Michigan Law Review

Volume 31 | Issue 3

1933

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MICHIGAN LAW REVIEW

VOL. 31 JANUARY, 1933 No. 3

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THE early common law took a strictly logical view in regard to the assignability of contract rights and duties. Since a contract is essentially a personal relationship voluntarily entered into by the parties to it, it follows as a logical deduction that one of the parties should not be allowed to destroy that relationship by introducing a third person into it in his place without the consent of the other party. This was the view of the early common law. However, in the course of time, as we know, the commercial spirit gradually made inroads into this doctrine until we have reached the stage today in which the contract that is not assignable is regarded as the exception rather than the rule.[1]

In order that some measure of choice in regard to the person at the other end of a relationship created by the contract may be retained it has become common practice for the parties thereto to incorporate in the contract a clause prohibiting or at least restricting its assignment. It will be the aim of this paper to discover, if possible, to what extent such a prohibition or restriction is or ought to be effective for the attainment of the end in view.[2]

It is to be noted at the outset that, in general, such a clause may take

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[1] For a survey of this development see Cook, "The Alienability of Choses in Action," 29 HARV. L. REV. 816 (1916); SELECTED READINGS ON CONTRACTS 738 (1931); Holdsworth, "The History of The Treatment of Choses in Action by The Common Law," 33 HARV. L. REV. 997 (1920); SELECTED READINGS ON CONTRACTS 706 (1931).

[2] It should be borne in mind, of course, that if the particular contract right or duty sought to be assigned is one which is not assignable because of its nature, even under the liberal rules relating to assignments that are generally applied today, then the question as to the effect of a restriction on assignment becomes unimportant.

any one or more of three different forms, and that its operation may depend upon the form which it takes.

1. It may be simply a *promise* by a party that he will not make an assignment. If this be its purport, then, if the usual contractual principles are to be applied, an assignment made in violation of the promise would not be invalid. At the most it would give the other party an action for damages for breach of contract or for specific performance. It might conceivably entitle him to avoid the contract itself (not the assignment) on the theory of the breach of a constructive condition, provided the breach of this promise were so serious as to go to the "root" or "essence" of the contract. The thing to note particularly is the fact that a clause in this form does not purport to preclude the power to assign.

2. The stipulation may take the form of a statement or declaration that any assignment made shall be invalid, or that the contract shall be "non-assignable" or "non-transferable," or that any assignment to be valid must be made in a certain specified way. If such a clause be given literal effect, of course, the power to assign does not exist, and any attempted assignment is wholly void, except in those cases in which a prescribed mode for making the assignment exists, and then it is valid only if the prescribed method be followed. The contract, however, as between the original parties to it is in no manner invalidated by the mere fact of an assignment in violation of the stipulation.

3. The contract may stipulate that an assignment by one of the parties shall give the other the right to forfeit the contract. In other words, non-assignment may in effect be made an express condition precedent to the other party's duty to perform his promises.[3] The thing to notice is that a clause in this form, like that mentioned under the first head, does not purport to preclude the power to assign or to invalidate an assignment in any way. What it does purport to do is to give the non-assigning party to the contract the right to invalidate the contract itself. If such a stipulation be given the effect which stipulations in this form normally have, a violation of it gives the non-assigning party to the contract the power to put an end to the contract if he so elects.

Unfortunately, as an examination of the cases will show, the courts have not always had these distinctions in mind, with the result that the law on the subject is in a very confused state.

[3] Sometimes such a stipulation is qualified by the statement that the assignment shall have this effect only if it is not made in a prescribed way. Such a qualification has no bearing, however, on the question discussed.

PROMISE TO REFRAIN FROM ASSIGNING

The confusion which exists is well illustrated by the two cases involving this subject which have come before the Supreme Court of the United States, namely, *Burck v. Taylor*,[4] and *Portuguese-American Bank v. Welles*.[5] In each of these cases the stipulation in the contract was in the form of a promise to refrain from making an assignment, coupled in the latter case with a general provision for the forfeiture of the contract for violation of any of its covenants or conditions. In neither case was there a declaration that an assignment made should be invalid. Each case involved a construction contract, and in each the assignee was claiming the right to recover money that was admittedly due or paid under the contract. In the *Burck* case the suit was brought by a partial assignee for an accounting against a later assignee[6] who had performed the contract and had been paid in full by the other contracting party. The Court in denying relief to the partial assignee asserted as one reason for its decision that the stipulation regarding assignment rendered the assignment wholly nugatory; that therefore the assignment simply created a personal right of the assignee against the assignor but gave him no rights either against the other contracting party or anyone else. In other words, the case in effect held that a promise by a party to a contract that he would not make an assignment destroyed his power to assign.

Likewise in the *Portuguese-American Bank* case the other party to the contract was not objecting to the assignment. The contest was one between the assignee and a later attaching creditor of the assignor. In this case, however, the Court, speaking through Justice Holmes, reached a conclusion favorable to the assignee. It held that the assignment was not rendered wholly nugatory by the stipulation of the contract; that if any infirmity attached to it at all the only person who could take advantage of that infirmity would be the other party to the contract.

The decision is not a very satisfactory one, since it does not pretend to make a careful analysis of the problem. The Court seemingly ignores the fact that the contract did not, at least in terms, purport to destroy the power to assign, but treats it as if it had.[7] It then goes on to intimate

[4] 152 U. S. 634, 14 Sup. Ct. 696 (1894).

[5] 242 U. S. 7, 37 Sup. Ct. 3 (1916).

[6] The second assignee had taken his assignment with the consent of the other contracting party.

[7] It is true that the contract clause in this case apparently contained no express words of promise. It is said, in Portuguese-American Bank v. Welles, 242 U. S. 7 at

that an attempt to destroy the power to assign a claim to money is wholly without effect, because it is an unlawful restraint on alienation; and concludes by saying that if such a restriction is lawful, at any rate only the other party to the contract can take advantage of it.[8] This analysis seems to involve a contradiction. If it be assumed that the promise did destroy the power to assign so far as the other party to the contract was concerned, then it is difficult to see why it should not have destroyed that power for all purposes.

It is submitted that the decision in this case is sound. However, it seems unfortunate that it was not placed on the more satisfactory ground that a promise by a party to refrain from assigning does not destroy the power to assign, but, like any other promise, simply gives the other party to the contract the usual remedies for breach of promise, namely, an action for damages, and in a proper case perhaps a right to sue for specific performance, or to forfeit the contract for breach of a constructive condition; and that as the other party to the contract in the instant case was not making any objection, the non-assignment clause had no effect on the plaintiff's rights. A similar conclusion might well have been reached in the *Burck* case and on the same grounds.

Another leading case is *The City of Omaha v. The Standard Oil Company*.[9] In that case one who had a street lighting contract with the city of Omaha assigned his right to certain earned sums to the plaintiff without the consent of the city. A second assignment of the same claim was made later and the city paid the second assignee. The contract under which the money was earned contained a promise by the contractor to refrain from assigning the contract. There was no declaration that an assignment made in violation of the promise should be invalid. In a suit by the first assignee against the city, the court, relying heavily on *Burck v. Taylor*, supra, held that the clause in question rendered the assignment invalid, so that the assignee had acquired no rights which it could assert against the city. In other words, this case also decided that a promise to refrain from making an assignment destroyed the power to assign.

11, 37 Sup. Ct. 3 (1916), that "It (the contract) . . . declared . . . that he (the contractor) should not 'either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent.' " However, in view of the generally accepted principle that such restraints are to be strictly construed, it would be more reasonable, as is hereinafter shown, to interpret this language as a promise than anything else. There is nothing in the court's opinion inconsistent with this view.

[8] In accord with Portuguese-American Bank v. Welles, on similar facts, see In re Bresnan, (D. C. Md. 1930) 45 F. (2d) 193.

[9] 55 Neb. 337, 75 N. W. 859 (1898).

Had the court placed its decision on the ground that the promise was specifically enforcible as against an assignee who took with notice of the limitation, the decision would be understandable, although one might wonder why equity should grant specific performance of a negative covenant to a defendant who had not asked for that type of relief, especially in a case in which there was nothing to indicate that the defendant's legal remedy was inadequate. Or had the court said that the defendant had the right to avoid the contract because of the breach of a constructive condition, we could understand the holding, although we might disagree with the conclusion that the failure of performance of this promise went to the "root" or "essence" of the contract. But it is extremely difficult to see why such a promise, more than any other, should be made self-executing.

Other courts also have reached the conclusion that a promise to refrain from making an assignment destroys the power to assign, apparently without noticing the inconsistency involved in that holding.[10]

More in harmony with the underlying principle in regard to the legal effect of a promise are the lease cases. In them it has quite uniformly been taken for granted that an assignment made in violation of a promise or covenant to refrain from assigning is not invalid but vests the leasehold in the assignee, the landlord being remitted to an action for damages for breach of contract against the assignor,[11] or in a proper case to an action for specific performance.[12]

A few courts have taken the same view in cases involving contracts for the sale of land. Thus, in one case a vendee covenanted that he would not assign pending the making of certain stipulated improvements on the land. The assignee to whom an assignment had been made in violation of the covenant sued for specific performance. In granting the relief sought the court did not deny the validity of the

[10] Behrens v. Cloudy, 50 Wash. 400, 97 Pac. 450 (1908) (option contract); Deffenbaugh v. Foster, 40 Ind. 382 (1872) (construction contract); Fairbanks v. Crump Irr. etc. Co., Inc., 108 Cal. App. 197, 291 Pac. 629, 292 Pac. 529 (1930) (semble), commented on in 19 CALIF. L. REV. 207 (1930).

[11] Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684 (1897) (semble); Randol v. Tatum, 98 Cal. 390, 33 Pac. 433 (1893); Den v. Post, 25 N. J. L. 285 (1855); Hazelhurst v. Kendrick, 6 Serg. & R. (Pa.) 445 (1821); Paul v. Nurse, 8 Barn. & C. 486, 108 Eng. Repr. 1123 (1828); Hague v. Ahrens, (C. C. A. 3rd, 1892) 53 Fed. 58; Spear v. Fuller, 8 N. H. 174 (1835). But cf. Hynes v. Ecker, 34 Mo. App. 650 (1889); Rees v. Andrews, 169 Mo. 177, 69 S. W. 4 (1902); Behrens v. Cloudy, 50 Wash. 400, 97 Pac. 450 (1908); Cohen v. Todd, 130 Minn. 227, 153 N. W. 531 (1915).

[12] Best v. Parsons, 207 Ala. 115, 92 So. 267 (1922).

covenant in question. However, it held that the covenant was collateral merely and did not destroy the power to assign — that the normal remedy for breach of such a covenant is an action for damages. It held further that the fact that the plaintiff was a party to the breach of this covenant did not deprive him of the right to seek specific performance of the principal contract in equity; at least not in a case like the present, in which, at the time performance was sought by the assignee, there was no evidence that the vendor was prejudiced by the breach.[13]

In a Michigan case the assignee of the purchaser under a land contract, which contained a covenant against assignments, refused to carry out his part of the agreement with the purchaser, in part performance of which the purchaser had made the assignment. He based his refusal on the ground that the assignment was invalid and that therefore there was a failure of consideration. The vendor in the land contract at the same time claimed the right to forfeit his contract to sell because of the violation of the covenant against assignments. The purchaser brought a suit for specific performance against the assignee in which the vendor intervened and claimed the right to a decree of forfeiture. The Supreme Court of Michigan rightly held for the purchaser[14] that there was no failure of consideration, since the covenant did not destroy the power to assign, and that consequently the purchaser was entitled to a decree for specific performance. The court also held that the vendor was not entitled to a decree of forfeiture, inasmuch as there was no provision for forfeiture contained in the covenant in question. This conclusion also seems justified since there was no evidence that the breach in question was such a material one as to give rise to a constructive condition. As the court says: "In view of these facts, if the vendors have any remedy because of the assignment, it is an action for damages for breach of the covenant." [15]

So also, in a case involving a construction contract which contained a provision to the effect that the "contractor shall not assign the contract, or any of the moneys payable thereunder without the consent of the city" and that "in the absence of such consent no right under the contract, nor to any moneys to grow due by its terms, should be asserted against the city of New York," the Court of Appeals of New York held that the language quoted was a covenant which did not destroy the power to assign. Consequently, where the city was making no objection,

[13] Grigg v. Landis, 21 N. J. Eq. 494 (1870).
[14] Hull v. Hostettler, 224 Mich. 365, 194 N. W. 996 (1923).
[15] Hull v. Hostettler, 224 Mich. 365 at 369, 194 N. W. 996 at 997 (1923).

a prior assignee to whom an assignment had been made as collateral security for a loan and who had received his assignment in violation of this restriction, had priority over a later assignee who had taken his assignment with the consent of the city.[16]

No case has been found in which a court has held that a contract may be forfeited for breach of a mere covenant or promise to refrain from making an assignment. Such a holding could properly be predicated only on the theory that the performance of this promise is a constructive condition precedent to the duty of the other party to perform his promise. It is not surprising that no such cases have been found. If the contract were of such a character as to justify a court in saying that an assignment of it would constitute a material breach, so that the performance of the promise might be said to be a constructive condition precedent, it would probably also be true that the assignment would be invalid under the rules of law which, even today, do not permit the assignment of so-called personal rights and duties. This being so, the assignment, apart from any express prohibition or restriction, would amount to a repudiation of the contract such as would entitle the other party to forfeit it if he saw fit to do so, regardless of the restriction on assignment. This might not be true in the lease cases, since leases at common law are assignable in the absence of an express restriction on assignment.[17] However, the lease cases are unique in that courts have been loath to find any constructive conditions in leases under any circumstances, largely for historical reasons.[18]

DECLARATION THAT AN ASSIGNMENT SHALL BE VOID

The cases are also in hopeless conflict in regard to the effect of a stipulation in a contract which declares, in so many words, that any assignment made without the consent of the other party to it shall be invalid, or that the contract shall be "non-assignable" or "non-transferable," or that it shall be assignable only if certain prescribed formalities be observed.

One line of cases has held that such a stipulation destroys the power to assign and that the assignee acquires no rights whatever under the

[16] Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895). However, the court did say that the clause in question would have prevented the assignee from asserting any claim against the city had it objected. This statement may have been justified since the clause also seems to make consent to the assignment by the city a condition precedent to the duty of the city to recognize the assignment. See note 25, post.

[17] See 1 TIFFANY, LANDLORD AND TENANT, sec. 152 (1910).

[18] See 22 MICH L. REV. 377 (1924).

contract — that his only right is against the assignor on the assignment.[19] It is worthy of note, however, that the cases in which this view has been set forth have been cases involving a contest between the assignee and the other party to the contract. Whether these courts would carry the holding to its logical conclusion in a dispute between an assignee and some other claimant, such as the assignor, a second assignee or an attaching creditor, may be open to question.[20]

A second group of cases, on the other hand, has held that one can not thus restrain the alienation of what is essentially a property right, and that in spite of such a clause the assignee does get rights which he can enforce even as against the other party to the contract.[21] It is, however, to be observed that in all of the cases that have been found in which this view was taken the assignment challenged was one that dealt with a right to money.

A third group of cases dealing with land contracts has taken the position that, while such a restriction is not necessarily ineffective for all purposes, yet there are limits to the extent of its operation; that it may legitimately operate to destroy the power to assign while the contract is still unperformed on the part of the purchaser, to prevent his making an assignment to one who might not be able or disposed to

[19] Lockerby v. Amon, 64 Wash. 24, 116 Pac. 463 (1911) (land contract); Bonds-Foster Lbr. Co. v. Northern Pac. Ry. Co., 53 Wash. 302, 101 Pac. 877 (1909) (bill of lading marked "non-assignable"); Boyd v. Bondy, 113 Wash. 384, 194 Pac. 393 (1920) (land contract); Barringer v. Bes Line Construction Co., 23 Okla. 131, 99 Pac. 775 (1909) (time check marked "non-transferable"); Zetterlund v. Texas Land & Cattle Co., 55 Neb. 355, 75 N. W. 860 (1898) (agreement to pay a commission for the sale of land); Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co., 79 Ala. 377 (1885) (labor ticket marked "non-transferable"); Sperry & Hutchinson Co. v. Siegel, Cooper & Co., 309 Ill. 193, 140 N. E. 864 (1923) (trading stamp marked "non transferable"); New York Trust Co. v. Island Oil & Transport Co., (C. C. A. 2d, 1929) 34 F. (2d) 653 (contract for the sale of oil); Andrew v. Meyerdirck, 87 Md. 511, 40 Atl. 173 (1898) (semble); Iwanicki v. Levin, [1924] 1 Dom. L. Rep. 171 (1923) (semble), commented on in 37 HARV. L. REV. 766, 757 (1924). In the following cases there was a promise that no assignment would be made in addition to a declaration to the effect that any assignment made should be void: Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110 (1902) (semble) (construction contract); Myers v. Stone & Son, 128 Iowa 10, 102 N. W. 507 (1905) (option contract); Nance Realty Co. v. Wood-Wardowski Co., 242 Mich. 110, 218 N. W. 680 (1928) (land contract).

[20] Cf. the cases cited in note 24, infra.

[21] State Street Furniture Co. v. Armour & Co., 345 Ill. 160, 177 N. E. 702 (1931) (wage contract); Bank of United States v. Public Bank of N. Y. C., 88 Mis. 568, 151 N. Y. S. 26 (1915), commented on in 24 YALE L. J. 590 (1915) (bank deposit); Marcus v. St. Louis Mut. Fire Ins. Co., 68 N. Y. 625 (1877) (life insurance policy).

perform it, in order that the vendor's security may not be impaired; but that once the entire amount of the purchase money has been paid or tendered to the vendor the stipulation is no longer a bar to suit for specific performance by the assignee, either as against the vendor or one who took with notice of the assignee's claim. Apparently, also, though somewhat illogically, it makes no difference whether the assignment in question was made before or after the performance of the conditions precedent to the purchaser's right to a deed, provided the question as to the assignee's right does not come before the court until after those conditions have been performed.[22] The theory underlying this holding is not clearly set forth. Sometimes the court seems to put its decision on the ground that it is merely giving effect, by way of interpretation, to the presumed intention of the parties; the idea being that this stipulation was put into the contract to give the vendor added security for the payment of the purchase price. At other times it apparently proceeds on the theory that any more extensive operation of the stipulation would not be permissible, because it would be an unlawful restraint on alienation.

A somewhat similar view has been taken in a case involving an automobile insurance contract. The court held that although a provision in the policy to the effect that any assignment which was not made in a specified way should not be binding on the company might invalidate an assignment made before a loss had been suffered, it did not invalidate an assignment made thereafter.[23]

Still another view taken is that such a stipulation is intended for the benefit of the other party to the contract only, and that therefore he alone can object to an assignment made in violation thereof. The theory seems to be that the assignment is voidable at his election.[24] Where the contract says in so many words, as it frequently does especially in insurance cases, that the assignment shall not be binding *on the other party* unless made in a certain specified way, the conclusion just mentioned

[22] Cheney v. Bilby, (C. C. A. 8th, 1896) 74 Fed. 52; Wagner v. Cheney, 16 Neb. 202, 20 N. W. 222 (1884); Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14 (1898); Cowart v. Singletary, 140 Ga. 435, 79 S. E. 196 (1913).

[23] Ginsburg v. Bull Dog Auto Fire Ins. Ass'n, 328 Ill. 571, 160 N. E. 145 (1928).

[24] Burrows v. Hovland, 40 Neb. 464, 58 N. W. 947 (1894) (semble); Webster v. Nichols, 104 Ill. 160 (1882) (semble); Hogue v. Minnesota Packing & Provision Co., 59 Minn. 39, 60 N. W. 812 (1894). In Iwanicki v. Levin, [1924] 1 Dom. L. Rep. 171 (1923), commented on in 37 HARV. L. REV.. 766 (1924), it was held by an evenly-divided court that the assignee of the vendor could not take advantage of such a restriction to cut off an assignee of the purchaser who had taken an assignment in violation thereof.

may easily be justified. In such a case, assigning in the specified mode is in terms made only a condition precedent to the other party's duty to recognize the assignment. Such a condition, when properly construed, does not destroy the power to assign but simply gives the other party the right to refuse to recognize the assignment at his election. In other words, the other party to the contract may waive the condition, and if he does so no one else has any right to object to the validity of the assignment.[25] It is more difficult to see how this view can be justified in a case in which the contract says without qualification that any assignment made, or any not made in a specified way, shall be void.

Apparently what has happened in some of these cases is that the court has confused the type of stipulation before it with the type next hereinafter discussed, in which non-assignment is made an express condition precedent to the duty of the other party to perform his promises. In such a case, as will appear, the other party does have an election, but it is an election to perform or not to perform the contract rather than an election to affirm or avoid the assignment as such.

NON-ASSIGNMENT AN EXPRESS CONDITION PRECEDENT TO PERFORMANCE

This type of restriction on assignment has in the past been commonly used in contracts of insurance, other than life, and in leases, although in leases it has been customary to couple it with a promise or covenant of the lessee to refrain from making an assignment. While not unknown, it has apparently not been so frequently used in other kinds of contracts.

In dealing with a restriction in this form the courts have pretty generally agreed that it is to be given its normal effect, unless the clause in the particular contract is contrary to public policy and therefore void.[26]

Thus, where a theatre ticket contained a stipulation that it would not be honored at the door if re-sold on the sidewalk, it was held that the stipulation was valid and that the theatre owner had a right to refuse to honor a ticket sold in violation thereof; that therefore a scalper

[25] Opitz v. Karel, 118 Wis. 527, 95 N. W. 948 (1903). See also Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895), which may be a case of this kind.

[26] It is to be noted that this type of stipulation may be couched in various language. The contract may say that the other party to it shall have a right to forfeit the contract in case an assignment is made. Or it may say that the contract shall be "void" if it is assigned. The meaning of these two forms of expression may well be held to be the same, as apparently it is, judging from the cases cited in the notes in this section.

could not enjoin the theatre owner from carrying out the stipulation or from notifying prospective purchasers from the scalper that he would do so.[27]

When an insurance policy contains a stipulation for forfeiture in case an assignment is made, it is uniformly held that an assignment made before a loss has been suffered entitles the company to declare the contract forfeited.[28] On the other hand, a stipulation to the effect that an assignment made after loss shall invalidate and forfeit the contract is held to be null and void because contrary to public policy.[29]

So also in the lease cases, it is held that a provision for forfeiture because of an assignment made without the landlord's consent is valid and is to be given its normal effect.[30]

The Supreme Court of Michigan, in the case of *Rodenhouse v. DeGolia*,[31] has apparently reached the same conclusion in regard to the effect of such a stipulation contained in a land contract.

It is to be emphasized, however, that a violation of such a condition does not render the assignment invalid. That is to say, a restriction in this form, when rightly construed, does not destroy the power to assign. As was said by the court in *Merrill v. New England Mutual Life Insurance Company*,[32] in dealing with a policy of life insurance which stipulated that "if this policy or any interest therein shall be assigned without the written consent of the said company, then this policy shall be null and void":

> "The condition does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or refuse its consent to such transfer; and, if made without its consent, to avoid its contract altogether. The effect of the condition is, to defeat the policy, not to defeat the transfer. It is because the transfer takes effect, that the policy becomes void, or voidable." [33]

[27] Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20 (1905).

[28] Dube v. Mascoma Mut. Fire Ins. Co., 64 N. H. 527, 15 Atl. 141 (1888); Stolle v. Aetna Fire & Marine Ins. Co., 10 W. Va. 546 (1877); Waterhouse v. Gloucester Fire Ins. Co., 69 Me. 409 (1879); Lyford v. Conn. Fire Ins. Co., 99 Me. 273, 58 Atl. 916 (1904).

[29] Spare v. Home Mut. Ins. Co., (C. C. Or. 1883) 17 Fed. 568; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289 (1861); Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N. W. 303 (1880); Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 210 N. W. 689 (1926).

[30] Snyder v. Bernstein Bros., 201 Iowa 931, 208 N. W. 503 (1926); 1 TIFFANY, LANDLORD AND TENANT, sec. 152j (1910); 37 HARV. L. REV. 612 (1924).

[31] 198 Mich. 402, 164 N. W. 488 (1917).

[32] 103 Mass. 245 at 252 (1869).

[33] 103 Mass. 245 at 252 (1869).

Whether a court would permit a stipulation in this form to have its normal operation, if the case were one in which a serious forfeiture was involved without any corresponding damage to the other party resulting from the violation of the condition, may be open to question. The cases which hold that an insurance company cannot forfeit its policy for an assignment made after a loss has been sustained would seem to indicate that they would not. It is certainly arguable that such a forfeiture should be relieved against in a proper case on equitable grounds. The courts have apparently reached this conclusion but have preferred to explain the result on a different basis. They have usually said in such a case that the stipulation is contrary to public policy, or that an assignment after loss is not an assignment of the contract but of a mere right of action arising out of the contract.[34]

INTERPRETATION OF RESTRICTIONS ON ASSIGNMENT

The one thing that is uniformly agreed to is that "Restrictions against assignment of contracts are not looked upon by the courts with full favor, because they prohibit the alienation of such property rights, thus depriving the owner of the full enjoyment and control thereof; especially is this true when such deprivation results in no benefit to the debtor." [35] Following out this mode of approach, the common rule is that they are to be strictly construed. As a consequence many courts, while ostensibly recognizing the validity of such stipulations in general, have frequently avoided the necessity of giving effect to them in particular instances under the guise of interpretation.

Thus, sometimes a court, while apparently assuming, though erroneously, as we have seen, that *a promise* to refrain from making an assignment nullifies the power to assign, has avoided the necessity of declaring the assignment in the particular case to be invalid by interpreting the promise in such a way as to reach the conclusion that it had

[34] See the cases cited in note 29, supra. But cf. Dawsons Ltd. v. Bonnin, [1922] 2 A. C. 413, where the failure to perform an express condition precedent, which it was admitted was not in any sense material to the risk, was held to defeat recovery under an automobile policy.

The right to forfeit a contract for breach of such a condition may of course be lost through waiver or estoppel, just as the right to the benefit of any other condition may be lost in the same way. Smith v. Martin, 94 Or. 132, 185 Pac. 236 (1919); Stolle v. Aetna Fire & Marine Ins. Co., 10 W. Va. 546 (1877); Merrill v. New Englant Mut. Life Ins. Co., 103 Mass. 245 (1869).

[35] Inter-Southern Life Ins. Co. v. Humphrey, 122 Miss. 579 at 593, 84 So. 625 at 626 (1919).

not been broken. In *Dixon-Reo Company v. Horton Motor Company*,[36] a promise in a contract between an automobile distributor and an automobile dealer that the latter would "not assign this agreement or any rights thereunder without the written consent of the distributor" was held not to prohibit the assignment of money due from the distributor to the dealer under the contract at the time when the contract was canceled according to its terms. The court concluded that the stipulation was intended to prevent the assignment only of the more personal rights and duties created by the contract and not the non-personal right to receive money due under the contract after its principal objects had been accomplished.

It is worthy of note that the result reached in this case, and cases like it, is undoubtedly sound. However, it is unfortunate that it was not placed on the more logical and satisfactory ground that since a promise not to assign does not destroy the power to assign, the assignment here was valid and the assignee was entitled to recover. The other party to the contract in such a case should be limited to a cross-action for damages, since the breach of promise was not one that was material under the circumstances.

So also it has been held that a covenant in a lease to the effect that the lessee will not make an assignment does not bind the executors of the lessee in the absence of "very special" language requiring this construction. The use of language at the end of the lease stipulating in general terms that the covenants and agreements of the lease should be binding on the parties and "their legal representatives" is not the "very special" language required to bring about this result.[37]

It has likewise been held that such a covenant or promise is not violated by an assignment made by a trustee in bankruptcy, whether the bankruptcy is voluntary or involuntary, in the absence of special language requiring this result;[38] or by an assignment of the contract as collateral security.[39]

[36] 49 N. D. 304, 191 N. W. 780 (1922). In accord on somewhat analogous facts see, Butler v. San Francisco Gas & Elec. Co., 168 Cal. 32, 141 Pac. 818 (1914). *Contra* on similar facts are, City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859 (1898); Murphy v. City of Plattsmouth, 78 Neb. 163, 110 N. W. 749 (1907).

[37] Francis v. Ferguson, 246 N. Y. 516, 159 N. E. 416 (1927). But see 1 TIFFANY, LANDLORD AND TENANT, sec. 152 g (1910).

[38] Miller v. Fredeking, 101 W. Va. 643, 133 S. E. 375 (1926); 1 TIFFANY, LANDLORD AND TENANT, sec. 152 f (1910).

[39] Crouse v. Michell, 130 Mich. 347, 90 N. W. 32 (1902) (lease); Badger Lbr. Co. v. Parker, 85 Kan. 134, 116 Pac. 242 (1911) (land contract); School Dist. No.

Occasionally, also, a court, while admitting that a stipulation, which in terms *denies validity* to an assignment, is to be given literal effect, has avoided the necessity of giving it effect against the assignee in the particular case by so interpreting it as to prevent its operation. Thus, in *Inter-Southern Life Insurance Company v. Humphrey*,[40] it was held that a clause in a contract relating to the payment of commissions to an agent, which in general terms stated that any assignment made should be invalid, destroyed only the power to make an unconditional assignment and did not prevent an assignment by way of collateral security. While the result reached may be justifiable, the court's reasoning in the case is not very convincing. It proceeds on the basis of the presumed intention of the parties to the contract. It may be admitted, as the court asserts, that one who has assigned simply as collateral security will thereafter take more interest in the performance of his remaining duties under the contract than one who has made an unconditional assignment; but it is difficult to see what bearing this has on the question of interpretation in a case such as the instant case, where apparently the only assignment possible was an assignment of money already earned through the full performance of duties.

It has also been held that such a stipulation does not render invalid an assignment to one as trustee of an express trust for the benefit of the assignor.[41]

It has been held that a certificate of deposit issued by a bank, which stated that the money deposited by the depositor should be "payable only to himself . . . on return of this certificate properly endorsed," while it made the certificate non-negotiable, did not affect its assignability.[42] In reaching this conclusion, Pound, J., said:[43]

> "Clear language should, therefore, be required to lead to the conclusion that the certificates are not assignable. . . . We cannot deduce such consequences from uncertain language. . . . The plainest words should have been chosen, so that he who runs could read,

1 v. Whalen, 17 Mont. 1, 41 Pac. 849 (1895) (construction contract). Cf. Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895).

[40] 122 Miss. 579, 84 So. 625 (1919); Butler v. Rockwell & Gage, 14 Colo. 125, 238 Pac. 462 (1889); Burrows v. Hovland, 40 Neb. 464, 58 N. W. 947 (1894) accord.

[41] Watson v. Barnard, 105 Wash. 536, 178 Pac. 477 (1919).

[42] State Bank v. Central Mercantile Bank, 248 N. Y. 428, 162 N. E. 475 (1928). The same conclusion was reached on somewhat similar facts in Dollar v. International Banking Corp., 10 Cal. App. 83, 101 Pac. 34 (1909).

[43] State Bank v. Central Mercantile Bank, 248 N. Y. 428 at 435, 162 N. E. 475 at 477 (1928).

in order to limit the freedom of alienation of rights and prohibit the assignment. It might have been stipulated on the face of the certificates that they should be 'non-transferable' or 'non-assignable.' "

A stipulation *permitting forfeiture of the contract* in case an assignment is made without consent has also been held not to affect the right to assign the contract as collateral security.[44]

Such a stipulation in an insurance policy is held to include only assignments made before loss, in the absence of express language to the contrary.[45]

Occasionally the result reached was undoubtedly in accord with the actual intention of the parties. For example, in *Bank of Harlem v. Bayonne*,[46] a frequently cited case, it can probably be said with truth that the particular assignment made was not intended by the parties to be prohibited. In that case a construction contract contained the following promise: "And the said party of the second part further agrees that he will give his personal attention constantly to the faithful performance of said work; that he will not assign nor sublet *the same* but will keep the same under his control." It was held that this clause was not intended to, and did not, in any manner affect an assignment of money earned or to be earned under the contract.

More often, however, interpretation in these cases is the process of reading into general language qualifications to meet a particular situation which it may be supposed the parties would have (or perhaps should have) written in had they thought about the matter at all. This practice is not necessarily to be condemned, since, as a practical matter, many situations arise in the course of the performance of a contract

[44] Aetna Ins. Co. v. Smith, McKinnon & Son, 117 Miss. 327, 78 So. 289 (1918); Stokes v. Liverpool & London & Globe Ins. Co., 130 S. C. 521, 126 S. E. 649 (1925). But this is not true if the restriction in terms forbids the assignment of the "whole policy or of any interest in it." Ferree v. Oxford Fire & Life Ins., Annuity & Trust Co., 67 Pa. St. 373 (1871).

[45] West Fla. Gro. Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1917); Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 210 N. W. 689 (1926) (semble); Garetson-Greason Lbr. Co. v. Home L. & A. Co., 131 Ark. 525, 199 S. W. 547 (1917); Perry v. Merchants' Ins. Co., 25 Ala. 355 (1854); Maryland Casualty Co. v. Omaha Elec. Light and Power Co., (C. C. A. 8th, 1907) 157 Fed. 514. In these cases it is frequently difficult to determine upon what theory the court reaches its conclusion. Sometimes it seems to say that it is simply interpreting the stipulation in conformity to the presumed intention of the parties. At other times it apparently takes the position that in so far as the restriction applies to assignments made after a loss has been incurred it is invalid.

[46] 48 N. J. Eq. 246, 21 Atl. 478 (1891).

which, although seemingly provided for in the general language of the contract, were nevertheless not so provided for in fact, simply because they are contingencies which were not in the minds of the parties when the contract was entered into. This being true, the court must of necessity "make a contract for the parties" to cover the situation in hand, unless it is to say that the whole transaction fails because it does not know what the parties would have agreed upon in relation to this particular matter if they had had it in mind. There is ample precedent for this process of reading presumed intentions into a contract. The whole doctrine of constructive conditions in contracts must rest upon this foundation, as do also the principles relating to so-called impossibility of performance. Once we admit that it is proper for the court to complete the contract for the parties in relation to such matters, it follows that it should make such a contract as will be just to all concerned under the particular circumstances. To take the position that general language is to be applied literally, even though it is apparent that the particular situation was not in the contemplation of the parties when the language was used, is to proceed on a mechanical basis which is unworthy of the genius of a matured legal system. While the older law was inclined to adopt this attitude, the more enlightened of the modern courts clearly do not. On the other hand, to admit that qualifications may be read into general language is to entrust a dangerous power to the court. The court must be careful that it does not abuse the power by denying effect to the real intentions of the parties under the guise of making a contract for a situation which the parties did not have in contemplation. Moreover, a proper regard for realities would seem to condemn the use of this device to evade a decision on the question of the validity of such a stipulation. If careful attention be given to the form of the stipulation together with the resulting legal implications, a just result can be reached without resort to so questionable a practice.

Where the language of the stipulation is ambiguous, so that there is a real doubt as to the form intended, it may properly be construed to be a promise to refrain from assigning rather than a provision for forfeiture of the contract or for invalidating the assignment itself.[47] This would seem to be a sound principle of construction, because a stipulation

[47] See Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895) (semble); Hull v. Hostettler, 224 Mich. 365, 194 N. W. 996 (1923) (semble). In Mutual Protection Ins. Co. v. Hamilton, 37 Tenn. 268 (1857), a life insurance policy had the following clause written at the bottom: "N. B. If assigned notice to be given to the company." It was held in effect that this was a mere request and had no effect whatever on the right or power to make an assignment.

in the form of a promise gives the other party to the contract ample protection, if properly applied, and at the same time it does not operate too harshly upon the rights of the assignee and the assignor.

ASSIGNMENTS DISTINGUISHED FROM OTHER TRANSACTIONS

It would seem to be too clear for argument that a prohibition against assignment in a contract, whatever its form or whatever effect is to be given to it, has an effect only on an assignment and not on some other legal transaction which may bear a superficial resemblance to an assignment. For example, it has apparently sometimes been assumed that a prohibition of assignment in a land contract would prevent the purchaser from making an independent contract to re-sell the land to a third person. This is clearly not so. There is nothing to prevent a man from making a binding contract to sell what he does not own. There is no reason why he should not make a binding contract to sell what he has a right to buy, even though he cannot transfer the right to buy which he himself has. It has been so decided.[48]

Likewise, a contract by a creditor that he will collect money that is owed to him and will pay it over to another is not an assignment, and therefore is in no sense a violation of a prohibition of assignment in the creditor's contract with his debtor.[49]

So also it is held that a covenant in a lease that the lessee shall not assign is not violated by the making of a sub-lease.[50]

Perhaps the cases which hold that a transfer as collateral security is not affected by a stipulation against assignment could be justified on the theory that such a transfer is in reality the equivalent of a mortgage of the assignor's interest and therefore is not in any true sense an assignment.[51]

STATUTES LEGALIZING ASSIGNMENTS

It has sometimes been contended that the fact that a statute has been enacted, as it has been in some jurisdictions, declaring in general terms that contract rights shall be assignable, prevents the making of a valid stipulation that no assignment shall be made. However, this argument has generally been rejected, and it would seem rightly so. As has been said, "The purpose of this statute was not to prohibit parties

[48] Cutler v. Lovinger, 212 Mich. 272, 180 N. W. 462 (1920); McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889 (1905).

[49] Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110 (1902).

[50] See 1 TIFFANY, LANDLORD AND TENANT, sec. 152 b (1910).

[51] See the cases cited in notes 39, 40 and 44, supra.

from contracting that their contracts shall not be assignable. The intention of this statute and of similar statutes as they exist in other States is to remove the restriction of the common law rule upon choses in action which prevented their transfer and to permit the assignee to maintain suit in his own name." [52] In other words, the purpose of this statute is the same as that of the other type of statute adopted in many States, which provides that every action shall be prosecuted in the name of the real party in interest, and there is no reason for giving it a broader construction.

BEARING OF THE RULE AGAINST RESTRAINTS ON ALIENATION

It is frequently asserted that restrictions on assignability are objectionable in that they amount to unlawful restraints on alienation. This contention has been pressed especially in two types of cases: (1) those dealing with the rights of an assignee of a land contract,[53] and (2) those dealing with the rights of an assignee of a claim to money which was unconditionally due at the time of the assignment, or which has since become unconditionally due.[54]

In the land contract cases the argument made is that such a contract creates in the purchaser an equitable property interest; and that since restraints on the alienation of property interests in land are generally unlawful, therefore these restrictions are unlawful.

As Professor Goddard has demonstrated in a recent article in this Review,[55] there is very little support to be found, either in the precedents or in reason, for holding that such a restriction in a land contract, whatever its form, does amount to an unlawful restraint on alienation. Perhaps, as he suggests, it can be properly urged that when the restriction is one which purports to destroy the power to assign, or to give the other party the right to forfeit the contract, its operation should be limited; so that in case the vendor has received payment or tender

[52] Barringer v. Bes Line Construction Co., 23 Okla. 131 at 134, 99 Pac. 775 at 776 (1909). In accord see La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42 (1890); Bewick Lumber Co. v. Hall, 94 Ga 539, 21 S. E. 154 (1894) *contra*. But cf. Cowart v. Singletary, 140 Ga. 435, 79 S. E. 196 (1913).

Iowa is unique in that in that chapter of its compiled statutes which deals with bills and notes it is provided that the assignment of "an instrument" which contains a prohibition of assignment shall nevertheless be valid. See Snyder v. Bernstein Bros., 201 Iowa 931, 208 N. W. 503 (1926), for the limits to the application of this statute.

[53] See Goddard, "Non-Assignment Provisions in Land Contracts," 31 MICH. L. REV. 1 (1932).

[54] See 31 MICH. L. REV. 236 (1932).

[55] Op. cit., note 53, supra.

of the full purchase price, for the better securing of which such stipulations are usually inserted, he cannot thereafter refuse to recognize the assignee's rights.[56] Certainly this is as far as the rule in regard to restraints on the alienation of interests in land should be allowed to interfere. Even then it is arguable that the same result can be reached more satisfactorily on some other basis.

In the cases dealing with the right to assign a money claim it is said that such a right is property similar to a chattel; that since the seller of a chattel may not lawfully place any restrictions on the right of the purchaser to re-sell the chattel, it follows that a party to a contract may not restrict the right to transfer a claim to money which would be transferable except for the restriction. It is also said that there is no legitimate interest of the debtor to be secured by means of such a restriction; therefore it should not be upheld.

The soundness of both of these arguments is subject to doubt. In the first place, it is very questionable whether the chattel analogy is apropos. When a seller transfers a chattel he, so to speak, drops completely out of the picture. There is nothing more for him to do except to keep his hands off. The debtor, on the other hand, after the debt is created and before it is paid, is very much in the picture. He must pay the debt to the person entitled to it, and he has a very definite interest in knowing who that person is. It is not an answer to this position to say that, of course, he may avail himself as against the assignee of all his defenses against the assignor. He must, in spite of this fact, make sure that he pays his debt to the proper person if he is to avoid a larger liability than he has contracted for. He may, therefore, very properly claim that he has a good reason for insisting that he be permitted to pay it to the original creditor, so that he may not be subjected to the necessity of determining who the proper person is. That the problem of determining the proper person, where assignment is permitted, is not one that is always easy of solution is demonstrated by such a case as *Salem Trust Company v. Manufacturers' Finance Company*,[57] where successive assignments of the same claim had been made. In such a case the debtor is pretty sure to have a law suit on his hands. Certainly there is no such compelling public policy in favor of making contract rights to money freely alienable as to require that a debtor be deprived of the ability to insure himself against litigation, even though the litigation be no more burdensome than is a bill of interpleader.

[56] See the cases cited in note 22, supra.

[57] 264 U. S. 182, 44 Sup. Ct. 266 (1923).

CONCLUSION

In conclusion it may be said that there is no apparent reason why these restrictions on the assignment of contract rights and duties should not be given effect according to their form. As is clear from the foregoing discussion, much of their seeming harshness could be avoided in specific instances without denying their validity, as is sometimes done. All that is needed is a proper regard for the wording of the particular clause and enforcement of it according to its terms. This much is demanded in the interests of consistency in the law, a thing which is to be striven for when it can be approximated without injustice, as it can be in this instance.

Where the restriction is in the form of a *promise* only, there can never be much objection to it on the ground of harshness. The most that can happen, except in a very unusual case, is that the assignor will be subjected to liability for damages for breach of contract. In the normal case these damages would be nominal so that the debtor probably would not even trouble to sue him. If the breach is so serious that it ought to be said that the performance of the promise is a constructive condition precedent, then very likely any court would be willing to admit that the restriction is proper in any event. Probably such a conclusion could be properly reached only in a case in which the rights or duties attempted to be assigned were of such a personal character as to be non-assignable at common law, irrespective of a prohibition of assignment.

When the restriction is in the form of a declaration that the assignment shall be invalid, no harm is normally done, since the liability of the other party on the contract stands unimpaired. Moreover, the interests of the assignee whose assignment is invalid can be fully secured, without doing violence to accepted legal principles, by giving him an equitable lien on the assignor's rights under the contract, or by declaring that the assignor holds those rights in trust for him. This would not be inconsistent with the restriction in the contract and would fully preserve its effect.[58]

Where non-assignment is stipulated as a ground for forfeiting the

[58] Of course the non-assigning party to the contract may estop himself from taking advantage of the defense given him by the stipulation. Corning Roller Mills v. W. Kelley Mill Co., 159 Ark. 1, 250 S. W. 895 (1923); Barbo v. Norris, 138 Wash. 627, 245 Pac. 414 (1926); Maday v. Roth, 160 Mich. 289, 125 N. W. 13 (1910). Probably in these cases there is seldom a true estoppel. There has usually been merely a failure to perform a promise. However, promissory estoppels are not unknown in the modern law.

contract, perhaps the most serious difficulty is encountered. Such a stipulation, if given its normal effect, is apt to bear rather heavily on the assignor and the assignee. But even here the difficulty can readily be met by a judicious application of the equitable principles under which unjust forfeitures are relieved against.[59]

Perhaps it is proper to urge also that there is some virtue, even today, in permitting people to contract freely unless there is some compelling public policy to the contrary.

[59] In the lease cases in which this question has sometimes been raised directly, it has generally been said that equity will not relieve against the forfeiture of a term because of the breach of such a stipulation, on the ground that it is not possible adequately to measure the damages; Wafer v. Mocato, 9 Modern 112 (1724); Barrow v. Isaacs & Son, [1890-91] L. R. 1 Q. B. 417 (1890); 1 POMEROY, EQUITY JURISPRUDENCE, 4th ed., sec. 454 (1918). Yet such relief has been granted in at least one case, E. H. Powers Shoe Co. v. The Odd Fellows Hall Co., 133 Mo. App. 229, 113 S. W. 253 (1908).