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Recent Decisions

RECENT DECISIONS

ADMIRALTY—UNSEAWORTHINESS—VICIOUS PROCLIVITIES OF SEAMAN UNKNOWN TO OWNER.—Plaintiff, a seaman aboard defendant shipping company's vessel, was assaulted and seriously injured by a fellow seaman. The two seamen had quarrelled and plaintiff struck the assailant, knocking him down. The latter retreated to the galley, procured a cleaver and returned to strike plaintiff over the head from behind. In the District Court a verdict was rendered for defendant. Plaintiff appealed from the judgment entered upon the verdict, alleging that the assailant was insane and that his presence on board rendered the vessel unseaworthy whether or not the owners had knowledge of his vicious tendencies. The trial judge had declined to permit plaintiff to introduce evidence of assailant's alleged insanity unless it had come to defendant's knowledge. On appeal, *held*, judgment reversed, new trial ordered. *Keen v. Oversea Tankship Corp.*, 194 F. 2d 515 (2d Cir. 1952), *cert. denied*, 96 Sup. Ct. 898 (1952).

In considering the allegation of unseaworthiness, negligence is of no concern.[1] There is an ancient obligation imposed on all shipowners to break ground only with ships which are capable of withstanding all the ordinary rigors of the sea.[2] This obligation is essentially a species of liability without fault, and is neither limited by conceptions of negligence,[3] nor is it contractual in nature, but rather sounds in tort.[4] That the warranty of seaworthiness includes a guarantee that the master and crew are fit for their duties has long been established,[5] and that it operates in favor of seamen as well as passengers and owners of cargo may not be disputed.[6] It is the extent of this warranty to seamen that is here in dispute.

It is well settled that a seaman may have indemnity for an injury caused by a defect in the hull or gear, although the defect was unknown to the owner. The case of *Seas Shipping Co. v. Sieracki*[7] is in point. In that case an employee was injured when a shackle broke due to a latent defect, causing a boom and tackle to fall on him. The court held there was no obligation on the part of the shipowner to test the shackle and that there was therefore no negligence. Nonetheless, the ship was held to be unseaworthy and the shipowner to be liable for injuries resulting

1. A seaman may in addition, as did the plaintiff in this case, bring an action in negligence, under the Merchant Marine Act of 1920, commonly known as the Jones Act, 41 STAT. 1007 (1920), 46 U. S. C. 688 (1946). Although the allegation of negligence was not dealt with on appeal it would seem that there was no negligence on the part of the owner. Liability cannot be founded on the doctrine of *respondeat superior* as the assault did not appear to be committed in the course of the discharge of the assailant's duties, nor in furtherance of the work of the employer's business, but appeared to be merely the culmination of a personal difference. Brailas v. Shepard S.S. Co., 152 F. 2d 849 (2d Cir. 1945), *cert. denied*, 327 U. S. 807 (1946). Nor did the owner appear to be negligent in keeping such a man on board, since it had no actual knowledge of his vicious proclivities, and it would appear there was no duty to acquire such knowledge. Gonzales v. United Fruit, 193 F. 2d 479 (2d Cir. 1951).

2. The Osceola, 189 U. S. 158 (1903).

3. The Seeandbee, 102 F. 2d 577 (6th Cir. 1939).

4. Cortes, Admr. v. Baltimore Insular Line Inc., 287 U. S. 367 (2d Cir. 1932).

5. The Magdapur, 3 F. Supp. 971 (S. D. N. Y. 1933).

6. Mahnich v. Southern S.S. Co., 321 U. S. 96, 99 (1944); The Osceola, 189 U. S. 158 (1903).

7. 328 U. S. 85 (1946).

therefrom. The *Sieracki Case* justifies its result on the ground that the owner is able to distribute the loss in the shipping community which receives the service and should bear its cost.[8]

The decision in the instant case has the effect of affording seamen the same protection from fellow seamen as the decision in the *Sieracki* case gave from the ship and its tackle, arguing, as did the court in the *Sieracki* case that the cost should be distributed by the employer.

This holding would seem to be an extension of the rule of absolute liability as it heretofore existed, since in prior cases in which the allegation of unseaworthiness due to the presence of a vicious seaman was upheld, the owner had knowledge of the tendencies in the seaman which resulted in the assault. *The Rolph*[9] was such a case and was interpreted by the trial judge in the instant case as having been decided on the ground of knowledge by the owner. That the decision would have been otherwise in the absence of knowledge was not decided.[10] In the recent case of *Kable v. United States*[11] the Court of Appeals for the Second Circuit declined to find any unseaworthiness due to the fact that the assailant was not found to have been a person of vicious, pugnacious or dangerous disposition. If such disposition had been found to be present, whether the owner's knowledge of it would have to be shown in order to support an allegation of unseaworthiness, was not decided. These questions left unanswered by the decisions in *The Rolph* and the *Kable* cases have been disposed of in the instant case.

The decision in the instant case would seem to impose on the owner the obligation of a virtual insurer for the actions of his crew members. In most cases it would appear to be impossible to discover beforehand whether a prospective employee is likely to be of a vicious nature. Even if this could be discovered the cost of the discovery might very well be overwhelming. Nonetheless, it is submitted, this decision is in harmony with the flexible and ever-expanding character of the doctrine of seaworthiness[12] as well as with the traditional position of the seaman as the "ward of the admiralty".[13]

It has been observed[14] with foresight that the only limitation on the doctrine

8. *Id.* at 85, 94

9. 299 Fed. 52 (1924), *cert. denied,* 266 U. S. 614 (1924).

10. It is interesting to note that the then Circuit Court of Appeals for the Second Circuit cited The Rolph with apparent approval in Cain v. Alpha S.S. Corp. *et al.,* 35 F. 2d 717, 720 (2d Cir. 1929), and that in a footnote to Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490, 492 (2d Cir. 1944) the court observed that there was no proof in the *Cain* case that the marauding employee was known, or reasonably should have been known, to be unusually belligerent. In a note in 43 HARV. L. REV. 490 (1930) it was stated that, since the offending officer was not notoriously brutal, liability could not be rested on any theory of unseaworthiness in Cain v. Alpha S.S. Corp., *supra.*

11. 169 F. 2d 90 (2d Cir. 1948).

12. A few of the cases within this trend are: Mahnich v. Southern S.S. Co., 321 U. S. 96 (1944) (defective rope selected by mate when good rope was available); Carlisle Packing Co. v. Sandanger, 259 U. S. 255 (1922) (can marked "coal oil" actually containing gasoline); The State of Maryland, Marshall v. Manese, 85 F. 2d 944 (4th Cir. 1936) (failure to instruct inexperienced hand). The decisions are collected in 1 BENEDICT, ADMIRALTY at 255 n. 34 (6th Ed. 1940).

13. Aguilar v. Standard Oil Co. of New Jersey, 318 U. S. 724 (1943).

14. *The Tangled Seine: A Survey of Maritime Personal Injury Remedies,* 57 YALE L. J. 243, 252 (1947).

of unseaworthiness is that of judicial conscience. The ways in which the doctrine of unseaworthiness has been used are unusual; for example where a seaman slipped on the soapy floor of the shower and this condition was held to make the vessel unseaworthy.[15] As admiralty's ward the seaman's relationship with his employer has been treated to be more closely analogous to that of father and child than that of employer and mere employee.[16] Whether or not, in the light of present day circumstances, one agrees with this concept, such a view does present a broad foundation upon which this decision can rest.

CONSTITUTIONAL LAW—WIRETAPPING—INTERCEPTION OF CONVERSATIONS BETWEEN ATTORNEY AND CLIENT AS A DENIAL OF EFFECTIVE AID OF COUNSEL.—Appellant was convicted of copying official intelligence reports relating to espionage and counter-espionage activities for the purpose of obtaining information respecting the national defense and with intent and reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, in violation of 18 U. S. C. § 793 (1950), and of wilfully and unlawfully concealing and removing official reports from the files of the Department of Justice in violation of 18 U. S. C. § 2071 (1951). In support of her motion for a new trial appellant charged that agents of the Federal Bureau of Investigation had tapped her home and office telephone wires and had thereby intercepted conversations between her and her counsel both before and during her trial. The trial court denied the motion. *Held*, one judge dissenting, order reversed, with a direction that a new trial be granted, if the trial court should find that the alleged telephone interceptions occurred; the interception of the conversations, if they occurred, deprived the accused of the effective aid of counsel, as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States, regardless of whether or not the interception yielded evidence which was introduced against her. *Coplon v. United States*, 191 F. 2d 749 (D. C. Cir. 1951), *cert. denied* 342 U. S. 946 (1952).

The right of an accused in a criminal action to have the assistance of counsel for his defense has been guaranteed by the Sixth Amendment.[1] It has also been held that due process of the law under the Fifth Amendment[2] entitles a defendant in a federal court to the effective aid of counsel.[3]

Effective aid of counsel has been held to require that an indigent accused be entitled to counsel;[4] that counsel be competent;[5] that counsel have adequate opportunity to prepare and to present the case;[6] and that counsel be present at all

15. Krey v. United States, 123 F. 2d 1008 (2d Cir. 1941).

16. Jones v. Waterman S.S. Corp., 155 F. 2d 992, 1000 (3d Cir. 1946).

1. U. S. CONST. AMEND. VI, provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. U. S. CONST. AMEND. V provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

3. Powell *et al.* v. Alabama, 287 U. S. 45, 71 (1932); Thomas *et al.* v. District of Columbia, 90 F. 2d 424, 428 (App. D. C. 1937).

4. Johnson v. Zerbst, 304 U. S. 458 (1938).

5. Glasser v. United States, 315 U. S. 60, 76 (1942); Williams v. State, 192 Ga. 247, 15 S. E. 2d 219 (1941).

6. Avery v. Alabama, 308 U. S. 444 (1940); Jones v. Kentucky, 97 F. 2d 335 (6th Cir. 1938).

stages of the proceeding.[7] An adequate opportunity to prepare and present the case necessarily involves an opportunity to confer privately with and to receive the advice of one's counsel;[8] the opportunity for counsel adequately to prepare the defense;[9] and the opportunity for counsel to present the case without interference or prejudice.[10] The majority of the court predicates its finding of a denial of the effective aid of counsel wholly upon the fact that the accused was denied the right to consult privately with counsel both before and during the trial.

The specific fact situation at issue has never been determined before. However, analogous situations have arisen where a privileged conversation between an attorney and client has been overheard either accidently or by design. Thus in *United States v. Olmstead et al.*[11] a conversation between an attorney and his client was overheard by a federal revenue agent who tapped the client's telephone wire. It was held that the revenue agent could testify as to the contents of the confidential conversation overheard by him. The *Olmstead* case is distinguishable from the instant case since the defendant there was neither under indictment nor being tried at the time of the wiretapping and the provisions of the Sixth Amendment were not, therefore, applicable.

In the instant case the majority of the court points out that the fact that the accused had ample personal consultation with her lawyer face to face, which no person overheard, would not eliminate the blot of unconstitutionality from the act of intercepting other conversations since there was a denial of her right privately to consult with counsel.

The two cases relied upon principally by the majority are *Louie Yung v. Coleman*[12] and *United States v. Venuto*.[13] In the former case the defendants were unable to speak English and their counsel could consult with them only through an interpreter. They were not allowed to have an interpreter unless there was also present an interpreter representing the prosecution. The court directed the prosecution to allow the petitioners to consult privately with their counsel through an interpreter selected by them. The *Venuto* case involved an order by a trial judge which prohibited discussion between counsel and accused during an eighteen hour recess in the trial. The Court of Appeals for the Third Circuit reversed the conviction and granted a new trial.

In similar cases denial of private consultation between client and attorney was condemned where the infringement of the right occurred either through the com-

7. United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950); Snell v. United States, 174 F. 2d 580 (10th Cir. 1949).

8. Louie Yung v. Coleman, 5 F. Supp. 702 (D. Idaho 1934); People *ex rel.* Burgess v. Risley, 66 How. Pr. 67 (N. Y. 1883).

9. Avery v. Alabama, 308 U. S. 444 (1940); Powell *et al.* v. Alabama, 287 U. S. 45 (1932); Jones v. Kentucky, 97 F. 2d 335 (6th Cir. 1938).

10. Thomas *et al.* v. District of Columbia, 90 F. 2d 424 (App. D. C. 1937); Downer v. Dunaway *et al.*, 1 F. Supp. 1001 (D. Ga. 1932).

11. 7 F. 2d 760 (W. D. Wash. 1925), *aff'd*, 277 U. S. 438 (1928). In State v. Falsetta, 43 Wash. 159, 86 Pac. 168 (1906), an officer of the court heard the defendant make a damaging admission to his counsel in the courtroom. He was permitted to testify as to what he had heard over the defendant's objection that the communication was privileged. The constitutional question of a denial of the effective aid of counsel was not raised.

12. 5 F. Supp. 702 (D. Idaho 1934).

13. 182 F. 2d 519 (3d Cir. 1950).

pulsory presence of a third person[14] or through deprivation of the right at some stage of the trial or proceeding.[15]

Once effective aid of counsel has been found to be denied as in the *Louie Yung* and *Venuto* cases the courts will reverse without considering whether the accused was damaged thereby since "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[16]

The justification for the conclusion of the majority of the court that the accused was denied her right to consult privately with her counsel lies only in defining the right as a right to an absolutely secret and uninterrupted series of conferences. This interpretation may be an extension of the existing law on the subject[17] since the decisions suggest that the right to consult privately with counsel is merely an adjunct of having an adequate opportunity to prepare and present the case and, as such, it has been held that the accused and his attorney must have sufficient opportunity to plan their strategy alone.[18] Lack of privacy might cause fear or reticence by the accused in conferring freely with his counsel and might also lead to a divulgence of trial strategy.

In the present case the accused and her counsel were apparently not aware of the wiretapping. In the *Louie Yung* case[19] the accused knew that his statements were being overheard and, therefore, might not have had that complete candor with his attorney which would be necessary to a proper defense. However, in the instant case since there was no awareness that the conversations were being overheard the accused may have made some damaging and prejudicial statements which would aid the government in the presentation of its case. It would be manifestly unfair in the principal case to place the burden of proving prejudice upon the accused. Information might have been obtained which could not be shown to have been intercepted but which might affect the government's conduct of certain parts of the case (e.g., some questions not to ask in cross-examination). The means of proving prejudice are not easily within the grasp of the accused.

The situation in the instant case is distinguishable from a situation where a

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14. Turner *et al.* v. State, 91 Tex. Crim. Rep. 627, 241 S. W. 162 (1922); State *ex rel.* Tucker v. Davis *et al.*, 9 Okla. Crim. Rep. 94, 130 Pac. 962 (1913); *Ex parte* Rider, 50 Cal. App. 797, 195 Pac. 965 (1920).

15. State v. Moore, 61 Kan. 732, 60 Pac. 748 (1900); Mays v. Commonwealth, 25 Ky. L. Rep. 646, 76 S. W. 162 (1903); People *ex rel.* Burgess v. Risely, 66 How. Pr. 67 (N. Y. 1883).

16. Glasser v. United States, 315 U. S. 60, 76 (1942).

17. The dissenting opinion in the principal case pointed out that the motion for a new trial failed to specify in what respect the defendant had been prejudiced by the interceptions and submitted that the hearing before the trial court, directed by the majority, should be limited to the question whether or not the defendant's right to the aid of counsel had been actually impaired by the interceptions.

18. ". . . a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." Powell *et al.* v. Alabama, 287 U. S. 45, 59 (1932). In Reliford v. State, 140 Ga. 777, 79 S. E. 1128 (1913), defense counsel was given ten minutes to prepare and this was considered insufficient, while in Wright v. Commonwealth, 114 Va. 872, 77 S. E. 503 (1913) the defendant was found guilty two days after the crime and no error in the proceedings was found.

19. Louie Yung v. Coleman, 5 F. Supp. 702 (D. Idaho 1934).

conversation was overheard accidentally as in *State v. Falsetta.*[20] In that case the accused and his counsel were cognizant that they were in a place where their conversations might be overheard and they could see who was about them. In the instant case the parties, telephoning from private locations, often from their own homes, had a right to feel a degree of privacy which they could not expect in a public place.

The right to counsel as provided by the Sixth Amendment has become inextricably bound up with due process as provided by the Fifth Amendment. The act of wiretapping the conversations of an accused with her attorney is not only "a serious breach of ethics",[21] but smacks of unfairness in the conduct of the action. The tactics of the F.B.I. would tend to debilitate the effective administration of justice and to cast suspicion upon the honesty of an accused's conviction. The circumstances surrounding this case gave rise to a very strong national emotional feeling against the accused. In such a situation a federal court could not place the stamp of approval upon tactics which are usually associated with police state procedures and which violate the fundamental fairness in the conduct of a criminal trial which is the very essence of due process.

CONTRACTS—ASSIGNMENTS—CLAUSE PROVIDING THAT ANY ASSIGNMENT OF CONTRACT OR MONEY DUE THEREUNDER SHALL BE VOID.—Defendant, a general contractor, subcontracted with a painting company for the performance by the latter of certain painting work. The subcontracts contained the following prohibitory clause: "The assignment by the second party [subcontractor] of this contract or any interest therein, or of any money due or to become due by reason of the terms hereof without the written consent of the first party [defendant] shall be void." The subcontractor subsequently assigned certain moneys due or to become due to him under the contracts to a bank which in turn assigned said rights to the plaintiff. No written consent of the defendant to the assignments was obtained. The contracts were not assigned, and no question of improper delegation of contractual duties was involved. Plaintiff assignee sued to recover certain money allegedly due and owing for work done by the subcontractor. On appeal from the Appellate Division which affirmed a judgment in favor of the defendant, dismissing the complaint on a motion for summary judgment, *held,* judgment affirmed on the ground that the prohibitory clause is a valid and effective restriction of the right to assign with the result that the attempted assignment is void as against the obligor. *Herman Allhusen v. Caristo Construction Corp.,* 303 N. Y. 446, 103 N. E. 2d 891 (1952).

The status of an assignee whose assignor has contracted not to assign the contract or any interest therein or any money due thereunder has vexed the courts of this state and of other jurisdictions. Where a contract by its terms forbids an assignment, it is a matter of interpretation of the language employed as to what is the extent of the restriction.[1] As stated in *Sacks v. Neptune Meter Co.*[2] it is one thing to

20. 43 Wash. 159, 86 Pac. 168 (1906).

21. This was the trial court's description of the act. United States v. Coplon, 91 F. Supp. 867, 870 (D. C. 1950).

1. See 2 WILLISTON, CONTRACTS § 422 (rev. ed. 1936); Grismore, *Effect of a Restriction on Assignment in a Contract,* 31 MICH. L. REV. 299 (1933).

2. 144 Misc. 70, 77, 258 N. Y. Supp. 254, 263 (Sup. Ct. 1932), *aff'd,* 238 App. Div. 82, 263 N. Y. Supp. 462 (1st Dep't 1933).

agree that a contract or interest therein shall not be assigned and that if assigned no right shall vest in the assignee as against the other contracting party[3] and another that the assignor merely covenants that he will not assign. In *Manchester* et al. *v. Kendall* et al.[4] the prohibitory clause read in substance as follows: that the party of the second part shall not assign or transfer his interest in the contract or any right thereunder without the written consent of the other party. In a suit by the assignee against the other contracting party the court held that the assignment was not void as to the other contracting party and that the assignee was entitled to recover. In *Reisler v. Cohen*,[5] however, where the anti-assignment clause was couched in language similar to that employed in the *Manchester* case, the court reached an opposite result, stating that the failure of the assignor to obtain written consent was fatal to the assignee's right to recover. Although there are similar holdings in other jurisdictions,[6] the decision of the *Manchester* case can be said to represent the New York law.[7] If the provision against assignment is without language to the effect that no interest shall vest in the assignee, the agreement is held to be merely a personal covenant on the part of the assignor not to assign.[8] Upon the breach of such covenant, the other contracting party may recover from the assignor such damages as he may have thereby sustained.[9]

Prior to the decision in the instant case, New York courts have stated by way of dicta that where the language of the anti-assignment clause is clear and unequivocal with respect to the intent of the parties, such intent will be given effect.[10] Such language is present in the instant case and the court implicitly recognized the distinction proffered in the *Sacks* case by stating that where parties agree that any assignment shall be void a court would have to do violence to such language in order to hold that the clause meant merely a promise not to assign. Rather the

3. See Morkel v. Metropolitan Life Insurance Co., 163 Misc. 366, 297 N. Y. Supp. 962 (Sup. Ct. 1934); Heffernan v. Prudential Insurance Co. of America, 88 Misc. 93, 150 N. Y. Supp. 644 (Sup. Ct. 1914).

4. 19 Jones & S. (51 Super. Ct.) 460 (1885), *aff'd mem.*, 103 N. Y. 638, 8 N. E. 653 (1886).

5. 67 Misc. 67, 121 N Y. Supp. 603 (Sup. Ct. 1910).

6. See Burck v. Taylor, 152 U. S. 634 (1893); Fairbanks v. Crump Irrigation Supply Co., 108 Cal. App. 197, 292 Pac. 529 (1930); Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110 (1902); Deffenbaugh v. Foster, 40 Ind. 382 (1872).

7. State Bank v. Central Mercantile Bank, 248 N. Y. 428, 162 N. E. 475 (1928); Sacks v. Neptune Meter Co., 144 Misc. 70, 258 N. Y. Supp. 254 (Sup. Ct. 1932), *aff'd*, 238 App. Div. 82, 263 N. Y. Supp. 462 (1st Dep't 1933).

8. State Bank v. Central Mercantile Bank, 248 N. Y. 428, 162 N. E. 475 (1928); Manchester *et al.* v. Kendall *et al.*, 19 Jones & S. (51 Super. Ct.) 460 (1885), *aff'd mem.*, 103 N. Y. 638, 8 N. E. 653 (1886); Reliable Loan and Investment Co. v. The Delgus Co. *et al.*, 223 App. Div. 94, 227 N. Y. Supp. 425 (1st Dep't 1928).

9. Reliable Loan and Investment Co. v. The Delgus Co. *et al.*, 223 App. Div. 94, 95, 227 N. Y. Supp. 425, 426 (1st Dep't 1928) While the decisions refer in general terms to the right to recover damages, it is difficult to envisage a case where the damages would be more than nominal.

10. State Bank v. Central Mercantile Bank, 248 N. Y. 428, 162 N. E. 475 (1928); Quinn v. Whitney, 204 N. Y. 363, 97 N. E. 724 (1912); N. Y. Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 48 (1905); Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895); Devlin v. Mayor, 63 N. Y. 8 (1875). See RESTATEMENT, CONTRACTS § 151 (1932).

court decided that the parties intended that an attempted assignment without consent would be void as against the obligor. The court further found that there was no sound reason which barred it from giving legal effect to the intent of the parties with respect to the prohibitory provision.

The plaintiff in the instant case contended that Section 41 of the Personal Property Law of New York[11] requires that the prohibitory clause be denied effect. In dismissing this contention the court stated that because the statute provides that a person may transfer a claim, it does not follow that he may not contract otherwise.[12] The court reasoned that its holding was not violative of public policy[13] because it found that the question of the free alienation of property was not involved. What was involved was the plaintiff's contractual right to the money due the contract. This right, stated the court, could not be separated from the other rights and obligations of the contract; the right is limited by the obligations.

However not all jurisdictions are in agreement with the court's decision that the assignor's right to the money due under the contract is merely a contractual one. There is authority to support the proposition that money owed by a contract debtor is property in the hands of the creditor of which the debtor cannot restrain the alienation as between the creditor and a third party.[14] It is submitted that the reasoning of the instant case is a sounder approach to the problem involved. The theory that the alienation of property cannot be effectively restrained contemplates a transfer of property to one person and the control of its devolution in another.[15] Performance by a contracting party of his part of the contract does not ipso facto vest a property right in him.[16] Rather he has a contractual right[17] which entitles him to the performance by the other contracting party of his part of the contract or to damages for the breach thereof. This right may not be the subject of an effective assignment where the assignment is prohibited by the contract creating the right.[18] Further, while the right to assign a matured claim may be a fundamental right existing in the owner of the claim it does not necessarily follow that he may not curtail such right by the very contract which gives rise to the claim.[19]

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11. This statute provides that any claim or demand can be assigned with certain exceptions not here pertinent.

12. *Contra:* Bandes v. Triborough Bridge Authority, 165 Misc. 698, 703, 1 N. Y. S. 2d 921, 926 (N. Y. City Ct. 1936). See Sacks v. Neptune Meter Co., 144 Misc. 70, 81, 258 N. Y. Supp. 254, 267 (Sup. Ct. 1932) (concurring opinion).

13. For another holding to the effect that the clause in question is not violative of public policy see Barringer v. Bes Line Construction Co., 23 Okla. 131, 99 Pac. 775 (1909).

14. Portuguese-American Bank v. Welles, 242 U. S. 7 (1916); State Street Furniture Co. v. Armour & Co., 345 Ill. 160, 177 N. E. 702 (1931).

15. Continental Insurance Co. *et al.* v. New York and H. R. R. Co. *et al.*, 187 N. Y. 225, 237, 79 N. E. 1026, 1029 (1907); De Peyster v. Michael, 6 N. Y. 467, 493 (1852); *in re* Farmer's Will, 99 Misc. 437, 442, 163 N. Y. Supp. 1089, 1091 (1917).

16. See Costigan, *The Doctrine of Boston Ice Company v. Potter,* 7 COL. L. REV. 32, 36 (1907).

17. See Sacks & Neptune Meter Co., 144 Misc. 70, 76, 258 N. Y. Supp. 254, 261 (Sup. Ct. 1932), *aff'd,* 238 App. Div. 82, 263 N. Y. Supp. 462 (1st Dep't 1933).

18. See Concrete Form Co. v. Grange Construction Co., 320 Pa. 205, 181 Atl. 589 (1935).

19. State *ex rel.* Kansas City Loan Guarantee Co. v. Kent, 98 Mo. App. 281, 282, 71 S. W. 1066, 1067 (1902).

CONTRACTS—RESTRAINT OF TRADE—POWER OF COURTS TO REFORM SUCH CONTRACTS.—Defendant sold his wholesale fruit and vegetable business to the plaintiffs, and as a part of the consideration agreed never to enter any kind of business in his own name or with any other person in the County of Muhlenberg and State of Kentucky. The defendant also conveyed to the plaintiffs a lease of the site of the business for a ten year term with the right of renewal. Two years later, in violation of the agreement, the defendant reentered the wholesale fruit and vegetable business in the same city. In an action by the plaintiffs to enjoin the defendant from competing with the plaintiffs, the Circuit Court found that the restrictions were too broad, but enjoined the defendant from competing in Muhlenberg County until the expiration of the plaintiffs' lease. Upon appeal, the Court of Appeals *held,* two justices dissenting, judgment affirmed. *Ceresia v. Mitchell* et al., 242 S. W. 2d 359 (Ky. 1951).

For the protection of one purchasing a business the courts have enforced restrictive covenants whereby the seller, as a part of the consideration, agrees not to compete within a specified area and a specified period of time, providing the restrictions are reasonable.[1] The reasonableness of the restraint depends upon whether it affords a fair protection to the party in whose favor it is given and to the interests of the general public.[2] The covenant in the instant case is clearly unreasonable inasmuch as it is unlimited as to time and excludes all types of businesses.[3] In cases where the covenants not to compete have been found unreasonable, the courts have differed as to how far, if at all, they should be enforced.

Where a promise in restraint of trade is both unreasonable and indivisible, a majority of the jurisdictions will not attempt to give it partial effect, but will let the whole fall.[4] The usual reason given is that where a promise is not clearly divisible, a court cannot take out the objectionable parts since that would be making a new contract for the parties.[5] Another reason is that where the contract is indivisible and partially unlawful, it is void since it is impossible for the court to determine which part of the restraint induced the consideration.[6]

Most of the modern decisions trace their root to two English cases, *Mallan* et al.

1. Oregon Steam Navigation Co. v. Winsor, 87 U. S. 64 (1873); Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419 (1887); Smith's Appeal, 113 Pa. 579, 6 Atl. 251 (1886).

2. Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770 (1905).

3. See note 1 *supra.*

4. *Accord,* 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 518 (1932). See also Capital Bakers, Inc. v. Leahy, 20 Del. Ch. 407, 178 Atl. 648 (1935); Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048 (1895); Buckelew v. Martens *et al.,* 108 N. J. L. 339, 156 Atl. 436 (1931); Harris Calorific Co. v. Marra, 345 Pa. 464, 29 A. 2d 64 (1942); Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712 (1890); Wisconsin Ice & Coal Co. v. Lueth *et al.,* 213 Wis. 42, 250 N. W. 819 (1933). In Biet *et al.* v. Biet, 135 Conn. 195, 63 A. 2d 161 (1948), the plaintiff made a promise which was in unreasonable restraint of trade, and was permitted to succeed in his suit to have such promise set aside. The Connecticut Supreme Court held that the contract was an entirety and that it could not be so divided by the court as to be enforced in one area and not in another. The court concluded that had the parties desired narrower provisions, they should have agreed upon them.

5. Emler v. Ferne, 23 Ohio App. 299, 155 N. E. 496 (1926). This court is one of the few American courts which has adopted the English "blue-pencil" test, *infra* footnote 9.

6. Johnson v. McMillion *et al.,* 178 Ky. 707, 199 S. W. 1070 (1918).

v. May[7] and *Price v. Green*,[8] which held that the lawful parts of a divisible agreement in restraint of trade or profession are enforceable while the other parts are void. However, the divisibility must appear in the contract itself and is a question of fact for the court. Thus, in the *Price* case, where a London and Westminister perfumer on selling out agreed not to carry on the perfumer's trade in London or Westminister or within 600 miles of those places, the agreement was held divisible as to the territory covered by the restriction and good as to London and Westminister, though void as to the 600 mile zone. This case represents the law of England today[9] and also the law of a majority of the American jurisdictions.[10]

Professor Williston criticizes the majority view by reasoning that if the lawful parts of a divisible contract can be enforced, there is no reason why a contract indivisible in terms cannot be enforced to the extent that it is legal.[11] Professor Corbin agrees, and further contends that partial enforcement of an indivisible contract would involve much less of a variation from the effects intended by the parties than total non-enforcement would.[12] The majority of the court in the instant case has adopted the views propounded by Professor Corbin, and has relied almost wholly upon his work on contracts.[13] This view has found favor in the courts of Massachusetts[14] and Kansas.[15] Several states have enacted statutes which also tend toward this view.[16] Although the New York courts seem to be in accord with the

7. 11 M. & W. 653, 152 Eng. Rep. 967 (1843).

8. 16 M. & W. 346, 153 Eng. Rep. 1222 (1847).

9. Putsman v. Taylor, [1927] 1 K. B. 471; Attwood v. Lamont, [1920] 3 K. B. 571; British Reinforced Concrete Engineering Co. v. Schelff, [1921] 2 Ch. 563. The English courts have adopted a test of divisibility known as "blue-pencilling": if a blue pencil mark can be drawn through the objectionable parts of a contract, the remainder will be enforced. However, the divisible parts must be more than merely "grammatically severable."

10. See John T. Stanley Co. v. Lagomarsino, 53 F. 2d 112, 115 (S. D. N. Y. 1931), where the court discusses the influence of the *Price* case.

11. 5 WILLISTON, CONTRACTS § 1660 (rev. ed. 1936).

12. 23 CONN. B. J. 43.

13. 6 CORBIN, CONTRACTS § 1390 (1950).

14. Cedric G. Chase Photographic Laboratories, Inc. v. Hennessey *et al.*, 97 N. E. 2d 397 (Mass. 1951); Metropolitan Ice Co. v. Ducas, 291 Mass. 403, 196 N. E. 856 (1935). In a recent Massachusetts case, similar to the instant case, the court reformed a covenant which prohibited reentry into the bakery business for seven years within a seven mile radius of Boston to four years within a four mile radius of Boston, holding that an agreement involving unreasonable provisions was enforceable to the extent that it was reasonable whether or not the agreement was by its terms divisible. Thomas *et al* v. Paker, 98 N. E. 2d 640 (Mass. 1951).

15. Foltz v. Struxness, 168 Kan. 714, 215 P. 2d 133 (1950); Fox v. Barbee *et al.*, 94 Kan. 212, 146 Pac. 364 (1915). Also see Hill v. Central West Public Service Ice Co., 37 F. 2d 451 (5th Cir. 1930). The area involved in this case was located in Texas; two years later, in a similar case, the Texas court followed the majority rule. Martin v. Hawley, 50 S. W. 2d 1105 (Tex. App. 1932). The *Hill* case was followed by John T. Stanley v. Lagomarsino, *supra* note 10, in the second circuit. Both federal cases were decided before Erie R.R. Co. v. Tompkins, 304 U. S. 64 (1938).

16. ALA. CODE tit. 9, §§ 22-4 (1940); CAL. BUS. & PRO. CODE §§ 16600-1 (Deering 1944); N. D. REV. CODE tit. 9, c. 8, § 6 (1943); OKLA. STAT. ANN. tit. 15, §§ 217-8 (1937); S. D. CODE tit. 10, c. 7, § 5 (1939). These statutes are almost verbatim copies of the California statute of 1872, and provide that every restraint of lawful business, trade or profession

majority,[17] several lower court decisions in recent years have followed the minority rule.[18]

In the instant case, plaintiffs were induced into buying the business by the promised restrictions. Should such restrictions be declared totally unenforceable, as they would have probably been under the majority view, plaintiffs would have lost the greater part of their consideration. However, by reforming the restraints, the majority of the court in the instant case has made a contract for the parties into which they never entered; something which most courts normally refuse to do.[19] There is no evidence whatever that the parties had ever agreed to the bargain which the court made for them. The sounder view, and the view propounded by the majority of the jurisdictions, is expressed by the dissent which holds that a court may reform a contract where it is construing the true intent of the parties in cases of mutual mistake or in cases of fraud by one party and mistake by the other, or, where a contract is divisible, the court may cast out the wicked and enforce the good. But beyond these limits, a court has no power to reform a contract. The criticism commonly leveled at the divisibility rule of the majority is that it permits the one in the stronger bargaining position to dictate the terms of the restraint, knowing that the court will trim it to the legal maximum.[20] However, this criticism applies with equal force to the minority rule.

SECURITIES AND EXCHANGE ACT—ISSUE OF STOCK TO KEY EMPLOYEES—PUBLIC OR PRIVATE OFFERING.—Defendant corporation offered its stock to key employees: those who were department heads, assistants to a department head, or other employees considered eligible for future promotion. Although the securities had not been registered with the Securities and Exchange Commission, defendant used the mails to complete its plan. The offer was made to about 500 employees or about 5 to 8 per cent of the total number of employees. The plaintiff, Securities and Exchange Commission, had obtained a temporary injunction restraining the sale as violative of the Securities and Exchange Act in that it was alleged to be an offer of unregistered securities through the mails. Thereupon the plaintiff moved to have the injunction made permanent. *Held,* injunction denied on the ground that the stock offering was a private offering and constituted a statutory exception to the

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is void except that where the good will of a business is sold, an agreement not to compete within a specified county, city or part thereof is valid and enforceable by the covenantee and his assigns so long as the business continues in that area. It has been held that these statutes merely invalidate the excess even though there is only one agreement and it has not been expressly divided by the parties. Wesley v. Chandler, 152 Okla. 22, 3 P. 2d 720 (1931).

17. Central New York Tel. & Tel. Co. v. Averill *et al.*, 199 N. Y. 128, 92 N. E. 206 (1910).

18. Goldstein v. Maisel, 271 App. Div. 971, 67 N. Y. S. 2d 410 (2d Dept. 1947); Molina v. Barnay, 56 N. Y. S. 2d 124 (1945) (not officially reported); Schmidl v. Central Laundry and Supply Co., 13 N. Y. S. 2d 817 (1939) (not officially reported); Widder Dye and Chemical Co. *et al.* v. United States Marking Tag Co. *et al.* 241 App. Div. 703, 269 N. Y. S. 802 (2d Dept. 1934). The *Schmidl* and *Molina* cases involved employment contracts with clauses not to compete after the termination of the employment.

19. Emler v. Ferne, *supra* note 5.

20. 5 WILLISTON, CONTRACTS § 1660 (rev. ed. 1936).

requirement that securities be registered. *Securities & Exchange Comm'n. v. Ralston Purina Co.*, 102 F. Supp. 964 (E. D. Mo. 1952).

The sole question before the court was whether the transaction engaged in was a public or private offering of stock.[1] Nowhere in the statute is "public offering" defined. In 1934 when the Securities Act was amended it was proposed to exempt stock issues sold to employees of the issuer from the requirement that the securities be registered. Both the House and the Senate rejected the proposal, the former on the ground that employees were in need of the statute's protection,[2] and the latter on the theory that employees were already without the section's prohibitions.[3]

The Securities and Exchange Commission itself has stated that the basis of determining whether or not an issue is public or private is determined by a number of factors: (1) number of offerees; (2) their relation *inter se* and with the issuer; (3) number of units of securities offered; (4) size of the offering; (5) manner in which the offering is made; (6) likelihood of present or subsequent injury to the public through an influx of unregistered speculative securities.[4] As in this case, however, the Commission has consistently maintained the position that where there is a substantial number of offerees the offering is a public one regardless of the other factors and this interpretation has been seemingly approved by the courts.[5]

In the instant case the court refused to base its decision on the number of offerees involved but rather bottomed its conclusion upon the purpose of the defendant in selecting the offerees and the circumstances of the offering. Here the court found that the purpose of the selection by the defendant was not an effort to raise funds but rather to secure the loyalty of the key company personnel in this manner, and that the circumstances surrounding the transaction showed good faith on the part of the defendant corporation.[6]

The court cited *Securites & Exchange Comm'n. v. Sunbeam Gold Mines Co.*,[7] as authority for its decision. There in an appeal by the Securities and Exchange Commission from an order denying a temporary injunction the sole question before the court was whether an issue of securities confined to stockholders of the offering corporation and to stockholders of another corporation whose assets the offering corporation was seeking to acquire, constituted a private offering. In reversing the

1. Under 48 STAT. 77 (1933), 15 U. S. C. § 77e (1934), the use of the mails or interstate commerce to offer or sell unregistered securities is prohibited. But by 48 STAT. 906 15 U. S. C. § 77d (1) (1934), the statute specifically exempts ". . . transactions by an issuer not involving any public offering; . . ."

2. H. R. REP. No. 1838, 73 Cong., 2d Sess. 41 (1934).

3. 78 CONG. REC. 10182 (June 1, 1934).

4. Opinion of General Counsel of the Securities & Exchange Commission, Release 285, January 24, 1935, 1 CCH FED. SEC. LAW REP. ¶ 2266.17 (1944). For other references discussing these elements see Campbell v. Degenther, 97 F. Supp. 975, 977 (W. D. Pa. 1951); Comment, 36 MICH. L. REV. 604, 609 (1938).

5. See Corporation Trust Co. v. Logan *et al.*, 52 F. Supp. 999, 1002 (D. Del. 1943); Note, 46 YALE L. J. 1071 (1937).

6. It is interesting to note that Professor Loss, who was counsel to the Commission in the principal case, in his recent work, SECURITIES REGULATION 396 (1951), after citing Securities and Exchange Comm'n. v. Sunbeam Gold Mines Co. *et al.*, 95 F. 2d 699 (9th Cir. 1938) and Campbell v. Degenther, 97 F. Supp. 975 (W. D. Pa. 1951) states that an offering restricted to members of a class having special knowledge of the issuer, for example, key executive employees, may be exempt, provided it meets the numbers test.

7. 95 F. 2d 699 (9th Cir. 1938).

holding below the court held it might be a public offering and expressly refrained from determining whether complete knowledge on the part of the subscriber would alter the court's decision since the burden of proof of such knowledge was on the company claiming the benefit of the exception for which the statute provides.

It would seem that although the test cited in the case at bar was discussed in the *Sunbeam* case, namely, whether or not there is a "sensible relation" between the class of offerees selected and the purposes of the offering, it was merely set forth as a general commentary on the problem and was not the actual grounds for the decision in that case. However, the test appears to be sounder and more workable than the arbitrary one of numbers suggested by the Commission.

On the assumption that the key employees of an offeror have sufficient knowledge of the offeror's financial condition, the result reached in the principal case appears to be sound, since in such a case the protective device of disclosure required by the statute is unnecessary.[8] However, a question may be raised as to the court's apparent conclusion that all of the offerees, by virtue of their employment by the offeror, possessed sufficient knowledge of its financial condition.

8. Dodd, *Amending the Securities Act—The American Bar Association Committee's Proposals,* 45 YALE L. J. 199, 205-8 (1935).