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STATUTES—SURVIVAL OF CAUSES OF ACTION—EFFECT OF SURVIVAL ON ASSIGNABILITY. In 1949, the North Dakota legislature enacted a statute providing in substance that no causes of action should abate by the death of a party, except actions for breach of promise, alienation of affections, libel, and slander.[1] While seemingly clear and unambiguous, this statute nevertheless poses a difficult problem in construction: What would the North Dakota court do if faced with the contention that a cause of action not previously assignable in North Dakota, but made to survive by this statute, is now also assignable?

Previously, the assignability and survivability of a cause of action were both established by this provision originally adopted as a part of the Field Code by the territorial legislature in 1865: "A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. Upon the death of the owner, it passes to his personal representatives except when in cases provided by law it passes to his devisees or successor in office."[2]

The North Dakota supreme court, construing this statute in the case of *Grabow v. Bergeth,*[3] said, ". . . it clearly appears that the term 'obligation' as used in § 5446[4] comprehends only legal duties resting upon contract or those which arise by operation of law from a status or from relationships voluntarily assumed as distinguished from obligations which are imposed by law. From this it follows that actions for general damages for deceit, fraud, negligence, libel, slander, assault, seduction, malicious prosecution, et cetera, do not survive and are not assignable."[5] Moreover, the court held that the statute established one rule for both survival and assignability of things in action. The question is whether the rule as announced is still valid. The problem will become more clear if the common law development of rules of assignability is considered.

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[1] "No action or cause of action, except for breach of promise, alienation of affections, libel and slander, shall abate by the death of a party or of a person who might have been a party had such death not occurred." N.D. Rev. Code § 28-01261 (Supp. 1949).

[2] N.D. Rev. Code § 47-0703 (1943).

[3] 59 N.D. 214, 229 N.W. 282 (1931).

[4] Now N.D. Rev. Code § 47-0703 (1943).

[5] Grabow v. Bergeth, 59 N.D. 214, 227, 229 N.W. 282, 287 (1931); *accord* as to construction of "obligation" in an identical statute, Simons v. Kidd, 41 N.W.2d 840 (S.D. 1950); Comment, 3 Dak. L. Rev. 265 (1931). Comegys v. Vasse, 1 Pet. 193, 213 (U.S. 1828). Justice Story: "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights ad rem and in re—possibilities coupled with an interest, and claims growing out of, and adhering to property—may pass by assignment."; Employer's Casualty Co. v. Moore, 60 Ariz. 544, 142 P.2d 414 (1943); Guggisberg v. Boettger, 139 Minn. 226, 166 N.W. 177 (1918); Purple v. Hudson River Ry., 4 Duer 74 (N.Y. 1854).

COMMON LAW DEVELOPMENT

At common law after it became possible to assign choses in action, survival became the most common test of assignability.[6] The courts reasoned that since on his death, a man's property passed to his personal representative for the benefit of creditors and heirs, any interest which would so survive to the representative should also pass by a general assignment for the benefit of creditors and also to the trustee in bankruptcy under early laws. If the claim would survive, it would pass by an assignment.[7] Since by the great weight of authority survival is the test of assignability, statutes providing for survival of causes of action, regardless of the nature of the cause of action made to survive, have been widely held to have the incidental effect of making the surviving causes of action assignable.[8] The proposition has been stated thus: "The statutes do not in terms declare that such rights are assignable, but that they survive. But the rule of law is that, if alive, then they are capable of assignment."[9]

In view of the lack of uniformity in the decisions hereinafter noted, it is not entirely certain what course will be followed in North Dakota. A dictum in a recent South Dakota case, *Simons v. Kidd*,[10] would tend to indicate that the rule that survivability means assignability might still be followed by the North Dakota court with respect to the new statute. In construing a statute providing for the survival *and transfer* of causes of action[11] and a 1947 act listing those actions to which a personal representative can be a party,[12] the court concluded that in enacting the 1947 legislation the legislature sought to describe all of the things in action which it intended to invest with the qualities of survivorship and assignability by the more general language of the earlier statute.[13] The court was, however, deciding only the question of survivability, and the indication that the statute also controlled assignment was not essential to the decision.

In view of the lack of uniformity in the decisions hereinafter noted, sumed to have been aware of the rule in *Grabow v. Bergeth* when it enacted the 1949 statute, a North Dakota court could take the superficially reasonable position that by giving survivability to actions the legislature intended to make them assignable also. But, a reasoned decision would seem to be otherwise.

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7 Comegys v. Vasse, *supra* note 6.

8 McWhirter v. Otis Elev. Co., 40 F. Supp. 11 (D.S.C. 1941); Tomkovitch v. Mistevitch, 222 Mich. 425, 192 N.W. 639 (1923); Saloushin v. Houle, 85 N.H. 126, 155 Atl. 47 (1931); Gulf C. & S. F. Ry. v. Miller, 21 Tex. Civ. App. 609, 53 S.W. 709 (1899).

9 Bultman et al. v. Atlantic Coast Line Ry., 103 S.C. 512, 88 S.E. 279, 280 (1916).

10 41 N.W.2d 840 (S.D. 1950).

11 S.D. Code § 51.0803 (1939). The first part of this section is nearly identical with N.D. Rev. Code § 47-0703 (1943).

12 S.D. Laws 1947, c. 158.

13 *See* Simons v. Kidd, 41 N.W.2d 840, 846 (S.D. 1950).

THE PROBLEM IN OTHER JURISDICTIONS

In the first place, it should be noted that not all courts agree that survivability and assignability of choses in action are necessarily convertible terms. States denying the principle have done so on varying theories. New York, for example, has changed her former conformist rule. Assignability now is dependent upon express statutory authority so that although, "no cause of action for injury to the person or property shall be lost because of the death of the person in whose favor the cause of the action existed. . .,"[14] certain actions are yet non-assignable because of a statute providing in part, "any claim or demand can be transferred except in one of the following cases: (1) where it is to recover damages for a personal injury, or for a breach of promise to marry."[15] New York courts have uniformly given effect to the transfer statutes, and no longer regard survival as a test of assignability.[16] Further, the general rule—that a statute which provides for the survival of an action also operates incidentally to remove the restriction against assignability—is not applicable where the enactment providing for the survival of certain designated actions expressly provides that the statute shall not be construed to give the right to assign a claim for a tort which is not otherwise assignable.[17]

Although Kansas statutes have provided for survival of "causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud,"[18] the Kansas courts have given a positive effect to a negative clause in her real party in interest statute which provides, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 27 [60-403], *but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.*"[19] The Kansas rule is that the italicized portion of the above section has the effect of denying assignability to any cause of action not arising out of contract.[20]

In New Jersey, a statute vesting in the administrator or executor an action for any trespass done to the person or property of the decedent was held not to have abrogated the state's rule that such

[14] N.Y. Dec. Est. Law § 119.

[15] N.Y. Pers. Prop. Law § 41, cl. 1.

[16] Saper v. Delgado, 146 F.2d 714 (2d Cir. 1945); Abbondola v. Kawecki, 177 Misc. 122, 29 N.Y.S.2d 530 (1941); Keeler v. Dunham, 114 App. Div. 94, 99 N.Y. Supp. 669 (1906).

[17] Hereford v. Meek, 52 S.E.2d 740 (W.Va. 1949).

[18] Kan. Gen. Stat. § 60-3201 (Supp. 1941).

[19] (*Italics supplied*) Kan. Gen. Stat. § 60-401 (1935).

[20] Howe v. Mohl, 168 Kan. 445, 214 P.2d 298 (1950); St. Paul Fire & Marine Insurance Co. v. Bender, 153 Kan. 752, 113 P.2d 1062 (1941). *Contra*: Sherman v. Harris, 36 S.D. 50, 153 N.W. 925 (1915). See Comment, 3 Dak. L. Rev. 265 (1931). It is interesting to note that N. Dak. at one time had this provision in a real party in interest statute, but deleted it by amendment of the provision in 1895. See N.D. Rev. Code § 5229 (1895).

causes of action were not assignable before judgment.[21] This holding was based on the theory that nothing is assignable, either at law or in equity, that does not directly or indirectly involve a right to property, and that the statute providing for survival of an action for personal injuries was not intended to transform the cause of action into a property right.[22]

CONCLUSION

These decisions clearly demonstrate that logically there may be a distinction drawn between survival and assignability of things in action. Moreover, another North Dakota statute provides, "In this state there is no common law in any case where the law is declared by code."[23] As has been noted, the present New York rule is that since the legislature has assumed to regulate the transfer of choses in action specifically by statute, previous decisions based on the test of survival have been rendered inapplicable.[24] It is arguable that the North Dakota court would give effect to the above statute and follow the lead of New York and hold that since the legislature has spoken with regard to transferability of causes of action,[25] the common law principle of convertibility of terms would have no application, and any change in the rules of assignability would have to be effected by specific legislative action. If such a course were followed, our recent legislation dealing in terms only with the survival of actions and causes of action would not change our rule concerning assignability, and the rule enunciated in *Grabow v. Bergeth* would still prevail, *i.e.*, that actions for general damages for deceit, fraud, negligence, libel, slander, assault, seduction, malicious prosecution, and similar personal actions would still remain non-assignable. It should be remembered that when the court in the *Grabow* case announced that the same rules governed assignability and survival of things in action, it was construing a statute dealing in terms with both.

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[21] Goldfarb v. Reicher, 112 N.J.L. 413, 171 Atl. 149 (1934), *aff'd*, 113 N.J.L. 399, 174 Atl. 507 (1934).

[22] Goldfarb v. Reicher, *supra* note 21; Weller v. Jersey City H. & P. St. Ry., 68 N.J. Eq. 659, 61 Atl. 459, 460 (1905) *affirming* Weller v. Jersey City H. & P. St. Ry., 66 N.J. Eq. 11, 57 Atl. 730 (1904); *accord*, Rice v. Stone, 1 Allen 566 (Mass. 1861); General Exchange Ins. Corp. v. Driscoll, 315 Mass. 360, 52 N.E.2d 970 (1944). It is noteworthy that the authority on which the *Goldfarb* case relies is traceable to Comegys v. Vasse, 1 Pet. 193, 213 (U.S. 1828), which is also relied on to support the general common law view. Courts reasoning along the lines of the *Goldfarb* decision apparently place a greater emphasis on the latter part of the statement of Justice Story in that case, quoted in note 6, *supra*.

[23] N.D. Rev. Code § 1-0106 (1943). Note in considering Simons v. Kidd, 41 N.W.2d 840 (S.D. 1950), that South Dakota has a statute providing that her code establishes the law of the state respecting the subjects to which it relates. S.D. Code § 65.0202 (1) (1939). The court, in that case, apparently didn't consider this statute.

[24] Keeler v. Dunham, 114 App. Div. 94, 99 N.Y. Supp. 669 (1906). See cases cited note 16 *supra*.

[25] N.D. Rev. Code § 47-0703 (1943).

While it is true, as suggested in *Simons v. Kidd, supra,* that N.D. Rev. Code § 28-01261 (Supp. 1949) deals with a part of the same subject matter, namely survival of things in action, as our earlier N.D. Rev. Code § 47-0703 (1943), the two statutes are in no way conflicting and there is no necessity of any repeal or amendment by implication of § 47-0703.

The only necessary effect of the recent enactment is to add to the number of causes of action permitted to survive by the construction given § 47-0703 in *Grabow v. Bergeth.* Thus, a cause of action for damages for a breach of contract could survive under either section while a cause of action for damages for personal injury based on negligence, for example, would survive only by virtue of § 28-01261.

It is submitted that our courts would be justified in assuming that the legislature in enacting the new survival statute intended that it should have no effect on the assignability of causes of action. It would seem that to conclude otherwise would be adding by judicial construction to an unambiguous statute dealing only with survivability.

Thomas D. Butler

TAX EXEMPT CORPORATIONS—FARMERS CO-OPERATIVE MARKETING AND PURCHASING ASSOCIATIONS. Farmers' co-operatives are only one of a group of nineteen categories of organizations which are given tax exemption by the Internal Revenue Code.[1] Their similarity, however, to ordinary commercial corporations and the fact that they compete directly with such corporations has made them a subject of much criticism. Such organizations as the National Tax Equality Association have conducted persistent campaigns to have the exemption ended on the ground that such exemption gives the co-operatives an unfair advantage over corporations subject to tax.[2]

It is not the purpose of this writing to enter into any discussion of whether or not the exemption should be continued. Rather, it is to illustrate the requirements to be met for tax exemption of farmers' co-operatives and the development of the law from the inception of the Income Tax Law in 1913 to the present date. These requirements present a number of difficulties from the standpoint of the co-operative. Indeed, so formidable a barrier have they proved that it was stated recently that only about one half of the farmers' co-operatives in the nation are now tax exempt.[3]

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[1] Int. Rev. Code § 101(12).

[2] Note, 34 Va. L. Rev. 314 (1948).

[3] Treasury Department Document No. 3157 (1948).