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CASES NOTED

ASSIGNMENTS—EMPLOYEE'S NON-COMPETITION COVENANT—TRANSFERS BETWEEN CORPORATIONS

The defendant was employed as a salesman by an Indiana corporation which had an inactive subsidiary incorporated in Florida. After working for some time in Florida under the direction of the Indiana corporation he was required to enter into an employment contract which contained a negative covenant not to compete after the termination of his employment. Subsequently, the assets of the Indiana corporation, including the employment contract, were assigned to the Florida corporation; the parties remaining the same as those who preceded the transfer. The defendant continued to work for the successor corporation until he resigned and violated the negative covenant in the employment contract. The plaintiff-assignee sued to enjoin the defendant from transgressing the non-competitive agreement. The decree of the chancellor granted the relief prayed. On appeal, *held*, affirmed: the corporation could assign a particular employment contract to a substantially identical corporation and have the successor corporation enforce the employee's negative covenant not to compete. *Nenow v. Cassidy*, 141 So.2d 636 (Fla. App. 1962).

The modern general rule, which has long been imbued with judicial acceptance, is that all ordinary business contracts are assignable.¹ This principle is subject to various exceptions,² the most universally espoused of which states that executory contracts for personal services are not assignable without the consent of the party to be charged.³ This exception has encountered great interpretive confusion with those tribunals, sitting in cases where an assignee sought enforcement of an employee's negative covenant, which failed to differentiate between positive agreements to work and restrictive covenants barring competitive performance.⁴

1. See 4 AM. JUR. *Assignments* § 5 (1936); 6 C.J.S. *Assignments* § 24 (1937); and cases cited therein.

2. Uniformly recognized exceptions are those that arise through technical guaranty; personal relationships, as between master and servant; suretyship; personal skill or services; personal contractual provisions; and relationships of personal confidence and credit. *Dittman v. Model Baking Co.*, 271 S.W. 75 (Tex. Civ. App. 1925).

3. The rationale is that it is inequitable to vest in the assignee the right to the labor of one who has never agreed to serve him. *Paige v. Faure*, 229 N.Y. 114, 127 N.E. 898 (1920); *Seligman & Latz v. Noonan*, 201 Misc. 96, 104 N.Y.S.2d 35 (Sup. Ct. 1951); *Texas Shop Towel, Inc. v. Haire*, 246 S.W.2d 482 (Tex. Civ. App. 1952); 1 WILLISTON, *CONTRACTS* § 421 (rev. ed. 1937); 4 AM. JUR. *Assignments* § 8 (1936); 6 C.J.S. *Assignments* § 26 (1937). See note 13 *infra*.

4. "There is a broad distinction between a breach of contract to render personal services and a violation of a restrictive covenant ancillary to such contract by which

Negative covenants of this type⁵ comprise one of the traditional common law restraints of trade,⁶ and present problems that have vexed the judiciary for more than five centuries.⁷ They typically provide that the employee shall not establish a competitive business or attempt solicitation of old customers for a specified period of time in a designated geographical area.⁸

Although the socio-economic climate has been altered considerably during the evolution of modern society, these covenants illustrate conflicting spheres of interest which have remained basically unchanged.⁹ Today, the courts are in almost universal agreement that the validity

the employee agrees not to engage in a competitive business . . . after the contract with his employer has been terminated." *National Linen Serv. Corp. v. Clower*, 179 Ga. 136, 146, 175 S.E. 460, 465 (1934). In the former case, the assignee seeks an injunction in order to compel performance of affirmative personal services under the employment contract assigned to him. In the latter case, what is sought is the injunction of the employee's breach of the wholly negative covenant, the paramount purpose being to protect the employer's business, rather than requiring the employee to perform against his will. The case of *Jack Tratenberg, Inc. v. Komoroff*, 87 Pa. D. & C. 1 (C.P. 1951), points out the employee cannot complain that he is forced to serve one with whom he has not contracted because the restrictive covenant is activated only after the termination of the personal employment relationship.

5. Agreements not to compete after a term of employment are to be distinguished from (1) agreements not to compete during the term of the employment, and (2) agreements of a vendor not to compete with the purchaser of his business. An analysis of these restraints is beyond the scope of this note.

6. The common law restraints are classified into two groups: (1) restraints ancillary to valid underlying contracts, and (2) restraints not subordinate to valid underlying contracts. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). See RESTATEMENT, CONTRACTS § 515(e) (1932).

7. *United States v. Addyston Pipe & Steel Co.*, *supra* note 6; *Pierce v. Fuller*, 8 Mass. 222 (1811); *Smith v. Scott*, 4 Paton 17 (H.L. 1798) (Scot.); *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711) (most cited case on common law restraints); *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f.5, pl. 26 (C.P. 1414); 5 WILLISTON, CONTRACTS § 1643 (rev. ed. 1937) (early cases of the twentieth century).

8. For definitive studies of the extent of postemployment restraints, see Annots., 41 A.L.R.2d 15 (1955), 43 A.L.R.2d 94 (1955), where various agreements are differentiated by duration and geographic extent of the restriction. Covenants which are not qualified as to time and space are always invalid as an unreasonable restraint of trade while, in most jurisdictions, those limited as to time but unlimited as to area are also unenforceable.

9. The employer's viewpoint is that these restraints are his only effective means of business protection against the appropriation of confidential information and customer followings by the employee. Paradoxically, the provision of special skills and training is a source of danger to the employer, since competition will be intensified by knowledge he has imparted. See *Kellogg v. Larkin*, 3 Chand. 133, 56 Am. Dec. 164 (1851); *Blaser v. Linen Serv. Corp.*, 135 S.W.2d 509 (Tex. Civ. App. 1940); *Martin v. Hawley*, 50 S.W.2d 1105 (Tex. Civ. App. 1932). The employee views the restrictive covenant as likely to have resulted from an inequality of bargaining power and unreasonably limiting both his economic mobility and vocational freedom, since potential competition may be intimidated. *Abalene Pest Control Serv., Inc. v. Powell*, 13 Misc. 2d 661, 176 N.Y.S.2d 6 (Sup. Ct. 1958). "One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." *Menter Co. v. Brock*, 147 Minn. 407, 411, 180 N.W. 553, 555 (1920). For an enlightening discussion of both viewpoints, see Blake, *Employee Covenants Not to Compete*, 73 HARV. L. REV. 625 (1960).

and enforceability of post-employment restraints are determined by the "reasonableness approach,"¹⁰ and breach of a valid covenant will be restrained in a court of equity.¹¹ However, a perplexing dichotomy of authority ensues when enforcement is sought by an assignee.¹²

In most of those jurisdictions that allow an assignee to enforce the restrictive agreement of the employee, the covenant is viewed as a severable asset of the enterprise,¹³ distinct from the personal contract of employment. This conclusion is reached by analogy to the vendor's covenant,¹⁴ although important distinctions between the two render the comparison specious.¹⁵ Inherent in the "severable asset" concept

10. The covenant restraining the employee is valid if (1) it is no greater than is required for the fair protection of the employer's legitimate interests, (2) it is not so large in its operation as to interfere with the public interest, and (3) it does not cast an undue hardship upon the employee. RESTATEMENT, CONTRACTS §§ 513-15 (1932). In actuality, the particular facts of each case determine how the "rule of reason" will be applied. *Torrington Creamery v. Davenport*, 126 Conn. 515, 12 A.2d 780 (1940); *Renwood Food Products, Inc. v. Schaefer*, 223 S.W.2d 144 (Mo. App. 1949). See generally Annots.: 119 A.L.R. 1452 (1939); 98 A.L.R. 963 (1935); 67 A.L.R. 1002 (1930); 52 A.L.R. 1362 (1928); 29 A.L.R. 1331 (1924); 20 A.L.R. 861 (1922); 9 A.L.R. 1456 (1920).

11. "Equity will interfere in behalf of the employer and restrain the employee from gaining unfair advantage . . . for a time reasonably necessary to protect the employer in his secured business and goodwill . . ." *Blaser v. Linen Serv. Corp.*, 135 S.W.2d 509, 511 (Tex. Civ. App. 1940). See *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S.E. 772 (1912); *Abalene Pest Control Serv., Inc. v. Powell*, 13 Misc. 2d 661, 176 N.Y.S.2d 6 (Sup. Ct. 1958).

12. No cohesive viewpoint is present among divergent theories to be examined in this note. A possible explanation is that the area of legal publications is surprisingly devoid of any detailed analytical study on this problem save Comment, 19 U. CHI. L. REV. 97 (1951). See note 43 *infra*.

13. The restrictive covenant is viewed as a valuable business asset severable from the employee's agreement to work, the benefits of which may be assigned and enforced by the courts. *Jacoby v. Whitmore*, 49 L.T.R. (n.s.) 335 (C.A. 1883); *Elves v. Croft*, 10 C.B. 241, 249 (1850); *Torrington Creamery v. Davenport*, 126 Conn. 515, 12 A.2d 780 (1940); *Abalene Pest Control Serv., Inc. v. Powell*, 13 Misc. 2d 661, 176 N.Y.S.2d 6 (Sup. Ct. 1958); *Premier Laundry, Inc. v. Klein*, 73 N.Y.S.2d 60 (Sup. Ct. 1947). Severance is necessary since, interpreting the covenant any other way, assignment would be impossible due to the fact that the personal employment contract, to which the restraint is appended, cannot ordinarily be assigned without the employee's consent.

14. An integral part of the sale of a business is the transfer of "good will" assets. This cannot be effectively accomplished without the vendor's covenant, in which he agrees not to act so as to lessen the value of the assets he is selling, since the purchaser will not receive full value unless the business good will remains unimpaired. The covenant is a valuable protective right in connection with the business and may be assigned as an incident thereof. Thus, it is equally justifiable to protect a business from subsequent competition by the seller or interference on the part of a former employee. *Jacoby v. Whitmore*, 49 L.T.R. 335 (C.A. 1883) (employee's covenant is part of the business good will); *Nelson v. Woods*, 205 Ga. 295, 53 S.E.2d 227 (1949); *A. Fink & Sons, Inc. v. Goldberg*, 101 N.J. Eq. 344, 139 Atl. 408 (Ch. 1927); *Trowbridge v. Denning*, 80 N.J.L. 236, 77 Atl. 1068 (1909); *Safier's, Inc. v. Bialer*, 93 N.E.2d 734 (Ohio C.P. 1950); *Blaser v. Linen Serv. Corp.*, 135 S.W.2d 509 (Tex. Civ. App. 1940); *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N.W. 412 (1911); 5 WILLISTON, CONTRACTS § 1643 (rev. ed. 1937).

15. Irrespective of covenants, a sale of good will implies an obligation to effectuate delivery by refraining from competition, while an ordinary employment contract carries no such interpretation. Unlike a vendor's covenant, an employee restraint is not a

is an apparent revitalization of the "blue pencil doctrine"¹⁶ propounded by the English courts where enforcement of a restrictive agreement would have been barred by an unreasonable restraint.

In some jurisdictions which refuse to accept the asset concept, a "ratification fiction" arises when the employee continues to labor for his new master following the assignment.¹⁷ This view of implicit assent to the assignment has been advanced by the American Law Institute which states:

If such assent is manifested after the creation of a contract, the assent is similarly effective if it is given for sufficient consideration . . . or if, in reasonable reliance on the manifestation, a material change of position takes place.¹⁸

A corollary of the ratification doctrine is the estoppel theory,¹⁹ exemplification of which is limited.

requisite through which the employer reaps the full valuation of the commodity purchased, since the current services of the employee are not effectuated until after termination of employment. Principal differentiations are presented in *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); and *Arthur Murray Dance Studios, Inc. v. Witter*, 62 Ohio L. Abs. 17, 105 N.E.2d 685, 704 (C.P. 1952). Courts have been more reluctant to sustain post-employment restraints, and view them with closer scrutiny than those ancillary to the sale of a business. *Morris v. Saxelby*, [1916] 1 A.C. 688; *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919).

16. The English courts would uphold a restraint if its wording was such that a blue pencil could be drawn through the unreasonable elements, leaving the valid ones to stand independently and be treated as a separate enforceable covenant. *Attwood v. Lamont*, [1920] 2 K.B. 146, 155; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1814] A.C. 535, 536; *Chester v. Nainby*, 2 Str. 740, 93 Eng. Rep. 819 (K.B. 1726); 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1927). While the doctrine of severance has heretofore been applied only in connection with the reasonableness of a restraint, its application is nonetheless essential if relief is sought by an assignee since the proverbial "blue line" can be drawn through the nonassignable parent contract—leaving the restrictive covenant to be transferred as an asset.

17. This theory recognizes the non-severability of the employee's covenant from the personal employment contract, but negates the distinction by relating the acquiescence of the employee back to the purported assignment, thus satisfying the non-assignment rule by imputing consent and recognition of the assignment, effective as of the time of the original transfer. *Nelson v. Woods*, 205 Ga. 295, 53 S.E.2d 227 (1949); *National Linen Serv. Corp. v. Clower*, 179 Ga. 136, 175 S.E. 460 (1934) (new employer is an equitable assignee); *Blaser v. Linen Serv. Corp.*, 135 S.W.2d 509 (Tex. Civ. App. 1939). Texas has also held that continuation of the employment is, as a matter of law, continuation of the old contract. *Thames v. Rotary Eng'r Co.*, 315 S.W.2d 589 (Tex. Civ. App. 1958).

18. RESTATEMENT, CONTRACTS § 162(2) (1932). For an application of this section to a factual situation identical with the instant case see *Jack Tratenberg, Inc. v. Komoroff*, 87 Pa. D. & C. 1 (C.P. 1951).

19. When there is an assignment of a personal service contract by the party to whom performance is due and the employee acts for the assignee with knowledge of the assignment, such conduct estops the employee from setting up nonconsent thereto and contending that the assignee cannot enforce the contract. Although this theory is usually tacitly understood in conjunction with that of ratification, it was positively expressed in *Utilities Ins. Co. v. Stuart*, 134 Neb. 413, 278 N.W. 827 (1938) (control by estoppel if there is no express ratification).

Some jurisdictions accept neither the asset nor ratification theories, but advance the novation concept,²⁰ where the continued service of the employee is viewed as creating a new contract of employment between himself and his assignee-employer. Though there has not been a precise ruling on the question, Florida has mentioned such an approach.²¹

The most significant of the views entitling the assignee to enforce the restrictive covenant is one which circumvents the rule against transferability of personal service contracts where the assignment results merely from a change in the legal form of ownership of the business.²² Validity and enforceability, in these cases, are correlative to whether the interests of the employee have been materially impaired by the assignment.²³ Also, it has been held that when there is a transfer between two corporations, there can be no objection on the basis of non-assignment of personal service contracts since "the agreement was made with a corporation which, in the nature of things, cannot perform personal functions."²⁴ In those cases where the parties are unchanged following the transfer, it is held that a technical, but ineffectual, assignment has been made.²⁵

Those jurisdictions denying enforcement of the employee's re-

20. Although the employee consents to the attempted assignment of his employment contract, there can actually be none, since the assignee cannot be substituted to a strictly personal relation. At best, a new contract exists between the employee and his new master. *Pestel Milk Co. v. Model Dairy Products Co.*, 52 N.E.2d 651 (Ohio App. 1943); 4 PAGE, CONTRACTS § 2258 (2d ed. 1920). "Service is like marriage, which, in the old law, was a species of it. It may be repeated, but substitution is unknown." *American Colortype Co. v. Continental Colortype Co.*, 188 U.S. 104, 107 (1903).

21. *Orlando Orange Groves v. Hale*, 119 Fla. 159, 175, 161 So. 284, 290 (1935).

22. The usual circumstances are the incorporation of a former partnership or a transfer between corporations situated in different jurisdictions; the parties involved remaining essentially the same. The prime motivational factor is usually a more convenient means of conducting business. *Niagara Share Corp. v. Fried*, 61 F.2d 740 (2d Cir. 1932); *Sands v. Potter*, 165 Ill. 397, 46 N.E. 282 (1896); *Walker v. Mason*, 272 Pa. 315, 319, 116 Atl. 305, 306 (1922) (only names changed after the transfer); *Model Baking Co. v. Dittman*, 266 S.W. 802 (Tex. Civ. App. 1924).

23. *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 182 P.2d 182 (Sup. Ct. 1947); *Walker v. Mason*, *supra* note 22; *Jack Tratenberg, Inc. v. Komoroff*, 87 Pa. D. & C. 1, 12 (C.P. 1951), in which the defendant-employee entered into a written employment contract, containing a negative covenant not to compete, with Jack Tratenberg. Four months later, the employer assigned all agreements relating to his business to the plaintiff (Jack Tratenberg, Inc.). The court held, "The assignment of an employment contract to a corporation, as here, where the management and personnel of the employer's business remain unchanged after the assignment, cannot in equity be regarded as materially prejudicial or disadvantageous to the employe [*sic*]."

24. *Haldor, Inc. v. Beebe*, 72 Cal. App. 2d 357, 365, 164 P.2d 568, 572 (Cal. App. 1946).

25. In *Gulf States Creosoting Co. v. Loving*, 120 F.2d 195 (4th Cir. 1941), the appellee-plaintiff formed a corporation and transferred into it all the assets, rights and liabilities of his business, including a personal sales contract entered into by the appellant. The court held the apparent assignment was merely part of a transfer of assets to the successor corporation, and did not fall within the rule denying assignability of personal contracts. *Accord*, *Model Baking Co. v. Dittman*, 266 S.W. 802, 803 (Tex. Civ. App. 1924). See generally 74 HARV. L. REV. 393 (1960).

strictive covenant by an assignee ignore it as a severable asset²⁶ and fail to accept continued employment under the new employer as a ratification of the purported assignment.²⁷ While only two jurisdictions²⁸ consistently have denied recovery in the past, the law on this subject possesses patent inconsistencies within jurisdictional boundary lines.²⁹ Any singular factual situation may be rendered non-assignable, thus non-recoverable, simply by interpreting the litigated agreement to be one of affirmative personal service rather than a wholly negative covenant not to perform.³⁰

In the instant case, the chancellor found that the rights of the employee were not prejudiced by the assignment of the employment contract and thus, it was valid.³¹ A vital factor was the continuing employment and management, the parties remaining substantially identical with those who preceded the assignment of assets to the Florida corporation.³²

26. Berlitz School of Languages v. Duchene, [1903] 6 Sess. Cas. 181 (Scot. 1st Div.); Seligman & Latz v. Noonan, 201 Misc. 96, 104 N.Y.S.2d 35 (Sup. Ct. 1951); Avenue Z Wet Wash Laundry Co. v. Yarmush, 129 App. Div. 427, 221 N.Y. Supp. 506, *aff'd*, 220 App. Div. 740, 221 N.Y. Supp. 788 (1927); Texas Shop Towel, Inc. v. Haire, 246 S.W.2d 482 (Tex. Civ. App. 1952); Oak Cliff Ice Delivery Co. v. Peterson, 300 S.W. 107 (Tex. Civ. App. 1927). Basic minority rationale is illustrated by Berlitz School of Languages v. Duchene, *supra*, asserting that since a contract of service as a whole cannot be assigned without the consent of the employee, a particular condition (negative covenant) of that contract cannot be assigned either.

27. Avenue Z Wet Wash Laundry Co. v. Yarmush, *supra* note 26; Oak Cliff Ice Delivery Co. v. Peterson, *supra* note 26.

28. New York and Scotland.

29. Although the law in New York had, in the past, been very adamant in denying enforcement of an assigned covenant, recent vacillation is evidenced by the cases of Abalene Pest Control Serv., Inc. v. Powell, 8 App. Div. 2d 734, 187 N.Y.S.2d 381 (1959), and Norman Ellis Corp. v. Lippus, 13 Misc. 2d 432, 176 N.Y.S.2d 5 (Sup. Ct. 1955), which point to a positive rule of recovery tinged with liberality. By the same token, virtually all recent Texas decisions unequivocally find no inhibition against the assignment of restrictive covenants, but Texas Shop Towel, Inc. v. Haire, 246 S.W.2d 482 (Tex. Civ. App. 1952), treated a contract for personal services with a negative covenant appended as unenforceable and is still good law. A probable explanation is the fact that this problem is capable of two interpretations which are mutually exclusive; one being a non-assignable personal service contract and the other being that of a severable, non-service covenant. See discussion in note 30 *infra*.

30. All courts recognize the non-assignability of personal service contracts, but those advocating enforcement by an assignee go a step further by asserting that the assignee is not seeking to compel the employee to work for him, but only to restrain him from competing after his duties have ended. Inherent in this view is the severability of the covenant since without such a procedure, nothing capable of assignment exists and the negative rule is invoked. National Linen Serv. Corp. v. Clower, 179 Ga. 136, 175 S.E. 460 (1934); Abalene Pest Control Serv., Inc. v. Powell, *supra* note 29; Norman Ellis Corp. v. Lippus, *supra* note 29; Seligman & Latz v. Noonan, 201 Misc. 96, 104 N.Y.S.2d 35 (Sup. Ct. 1951) (assignment disallowed); Thames v. Rotary Eng'r Co., 315 S.W.2d 589 (Tex. Civ. App. 1958); Texas Shop Towel, Inc. v. Haire, *supra* note 29 (assignment disallowed).

31. Nenow v. Cassidy, 141 So.2d 636, 638 (Fla. App. 1962).

32. As has been mentioned earlier in note 22 *supra*, circumvention of the assignability rule has been advocated in those circumstances where the only differentiation between the assignee and assignor firms is the technical change in business organization. Florida evidently adopts this realistic view, which emphasizes the solemnity of contractual obligations, joining California, Illinois, Pennsylvania and Texas, and the Federal courts

In affirming the decree of the chancellor, the court adopted the law of Pennsylvania,³³ stating, "The incorporation of the employer's business without other change does not abrogate the contract of employment, or alter the liability of the parties one to the other."³⁴ The court refused to distinguish between an incorporation and an exchange of stock for assets between two corporations,³⁵ thus facilitating the application of the legal principles involved to a unique factual pattern. Although Florida decisions have not ruled directly on the point involved, the court noted state authority³⁶ which propounded both the novation³⁷ and ratification³⁸ concepts of assignment enforceability. It also rejected the New York rule of nonassignability³⁹ as nonpersuasive, thus tacitly recognizing the important distinction between the transaction at bar and a bare assignment between two separate entities.⁴⁰

The somewhat unusual factual circumstances before the court presented a special situation in which there is a unanimity of judicial opinion in affirming a right of enforcement in the assignee.⁴¹ However, should a slightly different, and more common situation in which a transfer takes place between two distinct and different parties arise, the decision of the court by no means provides a precedent for cases engendering general assignment issues.⁴² The law relative to these more familiar circumstances remains in a state of confusion since the basis

of the Fourth Circuit. Whenever the applicable factual circumstances have arisen, the circumvention doctrine has been applied.

33. *Seligman & Latz v. Vernillo*, 382 Pa. 161, 114 A.2d 672 (1955) (change from partnership to corporation).

34. *Nenow v. Cassidy*, 141 So.2d 636, 639 (Fla. App. 1962); quoting from 35 AM. JUR. *Master and Servant* § 33 (1941).

35. In both a technical incorporation and the transaction in the instant case, if the individuals involved remain substantially the same as those who preceded them, only a modification in form has occurred and substantive rights and duties are essentially identical. It can be argued that bringing the dormant Florida corporation into active existence created a corporate entity that otherwise would not have functioned, and an analogous "incorporation" resulted.

36. *Orlando Orange Groves v. Hale*, 119 Fla. 159, 161 So. 284 (1935).

37. See note 20 *supra*.

38. See note 17 *supra*.

39. A bilateral contract involving the performance of personal services cannot be assigned by either party without the consent of the other. *Seligman & Latz v. Noonan*, 201 Misc. 96, 104 N.Y.S.2d 35 (Sup. Ct. 1951).

40. The instant case exemplifies that rare instance in which a technical assignment occurs, but the resultant effect is that of no assignment whatsoever. This is the essence of the circumvention concept, presented in notes 22 and 32 *supra*, which is limited to the singular type of transaction which took place. Representative language is found in *Gulf States Creosoting Co. v. Loving*, 120 F.2d 195, 199 (4th Cir. 1941), in which the court said "The assignment was merely part of the transfer of assets to a corporation formed to take over a going business, and after the transfer, the same persons were in control. Under such circumstances, an assignment of a contract does not ordinarily fall within the rule that denies assignability where the personal element is a material factor."

41. See note 32 *supra*.

42. The usual question litigated is that of enforcement of the non-competitive covenant by an assignee, distinct and unrelated to his assignor. Here, the haze of judicial uncertainty descends.

for decision has not been reduced to a single theory and identical factual situations may be construed differently depending upon the application of a certain "rule."⁴³

The Florida legislature, departing from a rigid common law approach,⁴⁴ has attempted to clarify the interpretation to be accorded covenants such as the one at bar through a statutory enactment which reads:

One who sells the good will of a business . . . may agree with the buyer, and one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, . . . so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.⁴⁵

Though not considered in the instant case, it is evident this statute provides a guideline to be set forth when the reasonableness of a restraint is in question. The greatest remaining difficulty is the determination of a positive rule of decision applicable to the law of assignments. This result, though impossible of complete uniformity in the myriad of factual circumstances litigated, may be attained by adoption of the process of reasoning the court in the instant case applied to the problem before it.

It is submitted that the basic tenet of the court was, legal refinements to the contrary, that a transaction which leaves the rights and duties of the parties unimpaired should not form the basis for an annulment of contractual relations, voluntarily assumed.⁴⁶ This is relief by factual merit rather than recovery based upon rigid application of a rule.

Surely, no more onerous result is reached than when legal dilutions and finite distinctions bar the satisfaction of an essentially just and equitable claim. It is hoped the Florida courts maintain their position when confronted with a similar problem in the future, rather than emulate some courts who allow themselves to be controlled by a maze of involute and abstruse "rules" and "exceptions" which becloud the fundamental interests of the litigants.

MARTIN E. SEGAL

43. Difficulty may readily be foreseen when the imposing array of asset, ratification, novation, estoppel, personal service and circumvention theories are made the basis for a supposedly uniform judicial decision.

44. *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1934) (employee restraint not enforced). This common law view is still evident in *United Loan Corp. v. Weddle*, 77 So.2d 629 (Fla. 1955), where a majority of the Florida Supreme Court seemed to ignore the newer view of the legislature.

45. FLA. STAT. § 542.12(2) (1961), applied in *Atlas Travel Serv., Inc. v. Morelly*, 98 So.2d 816 (Fla. App. 1957).

46. It is evident that such a view is not limited to a particular area, but may have a very broad application.