought to enjoin the defendant, Ray Starr Einstein, from continuing to assume the name Bauman, and to restrain both her and Bauman from representing that they were husband and

wife. The appellate court expressly affirmed the holding of the lower court that the divorce and marriage were void. However, although it considered that the conduct of the defendants was reprehensible, it refused to grant injunctive relief. The court considered that the declaratory judgment protected the plaintiff in whatever property rights she may have had because of the matrimonial status, and refused to protect the purely personal rights which remained. In particular, the court insisted that the only injury alleged was an injury to plaintiff’s feelings, and that an injunction would not be granted to prevent such an injury. Such reasoning leads to a result which refuses to give protection to full personality, making it unnecessary to decide whether the relief is expedient or not.

In family relations, where a third party is interfering with the marital relationship, there are several questions which a court of equity will find it necessary to consider in deciding a case. First, is there a right involved, which finds any sort of protection in our legal system? If the court answers this question in the affirmative, it is then necessary to consider, second, will a particular division of our legal system, equity, lend its aid in protecting this right? The answer to this second proposition is dependent upon at least three points:

1. Is the remedy at law adequate?
2. Is there a property right involved?
3. Assuming that all these hurdles have been surmounted, is it expedient to grant relief by injunction?

This analysis will now be considered more in detail.

First, is there a right involved, which finds any sort of protection in our legal system?

A husband is entitled to his wife’s services and society. It follows that he has a right of action against one who deprives him of them. Nor is it necessary that the wife be enticed to leave him. The husband has an action for alienation of her affections, although she has not left his house and although he

9 Tiffany on Domestic Relations (3d ed.) sec. 45 and cases cited in note 80; Staton v. Milburn, 180 Ky. 655, 203 S. W. 529 (1918); Modica v. Martino, 207 N. Y. Sup. 479 (1925); Deming v. Leising, 212 N. Y. Sup. 213 (1925); Pugsley v. Smyth, 98 Ore. 448, 194 Pac. 686 (1921); Harringer v. Keenan, 117 Wash. 311, 201 Pac. 316 (1921).
does not show any actual pecuniary loss.\textsuperscript{10} This is true even in states where it is provided by statute that the earnings of the wife shall be her separate property. There remains to the husband the technical right to services rendered in the household or in the business of the husband.\textsuperscript{11}

Such an action was likely based originally upon loss of services, it being presumed that by the alienation of her affections her services were rendered less valuable. To a certain extent this was a fiction; to a certain extent it was true.

But whatever may have been the basis of the original action, the modern action is based largely upon the loss to the husband of his wife's consortium, services being of less and less value to the husband as the emancipation of woman continues. Modern married women's statutes have not lessened the husband's right to his wife's consortium, her society, companionship, conjugal affection, and aid. Anyone who alienates the wife's affections is bound to lessen the value of these to the husband. For such an injury an action lies.

And in most jurisdictions the wife is allowed a similar action.\textsuperscript{12} Of course, her action cannot be based upon loss of services, but well considered cases reason that "inasmuch as the husband has the right to sue for the loss of consortium of the wife, there can be no intelligent reason why she should not possess the right to sue for the loss of the society, companionship, affection and protection of the husband, which the law has vouchsafed to her."\textsuperscript{13}

The difficulty in permitting the wife to sue at common law for alienation of the affections of her husband was largely procedural. Under the common law the identity of the wife was considered to be merged in that of her husband; she could bring no action without joining him, and any damages she might recover would belong to him. Consequently it was most difficult to attempt to work out an action for the wife in this

\textsuperscript{10} Tiffany op. cit. supra note 9, sec. 45 and cases cited in note 81; see note 44 A. L. R. 845.
\textsuperscript{11} Ibid. sec. 48 and cases cited in note 7.
\textsuperscript{12} Ibid. sec. 46 and cases cited in note 98; McCurdy's Cases on Domestic Relations, cases cited in note 2, page 818; Madden's Cases on Domestic Relations, cases cited in note 9, page 381; Woodson v. Bailey, 210 Ala. 568, 88 So. 809 (1924); Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869 (1920); Rott v. Goehringer, 33 N. D. 413, 157 N. W. 294 (1916).
\textsuperscript{13} Adams v. Main, 3 Ind. App. 232, 29 N. E. 792, 794 (1892).
type of situation. But whatever the position of the wife may have been under the common law, it would seem that under modern statutes, which have largely destroyed the fiction of the unity of the husband and wife, giving her the control of her property and the right to sue in her own name, there can no longer be any valid reason for denying the wife an action for alienation of her husband’s affections. And such is the prevailing rule.

Having found that a right is involved, which finds protection in our legal system, namely an action to either spouse at law for alienation of the affections of the other, we will now examine the second question in our analysis.

Second, will a particular division of our legal system, equity, lend its aid in protecting this right? In considering this question there are three points to be discussed.

(1) Is the remedy at law adequate?

The remedy at law is obviously inadequate. Of course either spouse has an action at law for damages. But damages are a poor palliative for loss of consortium and the continued shame and humiliation which the complaining party necessarily feels. In this type of case money is often little desired. The undisturbed enjoyment of the marital relationship, unmolested by the wrongful interference of the defendant, is the only relief which is adequate. As suggested by Buck, J., in Smith v. Womack, in considering whether the wife should have a right to ask for an injunction in such a case, to hold that damages are an adequate remedy "would be tantamount to holding that one who had a home, with carefully tilled crops on it, ready for harvest, would have the right to sue in damages an enemy who was seeking to destroy a dam or dyke, and thereby let the floods inundate such farm and crops and utterly destroy them, but would not have the capacity or right to prevent such acts by an injunction."

Nor is it sufficient to say to the complaining spouse that if he no longer desires the humiliation he can get a divorce. A divorce is not an adequate remedy. He does not want to sever the marital relationship. He wants to continue it.

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14 19 Ill. L. Rev. 587.
15 271 S. W. 209 (Texas, 1925).
16 Ibid. 212.
17 See generally 29 Har. L. Rev. 640, 668 ff.
(2) Is there a property right involved?

Is the jurisdiction of equity confined to securing rights of property? In the past this has not even been considered a moot question, for since Gee v. Pritchard courts of equity have considered that their jurisdiction was limited to the protection of rights of property, and that rights of personality were without the pale of relief. Although there is no substantial reason today for such limitation, and although able writers have argued to the contrary, this is still, apparently, the prevailing rule, with cases showing a tendency to relax it to be found in the books, but not in any great number. So it is well to consider whether there is a property right to be protected in the cases under discussion.

Although the right of the husband to his wife's services is now thoroughly "moribund for all substantial purposes," it still has sufficient vitality to constitute a property to be protected, if the courts desire to find one in a suit by the husband. But it is not necessary to use this particular right in order to secure a right of property to be protected. Each spouse is entitled to the consortium of the other. This right is recognized as an element of the marriage contract, and is a right of property. Any person who interferes with it must respond in damages, as we have learned. This right to consortium is fully sufficient to ground an injunction upon, as upon the protection of a property right, if the court desires to follow the historical rule.

Suppose though, that the plaintiff fails to allege injury to

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2 Swanst. 402 (1818).
3 Clark, Principles of Equity, 314.
4 Roscoe Pound, op. cit. supra n. 17, 640.
5 "It requires no argument or citations of authority to show that the marriage relation is based on civil contract. It follows as the night follows the day, that the parties to such a contract are entitled to protection against unlawful interference with the obligations of that contract on the part of third persons. If this action were for damages alone, instead of damages and injunction, it would be conceded on all sides that the wife is entitled to maintain an action to recover a money judgment for any damages she may have suffered. It is equally well settled that the wife would be entitled to compensation, not only for loss of support, as alleged in the petition and as found by the trial court, but that she would also be entitled to recover damages for loss of consortium. Both of these elements are recognized as elements of the marriage contract and as rights of property." (Italics are ours). Snedaker v. King, 111 Ohio 225, 145, N. E. 15, 19 (1924), dissenting opinion of Marshall, C. J.
services or consortium. This was true in the Hodecker case. Is it possible for the court to find a property interest to protect other than the rights to services or consortium? The dissenting opinions in the Bauman case lend us aid in considering this question.

It is there suggested by Crane and O'Brien, JJ., that the marriage relationship creates a "status." This status is more than a personal relationship. Created by consent of the parties, sanctioned by law, it may be considered a "property right" which is entitled to the protection of the law. The fact that we consider the marital status as a property right does not affect the fact that it remains a personal relationship. We are not put to a choice that it is a personal relationship on the one hand, or that it is a property right on the other. Personal and property interests of husband and wife are merged in this relationship. It is really a union of such rights. It is no great extension in the law to consider the marital relationship a sufficient property to be entitled to the protection of equity, if it is desired to follow the historical rule that equity protects only property rights.

Whether equity secures purely personal rights by injunctive relief has now apparently become a moot question. As suggested above, equity courts have considered in the past that they had jurisdiction only when the protection of property rights was involved. The trend is apparently in the direction of an extension of that rule. However, it is considered by the writer that a discussion of that most interesting question is not necessary in the husband and wife cases involving family relations, and so a consideration of it will be reserved for a subsequent paper on the "right of privacy," where it is not only apropos but necessary.

It is true that a court of equity could consider the question in the type of case under discussion, but it should not be necessary to do so. The historical rule that equity protects only property rights can be followed in any case, if the court is at all flexible-minded. As suggested, supra, if injury to the right to services or consortium is alleged, the court has before it a

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22 See note 6 supra.
24 Supra n. 18.
property right entitled to protection, if expedient. If there is a mere general allegation of injury to the marital relationship, there is a property right in the "status" upon which to base the injunction. If a situation should arise where injury to consortium was not alleged and where the court did not desire to consider that there was a "property right" to be protected in the marital status, it would be necessary for the court to decide whether it desired to protect purely personal rights, as such, by injunction. As to whether it would care to do so would be highly conjectural at the present state in the progress of the law on this question.

(3) Is it expedient to grant relief by injunction?

The feasibility of attempting to control domestic affairs involving the husband and wife by injunction is questionable. There are several points to be considered.

(a) The difficulty of enforcement of the decree.

It is hard to understand why an insuperable difficulty in enforcing such a decree should be encountered by the court. Contempt proceedings are the proper method of enforcing injunctive process and can be used here as readily as elsewhere. This phase of the problem is not peculiar to this situation. Nor should the court be concerned about securing information of possible infractions of the injunction. A jealous wife or husband would be an untiring agent of the court in this situation.

Until this point in this study, it has been possible to overcome all difficulties which would prevent relief. But difficulties to relief are now encountered which make such injunctions inexpedient except in rare cases.

(b) The doubtful beneficial results to be obtained.

Looking at the matter from the broad attitude of public policy, it is doubtful whether the beneficial results obtained justify the use of the injunction in such cases. Can the court effectively control marital relations by the use of injunctions? It is true that the court can say to the paramour, "Hands off." And while it cannot effectively say to the defendant, "Render to your spouse those personal services which the marital relationship calls for," it can say negatively to him, "Do not render them to another." Sometimes this negative relief has been
found to be effective in cases of the type of Lumley v. Wagner.25 But it is doubtful whether it is good policy for the court to render such relief in this type of cases. Should the court attempt to force two people to continue the marital relationship when one of them emphatically desires to discontinue it? After all arguments pro and con are considered, is it not perhaps better to adopt a policy of hands off in equity and leave the parties to either a reconciliation or the remedial relief of a divorce? Perhaps, after all, a divorce is the best relief for an eclipsed marital relationship. Perhaps that is the best solution from the standpoint of society, the parties, and even the children, if any. While not an "adequate" remedy, it may be the most "practical" one. That appears to be the attitude manifested in the Snedaker and Bauman cases.26

(c) The inherent danger of such decrees.

Is it wise to make it a part of the province of equity to administer paternal relief in domestic affairs of this character?

25 1 DeG., M. & G. 604 (1852). In this leading case the defendant contracted to sing for the plaintiff, and not elsewhere, for a certain number of nights. She broke her contract and was about to sing for another. The court restrained her from singing elsewhere on the ground that although it was impossible to compel her to sing, it might "thus possibly compel her to fulfill her engagement." This enforcement of the negative covenant gave the court an opportunity to do negatively what it was not feasible to do affirmatively.

26 Cf., Witte v. Bauelerer (Tex. Civ. Appl.), 255 S. W. 1016 (1923), where the court enjoined the defendant from having anything to do with plaintiff's wife, except in such way as necessary in her discharge of her duties as bookkeeper for the defendant. It is interesting to speculate upon the success the court would have in enforcing such an injunction. The decision cannot be said to be based upon any grounds "except the outraged feelings of the court, which cited no law, gave no reasons, but preached a good sermon in one paragraph." It is impossible to determine how much the Texas statute mentioned in Ex parte Warfield, 50 S. W. 933 (1899) influenced the decision, since the court did not mention it in the opinion.

Cf. also, Hall v. Smith, 140 N. Y. Sup. 796 (1913), where the court although refusing to give an injunction in the instant case because of laches, said that it did not doubt "that in a proper case the right to grant an injunction resided in a court of equity" under such circumstances. The court was not specific as to what would constitute a "proper case."

Cf. also, Hawks v. Yancey (Tex. Civ. App.), 265 S. W. 233 (1924), where the court granted an injunction to protect a woman from a man with whom she had had illicit relations from making statements about her, imposing himself upon her, preventing her marriage, and from making false charges concerning her to public officials. The injury to her business as a nurse, furnish a property right to be protected, it might be suggested.
There are limits of effective legal action. It can well be argued that attempts to govern too closely the morals of people by injunction will only result in making the courts which grant such decrees ridiculous and so injure the structure of the whole legal system. Regulation beyond a certain limit is dangerous. Perhaps the high office of the injunction should not be stultified by permitting a resort to it in such cases.

This danger was emphasized by Ex-President Coolidge in his address before the American Bar Association in San Francisco at the annual meeting in 1922. His remarks on the limitations of law are applicable to the point under discussion:

"Behind very many of these enlarging activities lies the untenable theory that there is some short-cut to perfection. It is conceived that there can be a horizontal elevation of the standards of the nation, immediate and perceptible, by the simple device of new laws. This has never been the case in human experience. Progress is slow and the result of a long and arduous process of self-discipline. It is not conferred upon the people, it comes from the people. In a republic the law reflects rather than makes the standard of conduct and the state of public opinion. Real reform does not begin with a law, it ends with a law. The attempt to dragoon the body when the need is to convince the soul will end only in revolt.

"Under the attempt to perform the impossible there sets in a general disintegration. The law, loses its sanctity and authority. A continuation of this condition opens the road to chaos." (Italics are ours.)

Therefore, it is concluded, that although it is possible for the court to enforce its decree, it is doubtful whether it would be good policy to grant an injunction in most cases. First, it is doubtful if the injunction, assuming it is enforced, will better the relations between the plaintiff and his spouse. Second, such an extension in the use of the injunction may be dangerous to the structure of our whole legal system as an attempt to go too far in the control of personal affairs.

It is true that recent cases denying relief have contained strong dissenting opinions; but dissenting opinions do not make law. Neither do they always mark the future course of it. As to whether they do in this instance remains for future decisions to disclose.
II. Cases Involving Infants

The jurisdiction of a court of equity over the person as well as over the property of infants has long been recognized. As stated in the case of New York Life Insurance Company v. Bangs, such jurisdiction "originated in the prerogative of the Crown, arising from its general duty as parens patriae to protect persons who have no other rightful protector. But partaking, says Story, as the prerogative does, more of the nature of a judicial administration of rights and duties in foro conscientiae than of a strict executive authority, it was very naturally exercised by the court of chancery as a branch of its original jurisdiction.'"

In Aymar v. Roff a girl twelve years old had married in ignorance of the duties of that relation, considering the matter a frolic. When she learned of the duties of marriage, she disentended and wished to evade the consequences of her act. Her father, as her next friend, brought a bill alleging these facts and the court ordered that she be placed under its protection as its ward and that the defendant, the husband, be restrained from holding any conversation or having any intercourse with her.

The court, in the leading case of Stark v. Hamilton, might have based its decision upon this jurisdiction of equity to secure and protect the rights of infants, but it did not do so. In that case a man had debauched a minor girl and induced her to live with him in a state of adultery and fornication and was persisting in a continuance of such conduct. Would equity afford the father of the girl a remedy by injunction? The court held that equity had jurisdiction and enjoined the man from associating with the girl, and from communicating with her in any way, either by writing, telephoning, telegraphing, or through the aid and agency of any third person.

Instead of basing its jurisdiction upon the power of equity.

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\[n\] 103 U. S. 435, 26 L. ed. 580 (1881).
\[n\] 3 Johns. Ch. 49 (N. Y., 1817).
\[n\] See also, Butler v. Freeman, 1 Ambl. 301, 27 Eng. Rep. 204 (1856); In re Cozza, 163 Cal. 514, 126 Pac. 161 (1914); State v. Tinker, 255 Mo. 1, 166 S. W. 1028 (1914); In re Pinney, 91 Kan. 407, 137 Pac. 987 (1914).
\[n\] 149 Ga. 227, 99 S. E. 861 (1919); affirming 149 Ga. 44, 99 S. E. 40 (1919); commented on in 34 Har. L. Rev. 388, 412; 33 Har. L. Rev. 314; 19 Col. L. Rev. 413; 5 Corn. L. Q. 177; 18 Mich. L. 335; 29 Yale L. J. 344.
to secure and protect the rights of infants, the court preferred to consider its power to protect property rights and rights of personality. It was proper for the court to rest its decision upon the protection of these rights, if it desired to do so, but it would have been far easier to have rested it upon its jurisdiction to protect infants.

Apparently, this is another case where the court was willing to protect personality, as such. But the case involved, as the court suggested, both personal and property rights. The property right involved, the right of the father to have his children reside in his home with his family and to enjoy the comfort of their association and the benefit of their services, is well recognized. The interference of the defendant with this right was an interference with a right of property of the father, and equity had jurisdiction to give the father protection. Having gained jurisdiction to protect this property right, it could retain jurisdiction to give full relief to the father, which might include a protection of personality.

But the court disapproved of giving protection to personality in this indirect manner, saying,

"It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family or palliate the humiliation of the father for the continual debauching of his daughter."

Apparently, the injunction here is not for the protection of the property right involved, as in Vanderbilt v. Mitchell, but rather for the protection of the personal rights involved, which seemed to predominate in the mind of the court. Like Ex parte Warfield, the case is weakened by state code provisions, which give extended jurisdiction to equity, if interpreted by a liberal court.

The case is interesting as indicating an additional way for courts of equity to protect the rights of infants. Aymar v.
Roff \textsuperscript{37} illustrates that equity has jurisdiction under a delegation of authority from the state as *parens patriae*. Stark v. Hamilton \textsuperscript{38} illustrates a second manner of acquiring jurisdiction by equity—to protect the father's interest in his child's services—a property right. Possibly it also illustrates a third manner of acquiring jurisdiction—to protect personality, where there is not an adequate remedy at law.

In *Ex parte Badger* \textsuperscript{39} the court considered all of these grounds for obtaining jurisdiction to protect infants. The facts of the case are particularly revolting. The husband, the defendant, had become infatuated with a nurse, known to be without character. He had broken with his wife and set up a home, placing this woman in charge as his mistress, over his children. The wife filed a bill in equity asking for maintenance and custody of the children. A decree was rendered in her favor. Upon refusal of the husband to comply with the decree, he was adjudged guilty of contempt and imprisoned. He then brought a proceeding in *habeas corpus* alleging that the equity court had not had jurisdiction to determine and award the custody of minor children. It was held that the court had jurisdiction.

There is language in the opinion that would indicate that this court, as did the one in Stark v. Hamilton,\textsuperscript{40} considered that equity has jurisdiction to protect personal rights as such, where the remedy at law is inadequate. The effect of this language is lessened, however, by the fact that the trial court had considered and disposed of property rights, as well as personal rights, of the infants. In particular, the court relied upon its jurisdiction to protect infants as a delegation of authority from the state as *parens patriae*. The court found that an infant's ownership of property is not essential to the exercise of such jurisdiction. Such jurisdiction is only obtained when the infant is a ward of the court, but "it is not necessary that it be a public charge, or that the purpose of the proceeding be to so declare it; ... it becomes the ward of the court when it is brought before it for any purpose; and any proceeding or application in equity relating directly to the infant is sufficient." The effect of this

\textsuperscript{37} Supra n. 30.
\textsuperscript{38} Supra n. 32.
\textsuperscript{39} 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286 (1920).
\textsuperscript{40} Supra n. 32.
language is far-reaching. The result of it is that, although the bill may be filed by the father or the mother of the infant, asking for such relief as the parent’s right to the child’s services may make him entitled to, the mere filing of the bill brings the infant under the jurisdiction of equity to protect, as its ward. This result causes the best interests of the infant to come first—even before the interests of its father and mother. This is proper.

It is possible then, for equity to obtain jurisdiction of infants upon any one of three grounds. First, as a delegation of authority from the state as parens patriae. Second, to protect any rights of property which may be involved, if the remedy at law is inadequate. Third, to protect personal rights of the infant if the remedy at law is not adequate, and the court is liberal-minded enough to consider it has jurisdiction to do so. At the present stage of the progress of the law on this question, this would be highly conjectural. The first ground, long accepted as a legitimate ground for equity taking jurisdiction in this type of cases, is considered by the writer as the best of the three.

III. Conclusion

Cases involving the use of the injunction to regulate family relations are not particularly helpful in considering the general problem of whether or not equity has jurisdiction to protect purely personal rights. In Vanderbilt v. Mitchell, it was not difficult to find a property right on which to base the jurisdiction of equity to render relief. In the other husband and wife cases discussed, the right to consortium or the interest in the marital status should have been sufficient to furnish property rights to be protected. In spite of strong dicta in several of these cases, it is doubtful if any of them, with the possible exceptions of Ex parte Warfield and Witte v. Bauderer protect purely personal rights as such. And these cases, giving full effect to the language of the opinions, are weakened by the facts that a state statute gives equity extended jurisdiction in Texas and that it was unnecessary to protect personal rights as such, in order to give relief in these two cases. But as-

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4 Supra n. 2.
4 Supra n. 4.
4 Supra n. 26. See also 24 Col. L. Rev. 431; 37 Har. L. Rev. 770.
suming this negative result to be true, one cannot escape the conclusion that the Texas cases and persuasive dicta in certain of the other ones will assist in pointing the way to a further extension of the rule that equity protects only property rights.

Nor is it necessary for the courts in cases involving infants to consider whether they will extend the rule that equity protects only property rights in order to get jurisdiction to protect personal rights of infants. Equity does not have to consider this problem in order to get jurisdiction to regulate and control their personal rights. Such jurisdiction, a delegation of authority from the state as parens patriae, equity has long enjoyed as an exception to the historic rule. Courts which have chosen not to rely on this exception, have been able to find a property right on which to base jurisdiction, a protection of the parent’s right to the services of the child. Some courts, as in Stark v. Hamilton and Ex parte Badger, show an inclination to extend the rule that equity protects only property rights. Although both of these cases contained property rights to be protected, the strong language on the protection of personal rights, as such, will be helpful to subsequent courts of equity, which desire to further extend the rule.

Following the analysis herein, it would appear that equity has jurisdiction to protect family relations. In the husband and wife cases, the remedy at law is not adequate, and a property right on which to ground the injunction can be found if the court does not care to protect personal rights, as such. But although equity has jurisdiction, it is concluded that it is generally expedient to grant injunctions in such cases. While the decree can be enforced by the usual contempt proceedings, its beneficial results and good policy are doubtful. Since the court has jurisdiction, the injunction could issue in a particular case, "but a wise chancellor, it is believed, would rarely exercise the power." However, in the infant cases the jurisdiction should be exercised when at all necessary to provide for the protection of those who need the aid of the court.

College of Law, University of Kentucky.

ROY MORELAND.

44 Supra n. 32.
45 Supra n. 39.
46 Frederick C. Woodward, 19 Ill. L. Rev. 587, 588.