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Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective

BY HAROLD R. WEINBERG*

I. INTRODUCTION

Dean Prosser has pointed out that a major function of the law of torts is to allocate losses arising in the course of human activity by placing the burden of the loss on the party at fault.¹ Tort causes of action are both diverse and plentiful in our society, and few persons can avoid being a tort victim at one time or another. Prior to suit, the injured party becomes the "owner" of a tort cause of action. Even though "ownership" is involved, it may seem awkward to classify a tort cause of action as personal property. This difficulty is lessened, however, when the monetary value of the cause of action is established through settlement with the tortfeasor or by a court rendered judgment. In any event, our law recognizes that many tort causes of action, as well as rights pursuant to tort settlement or judgment, are as assignable as most personalty. Despite this situation, the origins, evolution, and present state of the law concerning the inherent assignability of tort claims in the United States has never been subjected to close analysis and comment.² This is

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¹ W. PROSSER, *LAW OF TORTS* 5-6 (4th ed. 1971).

² The periodic literature dealing with this topic is generally narrow in its focus, usually dealing with a recent development in a single jurisdiction. See Flannagan, *Assignability of Insured's Cause of Action for Bad Faith or Negligent Refusal to Settle*, 1970 INS. L.J. 151 (1970) (discussing Kansas law); Comment, *Assignability of Causes of Action in Tort—Fraud*, 3 DAKOTA L. REV. 265 (1930); Comment, *Statutes—Survival of Causes of Action—Effect of Survival on Assignability*, 27 N.D.L. REV. 208 (1951); Note, *Assignment of Tort Claims in Pennsylvania*, 15 U. PITT. L. REV. 123 (1953); Note, *Obligor's Right of Set-Off Against Assigned Causes of Action*, 17 S.C.L. REV. 231 (1965); Note, *Assignment of Tort Causes of Action in Utah*, 4 UTAH L. REV. 539 (1955); Note, *Assignability of a Tort Cause of Action in Virginia*, 41 VA. L. REV. 687 (1955); 22 CALIF. L. REV. 456 (1934); 20 CHI.-KENT L. REV. 177 (1942); 41 HARV. L. REV. 666 (1928); 18 MINN. L. REV. 585 (1934); 24 MINN. L. REV. 269 (1940); 85 U. PA. L. REV. 637 (1937); 4 TENN. L. REV. 25 (1925). The legal encyclopedias and annotations provide

somewhat surprising in light of the substantial body of legal literature relating to the inherent assignability of rights *ex contractu*,³ and the fact that in some jurisdictions certain tort claims remain unassignable, a remnant of the archaic and out-moded English doctrine which prohibited assigning choses in action.⁴ Also neglected by the commentators⁵ has been the effect of such tort claim assignments on the parties to the assignment *inter se* and third persons not parties to the assignment.⁶ This absence of analysis is also perplexing because tort claims have been assigned to meet a variety of commercial and non-commercial needs, and questions relating to the validity and effect of such assignments have been litigated.⁷ This paper will attempt to fill these commentary voids.

II. THE INHERENT ASSIGNABILITY OF TORT CAUSES OF ACTION AND THE RIGHTS DERIVED THEREFROM

Tort causes of action are, in themselves, a form of intangible property, but they can also constitute the precursor of other future intangible property rights.⁸ These include a tort victim's right to payment under a settlement contract, a creditor's rights under a judgment, and rights in the fund which is ultimately produced by the tortfeasor in compliance with the settlement or judgment.⁹ Therefore, when discussing the inherent

a more comprehensive, but nonanalytic, source for finding the doctrine. See 6 AM. JUR.2d *Assignments* §§ 34-45 (1963); 6 C.J.S. *Assignments* §§ 32-37 (1937); Annot., 76 A.L.R.2d 1286 (1961).

³ See notes 27-35 *infra*.

⁴ See notes 14-18 and accompanying text *infra*.

⁵ See note 2 *supra*.

⁶ Such persons might include the tortfeasor, creditors of the assignor, or other assignees.

⁷ See pt. III *infra*.

⁸ For an analysis of the evolution of these tort-related rights, see notes 157-61 and accompanying text *infra*. The "evolution" of one intangible into another is not limited to tort causes of action and the rights which may be derived from them. The manner in which intangible rights included within the scope of Article Nine of the Uniform Commercial Code may "evolve" into other intangible rights also included within the scope of that article has been discussed elsewhere. See generally Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 999-1006 (1964). Neither tort claims nor tort judgments are within the scope of Article Nine. However, a right to payment under a settlement contract or in the fund ultimately generated may be. See pt. III *infra*.

⁹ Of course, a tort claim will be valueless to an assignee if there is no chance that it will be merged into a settlement or a judgment which will produce a fund.

assignability of rights arising from a tort, these derivative intangible property rights as well as a tort victim's original cause of action must be considered. Their assignability becomes even more significant because although it may not be possible to assign the tort cause of action directly, it may be possible to do so indirectly by assigning the future derivative rights.

The American approach to the assignment of tort claims is based on the supposed equivalency of survivability and assignability. That is, if a tort claim does not die with the tort victim, but can be sued upon by the victim's personal representative, it is deemed to be assignable by the victim *inter vivos*.¹⁰ The origin of this equivalency, which has been described as "obscure,"¹¹ is usually traced to *Comegys v. Vasse*,¹² a case decided by the United States Supreme Court in 1828. However, *Comegys* was not the first American opinion to refer to the equivalency; in fact, the decision may not have even relied on its application.¹³ Since the origins and evolution of the American doctrine can be better understood and appreciated when viewed against a backdrop of prior English law, the story of tort claim assignability in the United States is best begun in England.

A. *The English Background*

The English characterized a claim arising out of the commission of a tort as a chose in action, a classification used to denote those personal property rights not susceptible to physical possession and capable of enforcement only through legal action.¹⁴ This grouping embraced a number of claims, including "rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights arising by

¹⁰ See generally the materials cited at note 2 *supra*. Although the assignment of tort claims has been the subject of statutory enactment in a few jurisdictions, this equivalency remains the basic conceptual thread running through the law dealing with the assignment of rights arising out of the commission of a tort. See notes 111-115 and accompanying text *infra*.

¹¹ Note, *Assignment of Tort Causes of Action in Utah*, 4 UTAH L. REV. 539, 541 n.15 (1955).

¹² 26 U.S. (1 Pet.) 193 (1828).

¹³ See notes 70-90 and accompanying text *infra*.

¹⁴ See generally 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 515-17 (1926) [hereinafter cited as HOLDSWORTH].

reason of the commission of a tort or other wrong; and rights to recover the ownership or possession of property real or personal."¹⁵

At one time in England all choses in action were nonassignable. Several explanations for this rule have been advanced, e.g., they were too personal to transfer, there was a prohibition against maintenance,¹⁶ or valuation was too difficult.¹⁷ However, this blanket prohibition against assignability eventually weakened, so that rights arising out of the commission of a tort had developed a modicum of assignability in England before *Comegys* was decided.¹⁸ The assignability of tort claims first emerged as the product of legislative action. Beginning in 1330, the English enacted a series of statutes which permitted executors and administrators to sue for trespasses committed against personal property of the decedent during his lifetime,¹⁹ and which were thus in derogation of the common law principle *actio personalis moritur cum persona* (a personal action dies with the person).²⁰ It is interesting to note that although survivability is in some ways analogous to as-

¹⁵ *Id.* at 516. The inclusion of nonpossessory interests in real or personal property under the heading "choses in action" has been questioned. See Bordwell, *The Alienability of Nonpossessory Interests*, 19 N.C.L. Rev. 279, 279-85 (1941). The inclusion of torts has also been questioned. See Elphinstone, *What is a Chose in Action?*, 9 L.Q. Rev. 311 (1893). But see Williams, *Is a Right of Action in Tort a Chose in Action?*, 10 L.Q. Rev. 143 (1894).

¹⁶ Maintenance arises when a cause of action is transferred to promote unnecessary litigation. The vice, which will render the contract void, is "the tendency or purpose to stir up and foment litigation, multiply contentions, or unsettle the peace and quiet of a community, or set one neighbor against another, or give one litigant advantage over another." *Fordson Coal Co. v. Garrard*, 125 S.W.2d 977, 981 (Ky. 1939).

¹⁷ See J. AMES, *LECTURES ON LEGAL HISTORY* 211-12 (1913) [hereinafter cited as AMES]; 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 7.2 (1965) [hereinafter cited as GILMORE]; 3 HOLDSWORTH 332.

¹⁸ It is interesting and instructive to compare the developments relating to the assignment of rights *ex delicto* with the assignment of rights *ex contractu*. The latter set of developments are discussed at notes 27-35 and accompanying text *infra*.

¹⁹ See generally 3 HOLDSWORTH 584-850. That such causes of action descended to one's personal representative has been stated to be "hardly a departure from the rule [of nonassignability], since the representative was looked upon as a continuation of the person of the deceased." AMES at 210. However, other commentators have seen an analytic relationship between the questions of survival and assignment. See notes 20, 22 and accompanying text *infra*.

²⁰ Although actions *ex contractu* are also personal, they were largely unaffected by this principle and generally survived. See 3 HOLDSWORTH 577-78.

signability,²¹ particularly if a personal representative's title to a chose in action is deemed to have been obtained through assignment,²² the common law refusal to permit survival of tort actions was a function of a number of factors distinct from those underlying the general nonassignability rule.²³ The most important of these other factors was the concept that one purpose of an action for damages was to obtain revenge for the injury, which, of course, was futile once the victim was deceased.²⁴ The recital to the initial 1330 enactment indicates that its draftsmen viewed an action for trespass as punitive in character.²⁵ Although the statute expressly provided only for survival of actions in trespass, it was construed broadly by the courts to permit survival of other forms of action for injuries which had diminished the decedent's personal estate.²⁶

Aside from the statutory genesis, tort claims in England had acquired a degree of assignability in the courts through the doctrine of subrogation. However, before this erosion of the nonassignability rule can be placed in its proper perspective, it is necessary to review the English law concerning the assignment of contractual choses in action. The evolution of English law in this area has been the subject of considerable study, and its general outlines are well known.²⁷ Initially, the chancellor began to permit a debt assignee to bring a bill in equity in his own name to recover from the debtor.²⁸ In response to this

²¹ See 7 HOLDSWORTH 538-39 and note 19 *supra*.

²² This was apparently the situation. See *Raymond v. Fitch*, 150 Eng. Rep. 251, 254 (Ex. 1835).

²³ See generally Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 606-09 (1960).

²⁴ *Id.* at 608. This concept cut both ways. The English law also circumscribed the actions which might be brought by a tort victim against the estate of a deceased tortfeasor. See 3 HOLDSWORTH 578-79.

²⁵ Whereas in Times past Executors have not had Actions for a Trespass done to their testators, as of the Goods and Chattels of the same Testators carried away in their Life, and so such Trespasses have hitherto remained unpunished; it is enacted, That the Executors in such Cases shall have an Action against the Trespassers, and recover their Damages in like Manner as they, whose Executors they be, should have had if they were in Life.

4 Edw. 3, c. 7 (1330).

²⁶ See 1 E. WILLIAMS, A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS 608-10 (11th ed. 1921).

²⁷ See generally 1 GILMORE § 7.3; 7 HOLDSWORTH 534-37.

²⁸ See Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 821-22 (1916) [hereinafter cited as Cook].

development and to commercial pressure, courts of law introduced a procedure by which the assignor of a debt could empower the assignee to sue in the assignor's name as the assignor's attorney-in-fact, it being agreed that the assignee would keep all or part of any recovery.²⁹ Under this approach the nonassignability rule theoretically remained inviolate. When this procedure was challenged on the ground of maintenance,³⁰ the assignee could argue in defense that there was a common moral or legal interest in himself and the assignor; this defense was upheld in cases where the assignment had been in satisfaction of preexisting indebtedness.³¹ While maintenance was at first presumed by the English courts, this presumption had been eliminated by the time Blackstone's *Commentaries*³² were published during 1765-69.³³ Of course, the chancellor received fewer petitions once the law courts permitted the assignee of a contractual chose in action to sue in the name of his assignor. However, equity could still be of aid when the legal remedy proved inadequate.³⁴ Despite these developments, an assignee's rights, even when asserted in an action at law, continue to be termed "equitable."³⁵

As noted above, the second instance in English law in which tort claims assumed a degree of assignability prior to the *Comegys* decision involved the doctrine of subrogation. The doctrine, as applied in equity, allowed insurers who paid their insured's property damage claims to recover on the insured's cause of action. The doctrine was applied on behalf of marine

²⁹ See 7 HOLDSWORTH 534; Cook 322-23.

³⁰ See note 16 *supra*.

³¹ See 7 HOLDSWORTH 535. See generally Winfield, *Assignment of Choses in Action in Relation to Maintenance and Champerty*, 35 L.Q. REV. 143 (1919). One writer has offered another explanation for the "satisfaction of a preexisting debt" requirement. See Bailey, *Assignment of Debts in England from the Twelfth to the Twentieth Century*, 48 L.Q. REV. 548, 552-553 (1932) [hereinafter cited as Bailey].

³² W. BLACKSTONE, *COMMENTARIES* (Chitty ed. 1845). See *id.* at xii for reference to the publication date of the earliest edition.

³³ See 7 HOLDSWORTH 536.

³⁴ See *id.* at 535-36.

³⁵ See Williston, *The Word "Equitable" and its Application to the Assignment of Choses in Action*, 31 HARV. L. REV. 822, 824-25 (1918). The assignee continued to be required to sue at law in the name of the assignor until the enactment of codes of procedure requiring suit in the name of the real party in interest. See generally Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 263-66 (1925).

insurers by the mid-18th century.³⁶ In two early cases, decided in 1782 and 1783, the law courts determined that a nonmarine insurer which paid its insured's claim was entitled to sue on the claim, but only in the insured's name, not in its own.³⁷ Both suits were for property damage sustained during the riots of 1780, and were brought pursuant to the Riot Act which made certain residents collectively responsible for damage to property located within their residential area caused by a rioting mob.³⁸ The justices in both cases treated the act as substituting the residents for the actual tortfeasors in an action for trespass. In the first case, *Mason v. Sainsbury*,³⁹ the insurance company's suit in the name of its insured was sustained on the ground that it was well understood that an insurer stands in the place of its insured upon payment of a loss and can therefore recover in the insured's name. The second case, *London Assurance Co. v. Sainsbury*,⁴⁰ decided by the same panel of justices which decided *Mason* (including Lord Mansfield), is even more instructive as to the manner in which subrogation was viewed at law. The insured in *London Assurance* had previously sued in tort and received a judgment only for the uninsured portion of his loss, although the jury had been instructed to award damages for the entire loss and to disregard the payment of insurance. The insurance company then brought suit in its own name for the amount paid under the policy. The four-member court split on the question of whether the action could be so maintained.

³⁶ See *Randal v. Cockran*, 27 Eng. Rep. 916 (Ch. 1748). In this case the insurer, who had paid his insured for a vessel captured by the Spanish, argued that he was entitled to part of the compensation awarded by an English commission for the loss. The chancellor decreed the insured to be a constructive trustee of funds received from the commission. Although the right to compensation in this case may not immediately strike the modern legal mind as sounding in tort, a similar right may have been viewed as a tort by Justice Story in *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828). See notes 61-91 and accompanying text *infra*. Justice Story viewed *Randal* as an application of the marine insurance doctrine of abandonment. See text accompanying notes 77-80 *infra*.

³⁷ See *London Assurance Co. v. Sainsbury*, 99 Eng. Rep. 636 (K.B. 1783); *Mason v. Sainsbury*, 99 Eng. Rep. 538 (K.B. 1782).

³⁸ See *An Act for Preventing Tumults and Riotous Assemblies and for the More Speedy and Effectual Punishing the Rioters*, 1 Geo. 1, c. 5, § 6 (1714). See generally 2 L. RADZINCWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 164 (1956).

³⁹ 99 Eng. Rep. 538 (K.B. 1782).

⁴⁰ 99 Eng. Rep. 636 (K.B. 1783).

Lord Mansfield, while expressing regret that his finding would leave the loss on the insurer for "want of a remedy,"⁴¹ nevertheless reasoned that the cause of action belonged to the insured and was, therefore, under the general rule, nonassignable and maintainable only in the name of the insured:

I take it to be a maxim, that as against the person sued the action cannot be transferred. As between the parties themselves, the law has long supported it for the benefit of commerce; but the assignee must sue in the name of the assignor; by which the defense is not varied. [T]he general rule of law should prevail, that as against the person sued the right of action cannot be transferred, nor the defense varied.⁴²

A second justice, the one who had given the instructions which were ignored by the jury in *Mason*, reasoned in much the same way. He voiced his fear that permitting the suit could lead to a multiplicity of actions in situations where several insurance companies insured the same property.⁴³ The two justices finding for the insurance company deduced that it had been injured in its own right when it became liable under the policy and was, therefore, entitled to maintain an action in its own name.⁴⁴

As a result of these two cases, the principle that the insurer must sue in the name of the insured as the subrogee of a tort claim became well-established in English law.⁴⁵ However, perhaps the most interesting aspect of these cases as a second encroachment on the nonassignability rule is that neither the arguments of counsel nor the opinions of the court referred to the problem of maintenance. A plausible explanation is that at the time these cases were decided the vice of maintenance was

⁴¹ *Id.* at 640. This was apparently based on the assumption that a second action in the name of the insured was barred by the first action. Concerning whether this would be the result even if the insurer could sue in its own name, see note 43 *infra*.

⁴² 99 Eng. Rep. at 640.

⁴³ *Id.* at 639. This justice also suggested that the judgment in the action brought by the insured would bar the insurer's action even if the insurer could sue in its own name because the cause of action is the same regardless of whether it is sued upon by the insured or the insurer. *Id.* at 638.

⁴⁴ 99 Eng. Rep. at 639-40.

⁴⁵ See, e.g., *Yates v. Whyte*, 132 Eng. Rep. 793 (C.P. 1838); *Compania Colombiana De Seguros v. Pacific Steam Navigation Co.*, [1965] 1 Q.B. 101 (1963); *King v. Victoria Ins. Co.*, [1896] A.C. 250; *Simpson & Co. v. Thompson*, 3 App. Cas. 279 (1877). For further discussion relevant to the doctrine of subrogation in England, see notes 77-80 and accompanying text *infra*.

no longer presumed when assignees sued on contractual debts; consequently, it would have been very difficult to establish maintenance in a suit by a subrogee-insurer both because of the contractual relationship with the insured and because of the legitimate interests served by subrogation.⁴⁶ This explanation draws oblique support from Lord Mansfield's reference to commercial expediency and derives direct support from an English justice in a considerably more recent opinion:

Equity always, before 1873, compelled an assured to lend his name to enforce his underwriter's right of subrogation against a contract breaker or tortfeasor. [W]hy did equity act as equity did act before 1873 in relation to the enforcement of subrogation rights? I think the answer is because the enforcement of such rights was never regarded as the enforcement of a bare cause of action, but as the enforcement of a cause of action legitimately supported by the underwriter's interest in recouping himself in respect of the amount of the loss which he has paid under the policy as a result of the acts, neglects or defaults of the actual contract breaker or tortfeasor.⁴⁷

In summary, the enactment of survival statutes and the judicial doctrine of subrogation are the only instances in which it can be argued that tort claims had acquired a degree of assignability in England prior to the *Comegys* decision in 1828.⁴⁸ However, a third inroad into the nonassignability rule was developing and was soon to emerge full-flower in the law of bankruptcy. This development has particular significance,

⁴⁶ These interests include recoupment by the insurance company, assurance that the tortfeasor will pay for all the wrong, and prevention of double recovery by the insured.

⁴⁷ *Compania Columbiana De Seguros v. Pacific Steam Navigation Co.*, [1965] 1 Q.B. 101, 121 (1963). The significance of the year 1873 is that in that year law and equity were merged, and the assignment of choses in action became a matter governed partially by statute. See Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, § 25. Neither this act nor its successor, the Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, was intended to enlarge the class of choses in action which were assignable in equity prior to 1873. See generally 3 HALSBURY'S STATUTES OF ENGLAND 667-69 (3rd ed. 1968).

⁴⁸ There was some movement in English law prior to *Comegys* toward giving certain causes of action relating to the recovery of personality the attributes of assignability, but the question remained quite unsettled until the late 19th or early 20th century. See 7 HOLDSWORTH 521-23, 532-34.

for it is the only context in which English judges have ever considered, and perhaps adopted, the survivability-assignability equivalency.

In a line of cases beginning in the late 18th century, the English courts considered whether the bankrupt's estate could include certain rights of action of the bankrupt.⁴⁹ Though the vesting language of the bankruptcy acts was inclusive, the doctrine emerged during the 1830's and 1840's that while rights of action for commission of a tort or for breach of contract which directly injured the bankrupt's estate could pass to the trustee,⁵⁰ rights of action for personal or emotional injury to the bankrupt could not pass to the trustee.⁵¹ A number of these early cases discussed the analogy which could be drawn from statutes and case law dealing with survival of contract and tort causes of action.⁵² This analogy must have seemed particularly apt because, as discussed above, the English courts considered that the intent of the survival statutes was to provide compensation for depletion of the decedent's estate.⁵³ Survivability thus became very important in determining whether a claim was assignable in bankruptcy, and language in some of the opinions suggests that survival was conclusive on the question.⁵⁴ But, unlike the early American cases which developed

⁴⁹ See cases cited in notes 51-58 *infra*. For a discussion of the bankruptcy acts considered in these cases, see 8 HOLDSWORTH 236-45; 11 HOLDSWORTH 446-47; 13 HOLDSWORTH 376-78.

⁵⁰ See generally M. HUNTER & D. GRAHAM, *WILLIAM'S LAW AND PRACTICE IN BANKRUPTCY* 319-22 (18th ed. 1968).

⁵¹ See, e.g., *Beckham v. Drake*, 9 Eng. Rep. 1213 (H.L. 1849); *Rogers v. Spence*, 8 Eng. Rep. 1586 (H.L. 1846); *Brewer v. Dew*, 152 Eng. Rep. 955 (Ex. 1843); *Howard v. Crowther*, 151 Eng. Rep. 1179 (Ex. 1841); *Hancock v. Caffyn*, 131 Eng. Rep. 432 (C.P. 1832); *Porter v. Vorley*, 131 Eng. Rep. 549 (C.P. 1832); *Wright v. Fairfield*, 109 Eng. Rep. 1314, 1399 (K.B. 1831).

⁵² See *Beckham v. Drake*, 9 Eng. Rep. 1213, 1219 (H.L. 1849); *Wright v. Fairfield*, 109 Eng. Rep. 1314, 1316 (K.B. 1831); *Hancock v. Caffyn*, 131 Eng. Rep. 432, 435 (C.P. 1832).

⁵³ See notes 19-26 and accompanying text *supra*. It had also been held that personal representatives could not sue on some contractual claims, such as a breach of contract to marry, which could not be viewed as damaging the personal estate of the decedent. See *Chamberlain v. Williamson*, 105 Eng. Rep. 433 (K.B. 1814).

⁵⁴ The most authoritative analysis of the appropriateness of the equivalency is *Beckham v. Drake*, 9 Eng. Rep. 1213 (H.L. 1849). Although *Beckham* concerns an assignment of a contractual claim, it provides a lengthy statement and analysis of the doctrine of assignability of contract and tort causes of action in bankruptcy as it developed before 1850:

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee, and therefore may maintain any action in his right which he himself might. That must be understood to mean any action on a contract, for an executor never could sue for wrongs to his testator; "*actio personalis moritur cum persona*." And with respect to contracts some exceptions have been introduced by modern decisions . . . and the executor cannot sue upon contracts the breach of which is a mere personal wrong. The executor takes all the other personal rights of a testator, as a consequence of his representative character, whether they are available for the payment of debts or not, for his liability to pay debts is the consequence, not the object, of the appointment. The assignee is created by statute, for the purpose of recovering and receiving the estate, and paying the debts of the bankrupt, and takes only what the statute gives for that purpose. What then does it give? It clearly gives . . . not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform, the performance of which would be beneficial to the bankrupt's estate. These are "personal estate" [as that expression is used in the bankruptcy statute].

. . . The words "personal estate" clearly comprise all chattels, chattel interests, and all the subjects mentioned in the twelfth section; and they also comprise *some* rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate."

For instance, some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.

On the other hand, rights of action for injuries to the person, or reputation, or the possession of real estate, do not pass . . .

. . . .
What then is the proper construction of this section of the act, according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors . . . but all such as would be assets in their hands for the payment of debts, and no others—all which could be turned to profit, for such rights of action are *personal estate*. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule, "*actio personalis moritur cum persona*", and all actions of contract affecting the person only, would not pass. Of such the executor is not assignee in law; and whatever may be the reason of the law which prohibits him from being so, seems equally to apply to a bankrupt's assignee.

Id. at 1229-31. The opinion of Justice V. Williams also contains an analysis of this analogy. *See id.* at 1219.

The opinion of Judge Littledale in *Wright v. Fairfield*, 109 Eng. Rep. 1314 (K.B. 1831), another contract assignment case, also considers the matter of survivability:

I am of opinion that the Legislature in this statute intended to give assignees all the remedies in respect of the property which they were entitled to under

and utilized the survivability-assignability equivalency, the English courts were meticulous in articulating the similarities between a personal representative and a bankruptcy trustee.⁵⁵ This is probably the reason why survival has not been persuasive in England in other situations, where the fear of maintenance continues to be the predominant factor prohibiting assignability.⁵⁶ Maintenance was not a material factor in these early English bankruptcy cases, apparently because the cause of action was assignable under a statute and because of the important public policies embodied in the bankruptcy acts.⁵⁷

Although the survivability of tort claims in England did not become a factor in bankruptcy until after *Comegys*, the beginnings of the equivalency in bankruptcy arose before *Comegys* in nontort contexts.⁵⁸ But even though several early

the former Acts, and that they should have power (as it appears to me that they had under those statutes) to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death.

Id. at 1316.

Hancock v. Caffyn, 131 Eng. Rep. 432 (C.P. 1832), a case involving a tort cause of action, also discussed survivability:

Undoubtedly, there is a large class of actions, in which, though an action lies for the bankrupt, the right does not pass to his assignees; as for injuries to person or reputation: but we should not give due effect to the statute, if we were to hold that a right did not pass arising out of an injury which has lessened the amount of the fund belonging to the creditors When the statute directs an assignment of all the bankrupt's present personal estate, how can we except a right in respect of which the fund accruing to the creditors would receive compensation to the extent to which the property of the bankrupt had been diminished. The case of executors affords a close analogy: they cannot sue for any injury to the person of the testator; but in respect of an injury to the property which would have formed part of the assets, they are entitled to recover.

Id. at 435.

⁵⁵ See note 54 *supra*.

⁵⁶ See note 59 *infra*.

⁵⁷ It is interesting to note, however, that something like the flavor of the fear of maintenance can be found in discussions of the nonassignability of causes of action which did not result from a tort which diminished the bankrupt's estate. See, e.g., *Howard v. Crowther*, 151 Eng. Rep. 1179 (Ex. 1841) (cause of action for seduction of a servant): "Assignees of a bankrupt are not to make a profit of a man's wounded feelings; causes of action, therefore, which are, as in this case, purely personal, do not pass to the assignees . . ." *Id.* at 1180.

⁵⁸ In 1794 a divided English court in *Brandon v. Pate*, 126 Eng. Rep. 566 (C.P. 1794), held that the assignee of a bankrupt may recover money gambled away by the bankrupt in an action of debt provided by a statute which was enacted "for the better

American cases, including *Comegys*, involved assignments in bankruptcy, none expressly relied on these English cases. Thus, the significance of the English bankruptcy cases is not that they provide a non-American origin for the survivability-assignability equivalency, but rather that they represent a reasoned approach to special tort claim assignments which the English did not later extend to the assignment of all tort claims.⁵⁹ The logic of such a restriction may be tested by an analysis of the American experience with the equivalency in particular and tort claim assignability in general.⁶⁰

preventing of excessive and deceitful Gaming." 9 Anne c. 14 (1710). The problem of maintenance was ignored and the analogy with the question of survival of actions was considered:

An Executor clearly could not bring the action, which by the statute is limited to the loser himself, within the three months. But the assignees of a bankrupt are different from other representatives; for if the party himself were to recover the money, he must pay it over to the assignees. It is to be considered as part of the bankrupt's estate, which was wrongfully passed to the winner; and if so, the assignees have a right to it, and ought in reason to sue for it.

Id. at 568. A case decided the next year unanimously held that a right of action to recover real property could be assigned to a bankrupt's assignees as an exception to the general rule of nonassignability of rights of actions by virtue of the policy of bankrupt laws. *See Smith v. Coffin*, 126 Eng. Rep. 641 (C.P. 1795):

It is true that on general principles rights of action are not forfeitable, nor assignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averse to encourage litigation; but in this case the policy of the bankrupt laws requires that the right of action should be assignable and transferred to the assignees as much as any other species of property. It is an hereditament, and the words of the several statutes are large enough to comprehend it, and no case has been shown to prove that it ought not to pass. What then does the whole argument amount to but this, that in many cases, from the policy of the law, a right of action does not pass? But here the policy is, that every right belonging in any shape to the bankrupt, should pass to his assignees . . .

Id. at 650. In a third case, there is dicta to the effect that the assignee could receive a bankrupt's rights of action sounding in trover and assumpsit. *See Clark v. Calvert*, 129 Eng. Rep. 573, 576 (C.P. 1819).

⁵⁹ The instances of survival of tort claims, subrogation, and assignment to bankruptcy assignees today remain important exceptions to a general English rule of nonassignability which is still based on the prohibition against maintenance. R. HEUSTON, *SALMOND ON THE LAW OF TORTS* § 221 (15th ed. 1969). Important additional exceptions have been added. For example, there is authority for the proposition that property may be transferred even though subject to litigation and unrecoverable without a tort action. Also, damages to be recovered in the future in a tort action may be assigned although the claim itself cannot. *Id.*

⁶⁰ As the focus shifts to this American approach, it may be helpful to keep in mind

B. *Comegys v. Vasse as the Source of the Equivalency in America*

An analysis of the American experience must begin with *Comegys v. Vasse*,⁶¹ a case which triggered the acceptance of the survivability-assignability equivalency in America, and one which could have provided an excellent vehicle for a comprehensive analysis of tort claim assignability because it involved two separate assignments of what was arguably a tort claim. Vasse was an underwriter of marine insurance who, prior to 1802, had accepted the abandonments⁶² and paid the losses of United States citizens whose vessels and cargoes had been captured and condemned during the French and Spanish spoliation of American shipping which followed the signing of Jay's Treaty with Great Britain in 1794.⁶³ In 1802 Vasse's creditors forced him into a federal bankruptcy proceeding⁶⁴ and certain of Vasse's assets were assigned to the bankruptcy trustees. Vasse was ultimately discharged from his debts in that same year. In 1824 the trustees received a sum of money, pursuant to a treaty, in satisfaction of claims arising out of Spain's role in the Franco-Hispanic interferences with American commerce.⁶⁵ Vasse sued in assumpsit to recover this payment, thus raising the questions of whether the insured's claim against

the comments of a writer whose subject matter was the alienability of contractual choses in action:

We have now reached the time when America separated from the mother country and we must therefore transfer our attention from English, to American cases, for in this, as in so many other branches of our law, the so-called "common law" is received not as a completed system but as a growing organism whose further development under new and different surroundings is not necessarily the same as in the old home.

Cook, *supra* note 28, at 826.

⁶¹ 26 U.S. (1 Pet.) 193 (1828).

⁶² The doctrine of abandonment is discussed *infra* at notes 77-80 and accompanying text.

⁶³ See generally S. MORRISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 358-59 (5th ed. 1962). Concerning the Spanish participation in these adventures, see generally H. FULLER, *THE PURCHASE OF FLORIDA* 95-96 (1906).

⁶⁴ This was under the short-lived Bankruptcy Act of 1800 which was repealed in 1803. See Act of April 4, 1800, ch. 19, 2 Stat. 19; Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. The next federal bankruptcy legislation was not enacted until 1841. See Act of Aug. 19, 1841, ch. 9, 5 Stat. 440.

⁶⁵ 8 Stat. 252 (1819). This treaty is notable primarily because it ceded Florida to the United States. See generally H. FULLER, *THE PURCHASE OF FLORIDA* 307 (1906).

Spain had passed to Vasse through the insured's abandonment or Vasse's payment of the claim; and, if so, whether this claim had then been transferred to the bankruptcy trustees. The Federal Circuit Court of Pennsylvania, which first heard the case, answered only the second question. It held that the claim, which it characterized as "an expectancy without hope,"⁶⁵ was not the type of asset assignable by the terms of the bankruptcy statute.⁶⁷ This result left Vasse entitled to the fund without any analysis of how the claim came to be vested in Vasse in the first place.⁶⁸

Predictably, in their arguments to the United States Supreme Court the litigants devoted considerable time and effort to describing the claim and its assignability. Justice Story, however, deemed a detailed discussion of the authorities unnecessary. In holding for the trustees, he stated a rule which has had a significant impact in shaping the law of tort claim assignments in the United States:

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.⁶⁹

The general rule stated in *Comegys* can be dissected into two components: a negative statement of the survivability-assignability equivalency, and an affirmative declaration that "vested rights," "possibilities coupled with an interest," and property "claims" are assignable. The import of the negative statement is clear. The notion that surviving torts are assignable did not originate with Justice Story but can be traced to a series of four earlier Pennsylvania Supreme Court cases which were relied on by counsel in their arguments before the *Comegys* Court.⁷⁰ Three of these cases decided which tort

⁶⁵ *Vasse v. Comegys*, 28 F. Cas. 1101, 1105 (No. 16893) (C.C.E.D. Pa. 1825).

⁶⁷ *Id.* See also *Vasse v. Mifflin*, 28 F. Cas. 1106 (No. 16895) (C.C.E.D. Pa. 1825).

⁶⁸ *Vasse v. Comegys*, 28 F. Cas. 1101, 1105 (No. 16893) (C.C.E.D. Pa. 1825).

⁶⁹ 26 U.S. (1 Pet.) at 213.

⁷⁰ *Id.* at 198, 209. The cases were *O'Donnel v. Seybert*, 13 S. & R. 53 (Pa. 1825); *North v. Turner*, 9 S. & R. 243 (Pa. 1823); *Sommer v. Wilt*, 4 S. & R. 18 (Pa. 1818); *Shoemaker v. Keely*, 2 Dall. 213 (Pa. 1793). The equating of assignability with survivability originated in these cases which are discussed in notes 71-75 and accompa-

claims of an insolvent debtor passed to a trustee under Pennsylvania bankruptcy legislation.⁷¹ These opinions reveal, at least, a noncritical application of the same analogy with survivability which English Judges found so attractive in construing English bankruptcy legislation, and represent, at most, an outright adoption of the survivability-assignability equivalency as conclusive on the question of tort claim assignability.⁷² That a complete adoption of the equivalency was contemplated is evi-

nying text *infra*. Another opinion cited by counsel in *Comegys* in connection with tort claim assignability was *Bird v. Hempstead*, 3 Day 272 (Conn. 1808), which held that a right of action founded on tort was not assignable under the Federal Bankruptcy Act of 1800 because it did not fall within the statutory description of assignable assets. Other cited cases dealt with the assignment of a tort claim in the context of an abandonment under a marine insurance policy, and are discussed at notes 77-80 and accompanying text *infra*. Three other pre-*Comegys* American cases which discuss tort claim assignability are: *Young v. Ferguson*, 11 Ky. (2 Litt.) 298 (1822); *Stogdel v. Fugate*, 9 Ky. (2 Marsh.) 136 (1819) (both holding that a claim of trover is nonassignable); *Stanly v. Duhurst*, 2 Root 52 (Conn. 1793) (holding that an action for malicious abuse of process is not assignable under an insolvency act).

⁷¹ State insolvency legislation was undoubtedly more important during this period than it is today because of the nearly total absence of federal legislation addressing the problem. See note 64 *supra*.

⁷² See notes 49-57 and accompanying text *supra*. The first of these cases held in 1793 that an assignment in bankruptcy does not pass a cause of action for deceit, which remains the "mere personal concern of the bankrupt," because under the bankruptcy statute only debts were assignable. *Shoemaker v. Keely*, 2 Dall. 213 (Pa. 1793). The court avoided dealing directly with the assignee's argument that his suit should be sustained on the same principle that permitted an action to be brought by executors or administrators who are assignees of the deceased. The court could have again avoided the formulation of a general rule of tort claim assignability when, in 1818, an insolvent attempted to maintain an action for malicious abuse of process after he had filed his petition for relief under the Pennsylvania insolvent debtor's act. See *Sommer v. Wilt*, 4 S. & R. 18 (Pa. 1818). The defendant objected that the claim had passed to the assignee, but the court again held that a personal tort was not assignable under the language of that enactment, and that its earlier decision in *Shoemaker* was "conclusive." However, the court gratuitously added that the action was a "personal action which would die with [the insolvent's] person," and, putting the cart before the horse, "[i]f it passed by the assignment, and vested in the assignees, his death could not effect it." *Id.* at 28. The third of the Pennsylvania decisions, decided in 1825, considered whether an insolvent could maintain an action on the case arising out of an excessive distress for rent, after he had petitioned for relief under the state's insolvency laws. See *O'Donnel v. Seybert*, 13 S. & R. 53 (Pa. 1825). The court, ignoring the language of the insolvency act, stated that the claim could not be assigned "*moritur cum persona*: but it is likewise, an action on a penal statute, which does not survive." *Id.* at 56. That assignability of surviving claims became the law in Pennsylvania is demonstrated by the one noninsolvency case discussed in notes 73-75 and accompanying text *infra*.

denced by the one noninsolvency case, *North v. Turner*.⁷³ In that case, the Pennsylvania Supreme Court was asked to decide whether a claim for *trespass debonis asportatis* could be assigned for the purpose of avoiding the competency rule which excluded the testimony of a party to the suit.⁷⁴ Holding that the claim could be so assigned, the court noted that the tort in question survived to the personal representative under Pennsylvania law, and that this "clearly shows that such a cause of action is separable from the person of the owner"⁷⁵

The origin and meaning of the affirmative portion of the *Comegys* rule is more difficult to discern, but it appears to reflect several strands of legal doctrine which had some influence on the Court.

First, it seems quite likely that the affirmative segment is in part merely an elaboration of the thought expressed in the negative statement. That is, after stating that torts which do not survive are not assignable, Justice Story then described certain claims which had been held to survive and hence would be assignable under the equivalency. The language in the affirmative statement could, for example, comprehend the action

⁷³ 9 S. & R. 243 (Pa. 1823).

⁷⁴ The court in *North* noted that such an assignment had been previously held to be effective in Pennsylvania for that purpose, but in connection with a nontort claim. See 9 S. & R. at 248. The competency rule, now discarded, was once accepted as axiomatic:

Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; Therefore such persons should be totally excluded.

2 J. WIGMORE, EVIDENCE § 576, at 686 (1940). "The notion of interest at common law applied of course to the *parties to the suit*, for their interest in the event of the litigation was obviously the most marked." *Id.* § 577, at 693.

⁷⁵ 9 S. & R. at 248. This tort claim survived by virtue of the English survival statute, 4 Edw. 111, c. 7 (1330), which apparently became a part of the law of Pennsylvania through the operation of that state's reception statute. See PA. STAT. ANN. tit. 46, §§ 152-53 (1969) (repealed, Dec. 6, 1972, Pub. L. No. 290 § 4). This survival statute, enacted in 1330, is discussed at note 19 and accompanying text *supra*. Interestingly, the court suggested in dictum that an insolvent's action could pass to an assignee in bankruptcy because the assignee could obtain title to the personalty upon which the trespass was committed. 9 S. & R. at 248. This sort of uncertainty concerning the exact rationale for assignability or nonassignability can be found in some of the other Pennsylvania cases and in *Comegys*.

of detainee brought to recover personalty in specie or the action of trover for conversion of personalty, both of which had been previously held to survive.⁷⁶

Secondly, Justice Story definitely had in mind the marine insurance concept of abandonment when he wrote the affirmative portion of the general rule, as evidenced by his analysis of authorities utilizing this doctrine. An abandonment occurs when an insured under a marine insurance policy relinquishes all of his rights in the insured property in order to turn a partial loss into a total recovery. Acceptance of an abandonment entitles the insurance company to the insured's ownership rights.⁷⁷ However, the insurer is not entitled to assert the insured's rights against tortfeasors until it pays the insured's claim.⁷⁸ The rights upon payment are realized by the insurer through subrogation.⁷⁹ However, *Comegys* was decided before this distinction had developed.⁸⁰

⁷⁶ For actions of detainee, see *LeMason v. Dixon*, 82 Eng. Rep. 92 (K.B. 1620). See also the discussion of *LeMason* in the note to *Wheatly v. Lane*, 85 Eng. Rep. 228, 229 (K.B. 1669). Detainee was viewed as partly *delictual*. See 7 HOLDSWORTH 437-40. As for trover for conversion of personalty, see *Rutland v. Rutland*, 78 Eng. Rep. 624 (K.B. 1595). Trover was clearly *delictual*. See 7 HOLDSWORTH 440.

⁷⁷ See generally W. VANCE & B. ANDERSON, HANDBOOK ON THE LAW OF INSURANCE § 177 (3rd ed. 1951); 6 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE chs. 160-61 (1972) [hereinafter cited as APPLEMAN].

⁷⁸ See L. BUGLASS, MARINE INSURANCE CLAIMS: AMERICAN LAW AND PRACTICE 84-85 (1972); 6A APPLEMAN § 4121.

⁷⁹ *Id.*

⁸⁰ Discussions of the development of the distinction between the rights which an insurer realizes by accepting an abandonment and the rights realized upon payment of the insured's claim through subrogation can be found in Note, *Subrogation of the Insurer to Collateral Rights of the Insured*, 28 COLUM. L. REV. 202, 208, n.44 (1928) and Note, *Abandonment and Subrogation in Marine Insurance*, 18 HARV. L. REV. 383 (1905). Three of the cases which Justice Story discussed were products of the era during which the distinction between abandonment and subrogation was not clear. The cases were: *Gracie v. New York Ins. Co.*, 8 N.Y.C.L. (8 John.) 179 (1811); *Watson v. Insurance Co. of North America*, 1 Binn. 46 (Pa. 1803); and *Randal v. Cockran*, 27 Eng. Rep. 916 (Ch. 1748). The latter, which was the most influential of the three, is unclear as to whether it was decided on the basis of abandonment or on the doctrine of subrogation. However, it has been treated in England as being an application of the subrogation doctrine which is now clearly differentiated from the doctrine of abandonment in that country. See *Compania Columbiana de Seguros v. Pacific Steam Navigation Co.*, [1965] 1 Q.B. 101, 111-22 (1963); 22 HALSBURY'S LAWS OF ENGLAND 161, 162 n.9 (3rd ed. 1958). This is the better interpretation of *Randal* since the event which fixed the insurer's rights to compensation from a third party was satisfaction of the insured's claim. 27 Eng. Rep. at 916.

Finally, the affirmative portion of the *Comegys* rule reflects a series of American and English cases which recognized the right of a vendee of property with disputed title to assert the vendor's right of action to remove the cloud on the title. The vendee-assignee's interest in the property was sufficient to prevent the purchase agreements from being invalid on the grounds of maintenance or champerty,⁸¹ provided that the purchaser did not agree to pay costs or make advances beyond those necessary to support that portion of the litigation which involved his interest. Justice Story discussed these cases approvingly in his *Commentaries on Equity Jurisprudence*,⁸² published in 1836, eight years after *Comegys*. While none of the title cases decided prior to *Comegys* involved a tort cause of action or a transfer of personal property, they are nevertheless analogous to the situation in which an insured transfers both his rights in the insured property and his claims against third persons resulting from an invasion of that property. There would be a chance that the insurer might recover the property, which would constitute one of the "possibilities coupled with an interest" in the general rule. The resulting claim against third parties would be "growing out of, and adhering" to the property rights which had been transferred to the insurer.⁸³

Of the various doctrines available to Justice Story, which was employed in finding for the bankruptcy trustees? It was not the survivability-assignability equivalency. *Comegys* turned on abandonment and possibly on the notion that the right to compensation was transferable because it was appurtenant to the property rights passing to the assignees. This is apparent for several reasons. Justice Story himself characterized the issue before the Court as one that "turns upon the

⁸¹ "Champerty" is defined as "a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk in consideration of receiving, if successful, a part of the proceeds of subject sought to be recovered." BLACK'S LAW DICTIONARY 292 (4th ed. 1968). For a definition of maintenance, see note 16 *supra*.

⁸² 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1050-53 (13th ed. 1886).

⁸³ English law did take a few tentative steps toward validating the assignment of property-related tort claims prior to the decision in *Comegys*, but these developments, which were not discussed by Justice Story in his treatise on equity jurisprudence, were equivocal, and the law did not clearly move in this direction until after *Comegys*. See note 48 *supra*.

nature and effect of an abandonment, for a total loss to the underwriters," and after reviewing authorities dealing with this doctrine, he concluded "that the assignment by abandonment is competent not only to pass the property itself, . . . but also any compensation awarded by way of indemnity therefore."⁸⁴ The opinion does not mention any survival statute or judicial construction thereof. Justice Story concluded that there was a right to compensation which arose upon the illegal capture of the vessels and cargoes, but he did not characterize the right as a tort claim.⁸⁵ Although stated initially in the general rule, the equivalency resurfaced only once after Justice Story found the debtor's right to be assignable.⁸⁶ When faced with whether the right to compensation fell within the meaning of the bankruptcy act as assignable property, the Justice reasoned that the terms of the act were "broad enough to cover every description of vested right and interest attached to and growing out of property."⁸⁷ Then, in apparent reference to the equivalency, Justice Story assumed without analysis that the claim would survive, asking rhetorically: "[W]hy then should it not be assets in the hands of the assignees?"⁸⁸ Finally, when Justice Story published his *Commentaries on Equity Jurisprudence*,⁸⁹ he stated flatly, with no mention of the equivalency, that a mere right of action in tort is not assignable on public policy grounds because such an assignment would have the unsavory character of maintenance.⁹⁰

⁸⁴ 26 U.S. (1 Pet.) at 214.

⁸⁵ *Id.* at 216.

⁸⁶ Justice Story stated:

We consider it, then, clear, upon authority, that the right to the compensation in this case, was in its nature assignable, and passed by abandonment to Vasse; and upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own Courts, or by his own extraordinary interposition and grants upon public negotiation, is a right attached to the ownership of the property itself If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

Id. at 215.

⁸⁷ *Id.* at 218.

⁸⁸ *Id.*

⁸⁹ 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (13th ed. 1886).

⁹⁰ *Id.* § 1040g.

The issues of assignability raised in *Comegys* confronted Justice Story with a difficult legal problem in which little was clear except that, in fairness, the trustees should prevail. The survivability-assignability equivalency would probably have received broad acceptance without the impetus provided by *Comegys*,⁹¹ but *Comegys* stands as the root of the doctrine in America. Although the source can be located with no greater certainty than this, there is no room to doubt the broad acceptance which the equivalency has since enjoyed in American courts.

C. *American Acceptance and Application of the Equivalency*

Indicative of the prominence of the equivalency in American law is the fact that by 1916 the editors of a legal encyclopedia could state, with footnotes brimming, that the general common law rule in the United States was that the test of whether a tort cause of action was assignable depended on its survivability.⁹² Pomeroy, in his treatise on equity jurisprudence,⁹³ described torts which survived, and were thus assignable, as generally including those causing injury to real and personal property, and those arising from fraud, deceit, or other wrongs which damage an estate, real or personal. Among those not surviving, and thus not assignable, were torts to the person or character, where the injury was limited to the body or feelings.⁹⁴ Pomeroy broadly concluded that survivability was used to determine the assignability of all choses in action, including rights under contracts.⁹⁵

Perhaps the most interesting aspect of the later American cases adopting the equivalency is not what was said, but instead what was left unsaid. First, virtually all have assumed that assignability flows naturally from survivability just as night inevitably follows day. It troubled few courts that the

⁹¹ See, e.g., *Whitaker v. Gavit*, 18 Conn. 522 (1847); *People ex rel. Stanton v. Tioga*, 29 N.Y.C.L. (19 Wend.) 42 (1837).

⁹² See 5 C.J. *Assignments* § 52 (1916).

⁹³ J. POMEROY, *EQUITY JURISPRUDENCE* (3rd ed. 1905).

⁹⁴ *Id.* § 1275. See generally 3 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 86-88 (1906).

⁹⁵ Concerning the use of the survival test to determine assignability of rights *ex contractu*, see generally *RESTATEMENT OF CONTRACTS* § 547(d) (1932).

transfer to a decedent's personal representative could hardly be considered a voluntary or consensual assignment even if one is willing to assume that a personal representative is a type of assignee.⁹⁶ Presumably, the decedent-assignor would have preferred to retain his cause of action until "kingdom come" rather than "assign" it by dying. Furthermore, a decedent's "assignee" could hardly be deemed an intermeddler in a law suit, and his duties as a fiduciary would help to insure that any suit would be conducted for the benefit of the estate and not for the purpose of harassing or oppressing the tortfeasor. In comparison, an inter vivos assignment is voluntary and, although the assignment is made with the knowledge and consent of the assignor, the assignee would more readily appear to be an intermeddler who might be motivated to harass or oppress and who would not be subject to the duties of a fiduciary. Second, although America's broad application of the equivalency was a significant departure from its narrow usage in England, the extent of this departure was rarely recognized by American courts. Third, although American courts would occasionally refer to the English fear of maintenance to support their proscription of the assignment of personal tort claims, rarely was an attempt made to explain why maintenance was no longer a concern in the assignment of property tort claims. Nor was it explained what distinguished personal from property tort claims except to ritualistically state that the former did not survive while the latter did.

These observations of judicial silence are not offered as absolutes because there were notable exceptions. In 1855, Justice Augustus C. Hand, dissenting in *McKee v. Judd*,⁹⁷ both recognized and questioned the American departure from British doctrine:

I had supposed that a mere right of action for tort could not be assigned, either at law or in equity, except by means of some statutory proceedings A cause of action arising from a tortious act will sometimes pass to the assignees of an insolvent, or to the assignees in bankruptcy. In those cases,

⁹⁶ See notes 19-22 and accompanying text *supra*, and note 97 and accompanying text *infra*.

⁹⁷ 12 N.Y. 622 (1855).

there can be no objection on the ground of champerty and maintenance; and the criterion is whether the action is to recover damages for an injury to the property of the insolvent or bankrupt, or for a wrong personal to him. A *solatium* for an injury done to the person or personal feelings of the debtor cannot be assigned. But if the substantial cause of action arises from an act that diminishes or impairs his property, it passes to the assignees The transfer in such cases is in compliance with a statute, and is generally *in invitum*. But where the act is done on the mere motion of the parties, the assignment of a bare right to bring an action for a mere tort has been considered void on the ground of public policy. There is nothing in the [New York Civil Code] which abrogates this salutary principle; indeed the question is one of right or title and not of remedy.⁹⁸

Moreover, in 1861 the Supreme Judicial Court of Massachusetts made a number of observations concerning the matter of tort claim assignability. In *Rice v. Stone*,⁹⁹ the court held that a personal injury action could not be assigned before final judgment, even though this type of claim survived by a newly enacted statute in that jurisdiction. The opinion is revealing because it presents several of the justifications occasionally offered to support the equivalency, thereby suggesting the existence of some fallacies which undermine those justifications. The court first recognized that the old common law prohibition against maintenance has lost most of its force in America, but then allowed, without citing any authority, that it enjoyed a glimmer of life in connection with the proscription against personal tort assignments because "there are no counter balancing reasons in favor of such purchases [of personal tort claims], growing out of convenience of business" ¹⁰⁰ The validity of this assumption is called into question by the facts of *Rice*, where the tort assignment in question was made to secure a preexisting debt (although the opinion is not clear as to the commercial or personal nature of the debt).

The court next suggested that the rationale underlying the nonassignability of personal tort causes of action was grounded

⁹⁸ *Id.* at 627.

⁹⁹ 83 Mass. (1 Allen) 566 (1861).

¹⁰⁰ *Id.* at 569.

in the basic supposition that "[a] man cannot grant or change that which he has not,"¹⁰¹ and that the holder of a personal tort claim has nothing to transfer prior to settlement or judgment because it "has no value that can be so estimated as to form a proper consideration for a sale."¹⁰² The *Rice* court attempted to support this conclusion by distinguishing property-related torts from personal torts in that the value of the loss in the former can be objectively ascertained, the loss being measured by diminution in value,¹⁰³ whereas the value of the loss in the latter is less capable of being objectively determined. The validity of this distinction is debatable because "difficult" is not synonymous with "impossible," and the mere fact that a value may have to be determined through some conjecture, without agreement of the interested parties, does not in other circumstances stop courts and juries from setting values on injuries to property.

The court should have stopped on the shaky ground of its first two justifications, but instead it raised yet another argument which had occasionally surfaced to support the equivalency: "[T]he considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed, whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal, that an assignee cannot urge them with any force."¹⁰⁴ While the nonavailability of the tort victim to testify might arguably justify denying the survival of personal torts, the argument loses strength when an inter vivos assignment is involved because the victim is available to testify and may be quite able and willing to do so vigorously, particularly if he has retained some interest in the recovery.¹⁰⁵ Indeed, as noted earlier, one of the earliest American cases to apply the equivalency did so solely to enable the tort victim-assignor to testify.¹⁰⁶

¹⁰¹ *Id.*

¹⁰² *Id.* at 570.

¹⁰³ *Id.* at 569-70.

¹⁰⁴ *Id.*

¹⁰⁵ One example of this sort of situation would be where the tort victim has assigned part of any future recovery on his cause of action to an assignee while retaining the balance for himself. Concerning partial assignments, see generally 1 GILMORE 207-08. Concerning the assignment of the future proceeds of an existing tort cause of action, see pt. III *infra*.

¹⁰⁶ See the discussion of *North v. Turner* at notes 73-75 and accompanying text

One final interesting aspect of *Rice* is its use of the distinction between an inter vivos voluntary assignment and an involuntary assignment to a decedent's "assignee." As indicated above, the distinctions which might be drawn between the two situations had not prevented American courts from broadly adopting and applying the equivalency to property-related torts. Nevertheless, the *Rice* court relied on the distinction to disallow the voluntary assignment of a personal tort claim:

There cannot be the same objection to the transmission of such a claim to executors and administrators as to its assignment to strangers; and by our recent legislation actions for damage to the person survive; but we do not consider this as materially affecting the question whether such rights of actions may be assigned to a stranger.¹⁰⁷

Analyses such as those found in *McKee* and *Rice* were atypical. The overwhelming majority of courts which adopted or applied the equivalency treated it as a convenient rule of thumb to be applied without question. The lack of concern for the problem of maintenance in assignments of property-related torts can be traced to a pervasive, yet generally unarticulated, judicial feeling that the conditions precipitating the development and existence of the prohibition against maintenance in England simply did not exist in America.¹⁰⁸ This attitude, plus the need to permit the assignment of tort causes of action in bankruptcy and in commercial settings, probably account for the broad and rapid acceptance of the equivalency doctrine in the United States.¹⁰⁹ The courts' apparent perception of the "rightness" of the ultimate conclusion that personal torts were not assignable may be attributable to a deeply felt, if not entirely logical, belief that such causes of action should not be a commodity for sale.¹¹⁰

supra. However, *North* also stated in dictum that personal torts would not be assignable. See 9 S. & R. at 248-49.

¹⁰⁷ 83 Mass. (1 Allen) at 571.

¹⁰⁸ An early opinion in which this view is ably expressed is *Thalhimer v. Brinckerhoff*, 3 Cowen 623 (N.Y. Ct. of Errors 1824). See generally *Brooks, Champerty and Maintenance in the United States*, 3 VA. L. REV. 421-22 (1916).

¹⁰⁹ Some commercial situations in which tort causes of action have been assigned are discussed at notes 131-41 and accompanying text *infra*.

¹¹⁰ See *North Chicago State Ry. v. Ackely*, 49 N.E. 222, 225 (Ill. 1897). The court in rationalizing its holding said that even if a personal action survives, it cannot be

Turning to the present, the survivability-assignability equivalency continues as the common denominator for the law of tort claim transferability in the United States. Courts continue to apply it without question.¹¹¹ Some differentiate between personal and property-related torts, but the equivalency is the source of this distinction.¹¹² The equivalency also helps explain the statutes enacted to meet the problem of tort claim assignability. For example, New York's statute provides that any claim or demand is transferable except "where it is to recover damages for a personal injury,"¹¹³ and "personal injury" is defined to include libel, slander and malicious prosecution, assault, battery, false imprisonment, or other actionable injury to the person.¹¹⁴ Similarly, California's act provides that "a thing in action, arising out of the violation of a right of property . . . may be transferred by the owner."¹¹⁵

assigned inter vivos on the grounds that the purpose of the survival statute was to benefit the widow and next of kin of the decedent, and actions under it could be brought only for their benefit. Presumably all survival legislation has as an important purpose the aiding of beneficiaries of the decedent's estate, but research has disclosed no case in which this has been raised as an objection to the assignability of property-related torts. Some courts have permitted the assignment of personal injury actions once they have been made to survive by the legislature. See note 127 and accompanying text *infra*.

¹¹¹ See, e.g., *Selfridge v. Allstate Ins. Co.*, 219 So. 2d 127 (Fla. Ct. App. 1969); *Nichols v. United States Fidelity & Guar. Co.*, 155 N.W.2d 104 (Wis. 1967).

¹¹² See, e.g., *Demmery v. National Union Fire Ins. Co.*, 232 A.2d 21 (Pa. Super. Ct. 1961). See generally Note, *Assignment of Tort Claims in Pennsylvania*, 15 U. PITT. L. REV. 123 (1953).

¹¹³ The full statute provides:

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;
2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute;
3. Where a transfer thereof is expressly forbidden by a statute of the state, or the United States, or would contravene public policy.

N.Y. GEN. OBLIG. LAW § 13-101 (McKinney 1961).

¹¹⁴ N.Y. GEN. CONST. LAW § 37-a (McKinney 1951). The New York courts initially applied the equivalency to decide questions of tort claim assignability. See, e.g., *People ex rel. Stanton v. Tioga*, 29 N.Y.C.L. (19 Wend.) 42 (Sup. Jud. Ct. 1837). Some New York courts continued to consider the equivalency after tort claim assignments became a statutory matter. See, e.g., *Walker v. Sanford*, 214 N.Y.S. 202 (Sup. Ct.) *aff'd mem.*, 216 N.Y.S. 932, (App. Div. 1926). But see *Keeler v. Dunham*, 99 N.Y.S. 669, 671 (App. Div. 1906).

¹¹⁵ The full statute provides: "A thing in action, arising out of the violation of a

Of course, if the law is uncertain in its determinations of which tort causes of action survive, it will likewise be uncertain as to which tort causes of action are assignable.¹¹⁶ This uncertainty provides one basis for criticizing the equivalency. But a more fundamental criticism is that the survivability-assignability approach places a blanket prohibition on the assignment of certain tort claims when, at most, only selective invalidation of assignments is warranted. This is most apparent in the typical negligence action, such as might arise from an automobile accident.¹¹⁷ Today, the valuation of personal injury claims is an everyday occurrence which has even developed into something of an art, if not a science.¹¹⁸ Therefore, difficulties in valuation should no longer be cited to justify the invalidation of the assignment of such actions. Even if some of the elements of recovery, such as pain and suffering, are difficult to appraise, this factor should be considered by the potential assignee, and not serve as a reason for invalidating the assignment.¹¹⁹ The possibility that the assignee of a personal injury action might use it to harass or oppress the alleged tortfeasor, or that the claim might be entirely groundless, certainly exists, but no more than it does in the assignment of any property-related cause of action. There is no evidence that personal injury actions are more susceptible to being abused in

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 where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office." CAL. CIV. CODE § 954 (West 1954). See CAL. PROB. CODE § 573 (West Supp. 1974). The equivalency was applied in California before the assignment of tort claims became a statutory matter. See, e.g., *Lawrence v. Martin*, 22 Cal. 173 (1863).

¹¹⁶ See, e.g., *Cooper v. Runnels*, 291 P.2d 657 (Wash. 1955). Even if the statute and interpretive case law is unambiguous in dividing torts into surviving and nonsurviving categories, such classifications may be susceptible to challenge on constitutional grounds. See *Moyer v. Phillips*, 341 A.2d 441 (Pa. 1975).

¹¹⁷ Many jurisdictions still do not permit the survival of personal injury actions. See W. PROSSER, *LAW OF TORTS* 900 (4th ed. 1971). Thus, claims resulting from an alleged negligent injury to the person are probably the most common tort actions which remain unassignable. However, there is no substantive basis for distinguishing these actions from other nonsurviving personal torts, such as defamation, which should be treated the same as personal injury actions insofar as the matter of their assignability is concerned.

¹¹⁸ See generally JURY VERDICT RESEARCH, *PERSONAL INJURY VALUATION HANDBOOKS* 16-36 (1972).

¹¹⁹ See generally Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 71-72 (1935).

this manner. Furthermore, the availability of actions for defamation, malicious prosecution and abuse of process minimizes the likelihood that the assignment would be abused in one of these ways.¹²⁰ It may be against public policy to permit a person to conduct a business by actively seeking out the assignment of personal injury actions against target defendants such as transit systems,¹²¹ or to permit an attorney to purchase claims

¹²⁰ See generally *id.* at 66-71.

¹²¹ Some jurisdictions have statutory provisions which would prohibit this sort of practice and which are designed to be in furtherance of policies against maintenance, champerty and barratry, or to prevent the unauthorized practice of law. See, e.g., N.Y. JUDICIARY LAW § 489 (McKinney 1968):

No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise. Nothing herein contained shall affect any assignment heretofore or hereafter taken by any moneyed corporation authorized to do business in the state of New York or its nominee pursuant to a subrogation agreement or a salvage operation, or by any corporation organized for religious, benevolent or charitable purposes.

Any corporation or association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars; any person or co-partnership, violating the provisions of this section, and any officer, trustee, director, agent or employee of any person, co-partnership, corporation or association violating this section who directly, or indirectly, engages or assists in such violation, is guilty of a misdemeanor.

This penal provision is concerned both with the prevention of the unauthorized practice of law by corporations and with champertous agreements. See generally *American Hemisphere Marine Agencies, Inc. v. Kries*, 244 N.Y.S.2d 602 (Sup. Ct. 1963); *STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION 163-64* (1941). The New York courts have wisely construed this provision to be applicable only when the assignment is for the primary purpose of enabling the assignee to bring an action, and not where the assignment is incidental to some other purpose. See, e.g., *American Restaurant China Mfgs. Ass'n v. Corning Glass Works*, 198 N.Y.S.2d 366 (Sup. Ct. 1960); *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*, 270 N.E.2d 691, 321 N.Y.S.2d 857 (Ct. App. 1971). In the absence of a statutory provision such as this or the one discussed in note 122 and accompanying text *infra*, there may be no basis for prohibiting the transfer of assignable tort actions for any purpose, in any quantity, and to any assignee. See *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116 (Tex. Civ. Ct. App. 1917).

for the purpose of bringing an action thereon,¹²² but legislatures are quite capable of distinguishing these situations from those in which the assignment of a personal injury action would not be contrary to public policy, and they have done so in some jurisdictions.¹²³ A blanket prohibition against the assignment of personal injury actions is not justified, and this has been judicially recognized in a number of instances. For example, insurance companies, by using legal devices and rationales which honor form over substance, have often been permitted by courts to become subrogated to the nonassignable personal injury claims of an insured upon payment to the insured under the insurance contract.¹²⁴ Additionally, some courts, including an English court, have permitted the assignment of the future proceeds of a personal tort action even though the action itself was nonassignable.¹²⁵ These cases again provide an example

¹²² Some jurisdictions have statutory provisions which would prohibit such a practice. See, e.g., N.Y. JUDICIARY LAW § 488 (McKinney 1968):

An attorney or counselor shall not:

1. Directly or indirectly, buy, take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

2. By himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

3. An attorney or counselor who violates the provisions of this section is guilty of a misdemeanor.

To constitute an offense, the primary purpose of the assignment must be to enable the attorney to bring a suit, and not merely an incidental or contingent purpose. See *Stern v. Indemnity Ins. Co. of North America*, 4 N.Y.S.2d 73 (Sup. Ct.), rehearing denied, 7 N.Y.S.2d 495 (App. Div. 1938). Attorneys in New York have a statutory charging lien which will attach to the proceeds of a personal injury action pursuant to N.Y. JUDICIARY LAW § 475 (McKinney 1968), and may enter into consensual liens. See *Williams v. Ingersoll*, 89 N.Y. 508 (1882), discussed at notes 200-02 and accompanying text *infra*. See also N.Y. JUDICIARY LAW § 490 (McKinney 1968).

¹²³ See notes 121-22 and accompanying text *supra*.

¹²⁴ See generally Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 858, 867-68 (1962).

¹²⁵ The English case is *Glegg v. Bromley*, [1912] 3 K.B. 474. See generally Annot., 40 A.L.R.2d 500, 512-15 (1955). This annotation correctly states that the validity of

of honoring form over substance.¹²⁶ Still other courts have allowed personal injury actions to be assigned by applying the equivalency after legislation had been enacted permitting the claims to survive.¹²⁷ While these latter cases infrequently explain why the inter vivos assignment of personal injury actions suddenly becomes unobjectionable after the legislature decides to allow them to pass to personal representatives, they do represent a welcome, though somewhat belated, erosion of the general prohibition against the assignment of choses in action. The more recent cases which refuse to permit the assignment of personal injury actions¹²⁸ do so on the basis of in terrorem arguments which have little merit. It is a bit late to seriously suggest that such assignments are necessarily "fraught with possibilities"¹²⁹ or made to "unscrupulous people [who] would . . . traffic in law suits for pain and suffering."¹³⁰

III. TORT CLAIMS AS INTANGIBLE PROPERTY: MATTERS RELATING TO THE VALIDITY AND EFFECTIVENESS OF ASSIGNMENTS OF TORT CAUSES OF ACTION AND DERIVATIVE RIGHTS

The inherent assignability of most surviving tort causes of action was judicially established many years ago. Today, it can be generally stated that property-related torts are assignable, and that personal torts may in some jurisdictions be directly or indirectly assigned. Assignments of tort claims can arise in a variety of situations.¹³¹ Probably the most familiar occurs when an insurance company pays a claim and becomes subro-

this practice has been long established in New York. One New York court found itself bound to adhere to this principle but criticized it on the grounds that it is founded on a distinction which honors form over substance and fosters champerty and maintenance in personal injury actions. *See* Grossman v. Schlosser, 244 N.Y.S.2d 749 (App. Div. 1963).

¹²⁶ *See, e.g.,* Grossman v. Schlosser, 244 N.Y.S.2d 749 (App. Div. 1963); Harvey v. Cleman, 400 P.2d 87 (Wash. 1965).

¹²⁷ *See generally* Annot., 40 A.L.R.2d 500, 508-11 (1955).

¹²⁸ *See, e.g.,* Farm Bureau Ins. Co. v. Wright Oil Co., 454 S.W.2d 69 (Ark. 1970) (citing other cases).

¹²⁹ *Harleysville Mut. Life Ins. Co. v. Lea*, 410 P.2d 495, 499 (Ariz. Ct. App. 1966).

¹³⁰ *Id.* at 498.

¹³¹ It has been suggested that "contract," as a separate form of civil obligation, is "being reabsorbed into the mainstream of 'tort.'" G. GILMORE, *THE DEATH OF CONTRACT* 87 (1974). If this is correct, then the assignment of "tort-like" rights may in the future take place in additional contexts.

gated to the cause of action against the tortfeasor.¹³² However, assignments have also been made in less familiar contexts. Sales of personal and real property have been accompanied by the assignment of tort actions for injury to the property which occurred prior to the transaction.¹³³ Tort claims have been assigned to and then reassigned by receivers or assignees for the benefit of creditors.¹³⁴ Multiple victims of a tort have assigned their claims to one of their number for the purpose of bringing suit.¹³⁵ Liquidating partnerships have assigned tort causes of actions to former partners,¹³⁶ and tort causes of action have been assigned by business and nonbusiness entities to successor entities.¹³⁷ Tort claims have been assigned to satisfy a preexisting debt,¹³⁸ and creditors have sought a consensual security interest in tort causes of action, judgments, or settlements.¹³⁹ Assignments have been made to secure the payment for services rendered by physicians and hospitals.¹⁴⁰ Similarly, attorneys have taken such assignments to secure the payment of contingent fees.¹⁴¹ These examples illustrate the variety of

¹³² See generally note 124 and accompanying text *supra*; R. KEETON, BASIC TEXT ON INSURANCE LAW 148-53 (1971).

¹³³ See, e.g., *Balfour Guthrie & Co. v. Hansen*, 38 Cal. Rptr. 525 (Cal. Ct. App. 1964); *Mahoney v. Ogden*, 174 N.Y.S.2d 623 (App. Div. 1958); *Appliance Inv. Co. v. American Tel. & Tel. Co.*, 23 N.Y.S.2d 27, *aff'd mem.*, 29 N.Y.S.2d 509 (Sup. Ct. 1940).

¹³⁴ See, e.g., *In re Alfred Frank, Inc.*, 104 N.Y.S.2d 735 (App. Div. 1951); *Assets Collecting Co. v. Myers*, 152 N.Y.S. 930 (App. Div. 1915). Tort claims may also pass to trustees under the federal bankruptcy law. See generally 4A COLLIER ON BANKRUPTCY § 70.28 (3), (6) (4th ed. 1971).

¹³⁵ See *Benedict v. Guardian Trust Co.*, 86 N.Y.S. 370 (App. Div. 1908).

¹³⁶ See *Johnson v. Bennett*, 5 Abb. Pr. (n.s.) 331 (N.Y. Super. Ct. 1868).

¹³⁷ See *Grocer's Nat'l Bank v. Clark*, 48 Barb. 26 (N.Y. Sup. Ct. 1866). Cf. *Association for Preservation of Freedom of Choice, Inc. v. New York Post Corp.*, 228 N.Y.S.2d 767 (Sup. Ct. 1962).

¹³⁸ See *In re Wood's Estate*, 144 N.Y.S.2d 880 (Sur. Ct. 1955).

¹³⁹ See, e.g., *In re Modell*, 71 F.2d 148 (2d Cir. 1934); *Southern Farm Bureau Cas. Ins. Co. v. Wright Oil Co.*, 454 S.W.2d 69 (Ark. 1970); *Barnes v. United Ry. & Elec. Co.*, 116 A. 855 (Md. 1922); *Grubaugh v. Simon J. Murphy Co.*, 177 N.W. 217 (Mich. 1920); *Curtis v. Curtis*, 96 N.W. 32 (Mich. 1903); *In re City of New York*, 95 N.Y.S.2d 26 (Sup. Ct. 1950); *Kittinger Witt Co. v. Brookins*, 172 N.E. 297 (Ohio Ct. App. 1929); *Beck v. Germantown Cricket Club*, 45 Pa. Super. 358 (1910); *Globe Aircraft Corp. v. Thompson*, 203 S.W.2d 865 (Tex. Civ. Ct. App. 1947); *Harvey v. Cleman*, 400 P.2d 87 (Wash. 1965).

¹⁴⁰ See, e.g., *Neilson Realty Corp. v. Motor Vehicle Accident Indemn. Corp.*, 262 N.Y.S.2d 652 (Sup. Ct. 1965); *Reddy v. Zurich Gen. Accident & Liab. Co.*, 11 N.Y.S.2d 88 (Sup. Ct. 1939).

¹⁴¹ See, e.g., *Williams v. Ingersoll*, 89 N.Y. 508 (1882). See generally *Wentworth*,

situations in which tort claims or their derivative rights can be assigned, and indicate that such rights may properly be considered as an asset of the tort victim. Due regard must be given to the problems and pitfalls which lie between the creation of the cause of action and the realization of a fund; however, potential assignees and their attorneys remain the best judges of the value of a particular claim and the utility of accepting its assignment. In making such judgments, the likelihood that a fund will be derived and the purpose of the assignment will undoubtedly be crucial factors. Thus, although tort causes of action could never secure a continuing lending arrangement which depends on the rapid turnover of the security (*e.g.*, accounts receivable financing), they can serve to at least partially secure a single loan if some recovery can be reasonably anticipated during the term of the loan.

Having established that tort claims can be assigned in both personal and commercial transactions, it becomes necessary to consider other matters which bear on the desirability and feasibility of accepting an assignment of a tort claim. Specifically, those aspects of the law which govern the parties to the original assignment and other individuals, including the tortfeasor, other assignees, and creditors of the assignor who might assert an interest in the claim, must be discussed. This discussion, however, must be prefaced by a more precise characterization of the type of property represented by tort claims and their derivative rights.

Tort causes of action and derivative judgment and settlement rights are intangible personalty.¹⁴² Furthermore, they are nonpledgeable intangibles because they are not evidenced by writings indispensable to their transfer.¹⁴³ "Pledgeability" becomes significant in connection with the manner in which an assignment of the intangible collateral is made enforceable

Attorney's Liens—A Survey and a Proposal, 35 CONN. B.J. 191, 196 (1961).

¹⁴² See generally R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 7 (2d ed. 1955). The author is willing to assume that tort claims are "property" because assignors, assignees and courts have treated them as such, but readily admits that there is more to the concept of property than mere transferability. See *Woody's Olympia Lumber Co. v. Roney*, 513 P.2d 849 (Wash. 1973). See generally 4 A. CORBIN, *CONTRACTS* § 860 (1951); Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

¹⁴³ See generally 1 GILMORE § 1.3.

against third persons,¹⁴⁴ which for a tort claim can be determined through ascertaining the body of law which governs the relationship between the assignor, the assignee, and third parties.

A. *The Applicability of Article Nine to Tort Claim Assignments*

The relevance of Article Nine of the Uniform Commercial Code to the assignment of tort claims is not immediately apparent. The Article broadly applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property"¹⁴⁵ Thus, it might seem to control a security interest in a tort cause of action or derivative rights.¹⁴⁶ However, rights "represented by a judgment" and transfers "in whole or in part of . . . any claim arising out of tort" are expressly excluded from the scope of Article Nine on the theory that these intangibles do not customarily serve as commercial collateral.¹⁴⁷ This decision by the Code's draftsmen appears correct when viewed in light of the types of intangible property, such as commercial accounts receivable, that are included within the scope of Article Nine.¹⁴⁸ Moreover, it is consistent with the pre-UCC personal property security legislation in many jurisdictions which also did not include tort claims and judgments within its scope.¹⁴⁹ Excluding these intangibles from Article Nine may also evince an intent to have them

¹⁴⁴ *Id.*

¹⁴⁵ UNIFORM COMMERCIAL CODE § 9-102(1)(a) (1962 Official Text) [hereinafter cited as UCC]. Differences between this version of the UCC and the 1972 Official Text will be noted when relevant.

¹⁴⁶ *Id.* "Security interest" means an interest in personal property . . . which secures payment or performance of an obligation." UCC § 1-201 (37). The UCC applies this defined term to consensual interests in personalty and uses the undefined term "lien" to describe nonconsensual interests. See UCC § 9-102(2). This and other terms, such as "security agreement," "secured party," and "collateral," are used in this paper with the same meaning given them by the UCC. See UCC §§ 9-105(1)(h), (i), (c).

¹⁴⁷ See UCC §§ 9-104(h), (k), Comment 8. The exclusions contained in § 9-104 do not, however, exclude from Article Nine security interests in all types of collateral which do not customarily serve as commercial collateral. For example, a security interest in a decedent's estate has been held to be within the scope of Article Nine. See *In re Bowen*, 5 UCC REP. SERV. 261 (D. Ore. 1968). See generally 1 GILMORE § 10.7.

¹⁴⁸ Executory contract rights constitute another commercially important class of intangible property within Article Nine. See generally Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 999-1003 (1964).

¹⁴⁹ See generally 1 GILMORE chs. 7, 8.

handled on a state-by-state basis, each jurisdiction being free to apply its own public policies.¹⁵⁰ The appearance that Article Nine is not relevant to security interests in rights arising from the commission of a tort is further substantiated by its inapplicability "to a transfer of an interest or claim in or under any policy of insurance"¹⁵¹ Although this exclusion was intended to apply primarily to the assignment of life insurance policies,¹⁵² it is arguably broad enough to exclude the assignment of a claim under a casualty insurance policy arising out of a tortious act by a third person.¹⁵³

Although it appears that tort claims are outside the scope of Article Nine, a closer analysis reveals that a tort victim has the potential for obtaining property rights, derived from the tort, which might be subject to Article Nine. A typical sequence of events which could follow the commission of a tort will serve to illustrate the point. In considering the sequence of events, it must be kept in mind that property can become the subject of an Article Nine security interest in two ways: first, when the security interest is created directly in the property, in which case the property may be referred to as "original" collateral; and second, when the security interest is imposed on the "proceeds" of original collateral.¹⁵⁴ "Proceeds" are defined by Article Nine as including "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of."¹⁵⁵ Moreover, it should be recalled that a security interest in property in which the debtor will have no ownership until a future time can be granted under Article Nine.¹⁵⁶

¹⁵⁰ See generally Hawkland, *The Proposed Amendments to Article Nine of the U.C.C.—Part IV: The Scope of Article Nine*, 79 COM. L.J. 79, 83 (1972). There are nonuniform statutes relating to the assignment of judgments and causes of action which might have required modification or repeal in order to avoid conflict with Article Nine. See note 197 *infra*.

¹⁵¹ UCC § 9-104(g).

¹⁵² See UCC § 9-104, Comment 7. See generally 1 GILMORE § 10.7.

¹⁵³ See R. HENSON, *HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* §§ 6-8, at 150-51 (1973) [hereinafter cited as HENSON].

¹⁵⁴ See generally Weiss, *Original Collateral and Proceeds: A Code Puzzle*, 42 N.Y.U.L. REV. 785, 803-04 (1967).

¹⁵⁵ UCC § 9-306(1). The term also includes the account arising when the right to payment is earned under a contract. Money, checks and the like are referred to as "cash proceeds" while all other types of proceeds are "non-cash." *Id.*

¹⁵⁶ See UCC § 9-204(3). It will not attach and cannot be perfected, however, until the debtor has rights in the collateral. *Id.* § 9-204(1); § 9-303(1).

In the typical sequence of events, settlement occurs at some point after suit is filed but prior to judgment. In the settlement a tort victim obtains a contractual right to payment from the tortfeasor, or his insurer, which constitutes a new form of intangible personal property derived from the original tort claim.¹⁵⁷ When the tortfeasor or his insurer issues a check to satisfy this obligation another form of derivative property has come into existence—the victim-payee's rights on the check. Still another intangible derivative right is produced when the check is cashed or deposited—the rights in the fund. While the security assignment of the original tort claim is not within the scope of Article Nine, derivative settlement rights are excluded only if they are "claim[s] arising out of tort."¹⁵⁸ Therefore, these rights could constitute original collateral within Article Nine. Security interests in instruments,¹⁵⁹ such as checks, are governed by Article Nine, and a tort victim's rights on a settlement check could constitute original collateral if not excluded as "arising out of tort." Additionally, a security interest in the monetary proceeds of the settlement could be original collateral within Article Nine, subject to this exclusionary language, if the funds are not deposited in a savings, passbook, or similar account maintained with a bank, savings and loan association, or like organization. Security interests in these deposit accounts are removed from the scope of Article Nine by another exclusionary provision.¹⁶⁰ But even if the monetary proceeds could not be "original" collateral within the scope of Article Nine because of this latter exclusion, once they go into such an account they might constitute Article Nine "proceeds" which are within the scope of Article Nine as are, arguably, the check and the settlement agreement rights.¹⁶¹

¹⁵⁷ It thus became possible to sue on a contract for what amounts to liquidated tort damages. *See, e.g., Greenleaf v. Minneapolis St. P. & S. Ste. M. Ry.*, 151 N.W. 879, 881 (N.D. 1915).

¹⁵⁸ UCC § 9-104(k).

¹⁵⁹ *See* UCC § 9-105(1)(g).

¹⁶⁰ Such deposit accounts are excluded from the scope of Article Nine by § 9-104(k) which provides: "This article does not apply . . . to a transfer in whole or in part of . . . any deposit, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization."

¹⁶¹ *See* UCC §§ 9-306(1), (4). *See also* *Commercial Discount Corp. v. Milwaukee W. Bank*, 214 N.W.2d 33 (Wis. 1974). *See generally* Coogan, Kripke & Weiss, *The Outer Fringes of Article Nine: Subordination Agreements, Security Interests in Money*

If Article Nine's exclusions do not embrace a security assignment of these present or future property rights derived from a tort cause of action, then these nonexcluded rights (and their proceeds) are subject to Article Nine through its broad scope provision.¹⁶² Consistent with this conclusion are the Code's comments which suggest that the scope language should be broadly interpreted in keeping with Article Nine's main purpose: to provide a comprehensive scheme for all nonexcluded consensual security interests in personalty.¹⁶³ However, the one reported case that relates to this issue, *Arkwright Mutual Insurance Co. v. Bargain City U.S.A., Inc.*,¹⁶⁴ provides contrary authority.

In *Arkwright*, an insurer had issued a policy covering loss of rental income caused by property damage, including damage resulting from the impact of an aircraft. A United States Navy jet had crashed into one of the insured properties, causing a substantial loss of rental income. The insured's claim under the policy was held in abeyance pending his effort to recover from the United States by means of filing a claim with the Navy.¹⁶⁵ The Navy and the insured reached a settlement, and the Navy agreed to recommend to the Bureau of the Budget that the amount be paid. At this juncture, the insured requested that the insurer advance him funds, pending payment by the United States. The advance was made pursuant to an agreement which provided that the insured would, at the insurer's request, execute and deliver such instruments as would authorize the United States to make payment directly to the insurer; and that the insurer would pay to the insured any amount received from the United States in excess of the amount advanced.

and Deposits, Negative Pledge Clauses, and Participation Agreements, 79 HARV. L. REV. 229, 261-63 (1965). The scope provisions of the 1972 Official Text of the Uniform Commercial Code expressly state that deposit accounts can be proceeds within the meaning of Article Nine. See UCC § 9-104(1) (1972 Official Text).

¹⁶² See UCC § 9-102. The relationship between the scope provisions of Article Nine and its proceeds provision is discussed at notes 185-86 and accompanying text *infra*.

¹⁶³ See Comments to UCC §§ 9-101, 102, 104.

¹⁶⁴ 251 F. Supp. 221 (E.D. Pa. 1966), *aff'd*, 373 F.2d. 701 (3rd Cir.), *cert. denied*, 389 U.S. 825 (1967).

¹⁶⁵ The claim was filed pursuant to the Military Claims Act of 1956, 10 U.S.C. § 2733 (1959).

After receiving the advance, the insured filed a petition under Chapter XI of the Bankruptcy Act.¹⁶⁶ The insurer did not formally appear or file a claim in the bankruptcy proceeding even though it was scheduled as an unsecured creditor for the amount of its advance and the claim against the United States was scheduled as an asset of the insured. After the arrangement was confirmed and terminated, the insurer refused to accept as an unsecured creditor a payment of 15 percent of its total advance. Subsequently, the United States appropriated the amount of the settlement and the insurer instituted suit to recover its advance, initially succeeding in requiring the insured to deposit the fund into court.

The agreement between the insurer and its insured provided for an actual loan. The federal district court emphasized this,¹⁶⁷ and the circuit court of appeals indicated that the insured was to repay the difference if the amount received from the government was less than the amount advanced, and that the advance did not prejudice the insured's right to make a claim under the policy.¹⁶⁸ Since the transaction was a loan and not a payment pursuant to the policy, the insurer, if it was to have a claim to the appropriated fund, could not claim rights through subrogation.¹⁶⁹ Instead, its rights would have to be realized through a consensual assignment or some other means.

If there had been a consensual assignment to the insurer, the rights assigned could have been either the insured's tort action against the Navy, the derivative contractual rights under the settlement agreement negotiated with the Navy, or the derivative rights in the fund appropriated by the government. As suggested, the assignment of such derivative rights

¹⁶⁶ 11 U.S.C. § 701 *et seq.* (1959).

¹⁶⁷ 251 F. Supp. at 223.

¹⁶⁸ 373 F.2d at 703.

¹⁶⁹ A number of courts have held that the rights which a construction surety obtains by virtue of subrogation, upon the performance of its contractual commitments under payment or performance bonds, are not based on a consensual security interest but are equitable rights not subject to Article Nine. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 22-5 (1972). The insurance policy in *Arkwright* provided that the insurer could require the insured to assign all rights against third persons to the extent payment was made by the insurer, but no payment had been made under the policy.

for security is arguably within the scope of Article Nine, in which case Article Nine would apply to determine the rights of the insurer *qua* secured creditor in the Chapter XI proceedings.¹⁷⁰ The district court did not initially consider Article Nine because it found no assignment of any present or future property, but rather a mere agreement by the insured to pay a debt from a designated future fund.¹⁷¹ Then, assuming that the insurer's claim against the insured was valid, the court concluded that enforcement of the claim against the insured was barred by the bankruptcy proceeding. Inexplicably, the lower court then declared that the insurer's claimed lien was unperfected under the Uniform Commercial Code, a seemingly unnecessary finding in view of the court's initial determination that there had been no assignment.¹⁷² The court ignored the exclusions from the scope of Article Nine discussed above.

On appeal, the Third Circuit questioned the pertinence of the district court's declaration, stating in a footnote that the transaction was "beyond the pale" of Article Nine because the claim arose out of a tort.¹⁷³ The circuit court also referred to the Article's exclusion of transfers to an interest or claim in or under any insurance policy.¹⁷⁴ It did not, however, analyze the applicability of Article Nine beyond these observations. Most of the opinion was devoted to the determination that, assuming a non-Article Nine interest had been created, it had been extinguished in the Chapter XI bankruptcy proceedings when the insurer failed to assert its equitable rights.¹⁷⁵

The fact pattern presented in *Arkwright* was not ideal for

¹⁷⁰ 11 U.S.C. § 701 *et seq.* (1959). The fact that the federal government was the tortfeasor and potential obligor under the settlement agreement would not by itself remove the assignment from the scope of Article Nine. *See generally* 1 GILMORE § 10.7, ch. 13. On appeal the Third Circuit stated that the equities of the parties would not be affected by the Federal Anti-Assignment Act, 31 U.S.C. § 203 (1959), but would be determined by state law.

¹⁷¹ The parties authorized the district court to decide the case as if they had filed summary judgment motions. The court held that the fund was not impressed with a trust or equitable lien in favor of the insurer. 251 F. Supp. at 225-26. This determination was not necessary for the Third Circuit to hold against the insurer. *See* note 175 and accompanying text *infra*.

¹⁷² 251 F. Supp. at 228.

¹⁷³ 373 F.2d 704 nn.7 & 9. This language was apparently borrowed from Professor Gilmore. *See* note 177 and accompanying text *infra*.

¹⁷⁴ 373 F.2d 704 nn.7 & 9. *See* notes 151-53 and accompanying text *supra*.

¹⁷⁵ *Id.* at 706.

determining the scope of Article Nine in relation to tort-derived rights. It is clear from the facts that there had been no security assignment prior to the commencement of the bankruptcy proceedings, and, even assuming that there was a consensual assignment, the loan agreement did not specifically identify the collateral. However, even if rights such as those under the settlement agreement or in the future fund had been expressly secured prior to the bankruptcy proceedings, the court still should have concluded that Article Nine was inapplicable. If the scope provisions of Article Nine, with their accompanying official comments, are construed to include certain rights derived from a tort cause of action, the Code's exclusion of "any claim arising out of tort" would become meaningless due to the ease with which it could be circumvented by assignment of these rights. Placing these assignments outside Article Nine's coverage does no great violence to the exclusionary language, as such rights would never have existed but for the commission of a tort. Exclusion is appropriate for it was the more commercially familiar types of collateral and transactions which concerned the Code's draftsmen and which were the objects of their talents. The security assignment of a tort cause of action or derivative right was an unfamiliar commercial transaction involving unusual collateral. The tort claim exclusion, recommended in 1956 by the Editorial Board for the Uniform Commercial Code, was intended to achieve greater clarity and precision in defining the transactions "entirely" excluded from Article Nine.¹⁷⁶ Professor Gilmore, who was intimately involved in the development of the Article, has stated that the exclusion reflects the notion that such assignments are "beyond the pale with respect to a statute devoted to commercial financing."¹⁷⁷

If further evidence is needed to demonstrate that Article Nine's draftsmen desired to leave the security assignments of tort causes of action and derivative rights to extra-Code law, it may be obtained by considering how the Article would apply

¹⁷⁶ See AMERICAN LAW INSTITUTE, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 257-58 (1956) [hereinafter cited as 1956 RECOMMENDATIONS]. This recommendation was pursuant to a suggestion by the New York Law Revision Commission. See STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION 466 (1956).

¹⁷⁷ 1956 RECOMMENDATIONS at 258; See 1 GILMORE at 316.

to the security assignment of a derivative right. For example, a tort victim's rights under a contract of settlement can be characterized under Article Nine as a general intangible.¹⁷⁸ To perfect a security interest in a general intangible it is necessary to file a financing statement. Under two of the Article's three filing alternatives, filing would be in the office of the secretary of state or some other centralized location.¹⁷⁹ The third alternative requires central filing and, in some situations, a filing in the county where the debtor resides or has a place of business.¹⁸⁰ In the case of tort-derived rights, however, it is debatable whether any filing should be necessary.¹⁸¹ Even assuming that a filing requirement is warranted and litigation is pending or has been settled, would not a filing in court be more appropriate for giving public notice? It is unlikely that either Article Nine's draftsmen or the legislators who enacted the Code carefully considered these questions.

Applying Article Nine to tort-derived rights could lead to additional difficult problems. Consider, for example, the assignment of a tort cause of action to an assignee who immediately notifies the tortfeasor. There is authority for the proposi-

¹⁷⁸ See UCC § 9-106:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. "*General intangibles*" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments. All rights earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are contract rights and neither accounts nor general intangibles.

(Emphasis added).

If a tort victim's right to payment was not yet earned by performance, such as where the tort victim has failed to deliver an executed release from liability required by the settlement agreement, then the collateral might be characterized as a "contract right."

Under UCC § 9-106 (1972 Official Text) the term "contract right" has been eliminated. Rights under a settlement agreement must, under this version, be characterized as a general intangible.

¹⁷⁹ See UCC § 9-401.

¹⁸⁰ *Id.*

¹⁸¹ Under some circumstances a tort victim's rights under a settlement agreement may be characterized as a contract right. See note 178 *supra*. No filing is required to perfect a security interest in an "insolated" assignment of contract rights. See UCC § 9-302(1)(e).

tion that such an assignment carries with it rights in the ultimate judgment, and that the way to perfect such an assignment is through notice to the tortfeasor.¹⁸² Similarly, a court might reason that the assignment of the cause of action carries with it rights in any future settlement agreement. Article Nine clearly cannot cover the assignment of the cause of action itself because of the exclusion for claims arising out of tort, but it might be interpreted to cover rights under a future settlement agreement. If a priority conflict were to arise between two parties who are secured in what is ultimately the same property (one in the cause of action, the other in the future settlement rights), the problem is compounded because the two security assignments are arguably controlled by different bodies of law. The tort cause of action is governed by extra-UCC doctrine relating to assignments, while the derivative rights are subject to Article Nine. Article Nine was not drafted to deal with such a conflict.¹⁸³

The foregoing analysis of the scope of Article Nine leads to the conclusion that the draftsmen did not intend the Article to apply to the assignment of any rights derived from the commission of a tort. Since Article Nine's exclusionary provisions can be interpreted to exclude tort claims and their derivative rights from being original collateral, they should be so construed. This would result in the application of the common law and equitable doctrine of assignments to both security and nonsecurity assignments of tort causes of action and derivative rights. There is, however, one additional Article Nine problem which must be considered before turning attention to this doctrine. The question may be stated as follows: Can a creditor who has a valid Article Nine security interest in personalty claim as proceeds the tort cause of action and derivative rights which arise out of injury to that personalty?¹⁸⁴ For example, if

¹⁸² See generally 2 A. FREEMAN, JUDGMENTS §§ 1052-53 (1925); 2 GILMORE § 25.6. See note 204 and accompanying text *infra*.

¹⁸³ Cf. UCC § 9-310.

¹⁸⁴ "Proceeds" are defined in UCC § 9-306(1) as "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of." A secured party obtains his continuing interest in "proceeds" by virtue of UCC § 9-306(2):

Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable pro-

a third person negligently damages an automobile in which there exists a security interest, does the secured party's security extend to the fund created by the third person or his insurer upon payment for the loss? Except when Article Nine expressly provides otherwise,¹⁸⁵ property rights that cannot pass through the Article's "front door" as original collateral cannot enter via the "back door" as proceeds.¹⁸⁶ Therefore, the previously discussed exclusions from the scope of Article Nine serve as a basis for concluding that tort causes of action and rights derived therefrom can never be proceeds. The two reported cases which have considered this question, however, have reached this result on the basis of the Article's definition of proceeds, without reliance on the scope provisions.

In the first case,¹⁸⁷ the secured party attempted to intervene in its debtor's trespass action against a defendant who had allegedly destroyed the collateral, an automobile. Through an oversight there was no insurance protecting the secured party against loss of or damage to the collateral. The court held that the security interest did not make the secured party a permissible intervenor, and that Article Nine's definition of proceeds does not extend to situations where the collateral has depreciated in value through no fault of the debtor. The opinion was silent concerning possible Article Nine scope problems. In the second case,¹⁸⁸ which reached the same general result,

ceeds including collections received by the debtor.

Arguably, the phrase "received by the debtor" applies only to "collections" and not to "proceeds." See HENSON § 6-8 at 153 n.18.

It is interesting to note that Article Two of the UCC may enable a seller of goods to sue a third party who injures the goods. See UCC § 2-722. If a seller does have this right, there is some basis in Article Two for arguing that the financier of the sale can succeed to that right. See UCC § 2-707. See generally *Shapiro v. Union Bank and Savings Co.*, 458 F.2d 938 (7th Cir. 1972).

¹⁸⁵ "Proceeds" under Article Nine may include some property rights which are not within the scope of Article Nine as original collateral. An example under the 1962 Official Text is deposit accounts. See notes 160-61 and accompanying text *supra*.

¹⁸⁶ The opposite conclusion would lead to anomalous results. Consider a properly perfected Article Nine security interest in a motor vehicle and proceeds, the vehicle then being exchanged by the debtor for an acre of realty without the permission of the secured party. Although the scope of Article Nine is expressly limited to personal property and fixtures, if "proceeds" were not limited to property which is within the scope of the Article, the secured party could claim a continuing Article Nine security interest in the realty. See UCC § 9-102(1).

¹⁸⁷ *Hoffman v. Snack*, 2 UCC REP. SERV. 862 (Pa. C.P. 1964).

¹⁸⁸ *In re Hix*, 9 UCC REP. SERV. 925 (S.D. Ohio 1969).

the attorney for the perfected secured party and the debtor had successfully negotiated a settlement with the insurer of a third person who had damaged the debtor's automobile.¹⁸⁹ The debtor declared bankruptcy before the settlement was paid, and the trustee challenged the secured party's claim to the fund on the ground that the security agreement covered the automobile only. In holding for the trustee, the referee in bankruptcy found that when the debtor became bankrupt there had been no assignment of his cause of action to the secured party, and that there had been no sale, exchange, or disposition of the collateral within the Article Nine definition of proceeds. The referee noted the scope provisions excluding the transfer of an interest or claim in or under any policy of insurance and the transfer of claims arising out of tort, but expressly refused to consider their relation to the problem as a question "not before the court."¹⁹⁰

Although both of these cases were decided by courts of original jurisdiction, they are consistent in reasoning and result with a more extensive and authoritative line of cases holding that a secured party cannot claim as "proceeds" the debtor's rights against his own insurer or the fund created through the settlement with such an insurer.¹⁹¹ If one reads Article Nine's definition of proceeds as requiring a *voluntary* disposition by the *debtor*, there are two bases for arguing that the fund generated when the collateral is tortiously damaged or destroyed by a third person is not proceeds, because the disposition was neither voluntary nor by the debtor.¹⁹²

The 1972 Official Text of Article Nine of the Uniform Commercial Code, which has been enacted in at least 10

¹⁸⁹ Although the opinion does not discuss the possibility, Article Nine may require that proceeds be "received" by the debtor. See note 184 *supra*. The requirement was met in this case since the debtor had "received" rights to payment under the settlement agreement.

¹⁹⁰ 9 UCC REP. SERV. at 928.

¹⁹¹ See, e.g., *Quigley v. Caron*, 247 A.2d 94 (Me. 1968); *Universal C.I.T. Credit Corp. v. Prudential Inv. Corp.*, 222 A.2d 571 (R.I. 1966). *Contra*, *Firemen's Fund Am. Ins. Co. v. Ken-Lori Knits, Inc.*, 16 UCC REP. SERV. 1407 (E.D.N.Y. 1975). See generally HENSON § 6-8; Henson, *Insurance Proceeds as "Proceeds" Under Article Nine*, 18 CATH. L. REV. 453 (1969). It has also been held that a check in payment of a judgment for breach of warranty for defective collateral is not proceeds within Article Nine. See *In re Continental Trucking, Inc.*, 16 UCC REP. SERV. 526 (M.D. Fla. 1974).

¹⁹² Cf. HENSON at 148.

states,¹⁹³ has defined proceeds to include "[i]nsurance payable by reason of loss or damage to the collateral . . . except to the extent that it is payable to a person other than a party to the security agreement."¹⁹⁴ This amendment was designed to reverse the result achieved in the aforementioned cases where the secured party attempted to reach the proceeds of the *debtor's* insurance. The "except" clause was intended by the draftsmen to indicate that if the insurance contract specifies a third party to whom the insurance is payable, Article Nine will not interfere with the performance of the insurance contract.¹⁹⁵ Due to the revised definition of proceeds, a secured party with an Article Nine security interest in collateral damaged by a tortfeasor might arguably succeed to the insurance proceeds paid by the *tortfeasor's* insurer. Although such a result would not interfere with the performance of the tortfeasor's insurance contract, this interpretation could be troublesome if the Article Nine secured party was challenged by an assignee of the tort claim or its derivative rights, because such a priority conflict is not dealt with by Article Nine.¹⁹⁶

B. *Tort Claim Assignments and Assignment Doctrine*

If Article Nine of the Uniform Commercial Code does not control the validity of security assignments of tort claims and derivative rights, then these assignments, along with those which are not made for security, will be regulated in most jurisdictions by the common law and equitable doctrine of assignments.¹⁹⁷ No attempt will be made to generally review these

¹⁹³ See CCH SECURED TRANSACTIONS GUIDE ¶ 650A. The new version has been adopted in 14 states, but does not become effective in four of these until 1976.

¹⁹⁴ UCC § 9-306(1) (1972 Official Text). The scope of Article Nine was also amended to accommodate this broadened definition of "proceeds." *Id.* § 9-104(g).

¹⁹⁵ UCC § 9-306 (1972 Official Text), Reasons for 1972 Change. See generally PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REVIEW COMMITTEE FOR ARTICLE NINE OF THE UNIFORM COMMERCIAL CODE FINAL REPORT 220 (1971).

¹⁹⁶ See notes 182-83 and accompanying text *supra*. The broadened definition of proceeds does not apply to other kinds of substitute collateral which are not the result of a voluntary disposition of the original collateral by the debtor, such as a fund created through payment to the debtor of a settlement by an uninsured tortfeasor. Such distinctions may be difficult to justify conceptually. See Hawkland, *The Proposed Amendments to Article Nine of the UCC, Part II: Proceeds*, 77 COM. L.J. 12, 13 (1972).

¹⁹⁷ See generally 1 GILMORE at 315-16. Some jurisdictions have statutes which require filing a notice of the assignment of a cause of action or judgment. The filing

doctrines, for such review is available from a variety of sources.¹⁹⁸ However, attention must be given to the priority problems which could face the assignee of a tort cause of action because of the nature of the property assigned. Assuming that the assignment is made after the cause of action has accrued but before a fund has been produced, the fund can have no existence until some future date. Consequently, the assignee's security is actually in a fund which may not logically seem susceptible to either present ownership or transfer. According to Professor Gilmore in his treatise on personal property security, the priority issue created is whether one may make a present transfer of future property which, when the property "is acquired, will be entitled to priority over claims which have meantime accrued."¹⁹⁹ Separating future rights which have a sufficient probability of obtaining eventual existence so as to be susceptible to an effective present assignment from those which do not has been a troublesome task for the courts.²⁰⁰ In the case of future rights derived from a tort cause of action, it is still necessary to resort to the law of assignments, in which case a close reading of Professor Gilmore's analysis of the assignment of future intangibles is most helpful.²⁰¹ He uses a New York Court of Appeals decision to demonstrate that at one time in New York present assignability required only that there be a reasonable expectancy that a fund would ultimately exist. In his analysis of this case, *Williams v. Ingersoll*,²⁰² Professor Gilmore considered its applicability to future funds which were not the result of a tort, for example, the bonanza which a prospector might reap if he discovers uranium.²⁰³ Nevertheless, its particular significance as a case involving a future fund arising out of a tort claim makes it worthy of additional discussion.

In *Williams* the plaintiffs were New York attorneys who

many or may not affect the rights of third persons. Compare TEX. REV. CIV. STAT. ANN. art. 6636 (1969), with IND. ANN. STAT. § 34-1-31-1 (1973).

¹⁹⁸ These sources would include 3 WILLISTON ON CONTRACTS ch. 15 (3rd ed. 1960); RESTATEMENT (SECOND) OF CONTRACTS, ch. 7 (Tent. Drafts Nos. 1-7, 1973); 4 CORBIN chs. 47-51 (1951).

¹⁹⁹ 1 GILMORE at 229.

²⁰⁰ See generally *id.* § 12.9.

²⁰¹ See *id.* §§ 7.10-7.12, 12.9.

²⁰² 89 N.Y. 508, 54 N.Y.S. App. 749 (1882).

²⁰³ See 1 GILMORE § 7.12.

were representing a client named Heath in a number of legal actions. Uneasy about compensation for their services, they entered into an agreement with Heath whereby he gave them a lien upon any sum to which he might become entitled through these actions. One such action was a malicious prosecution suit then pending against the Ingersolls. A judgment creditor of Heath attempted to reach the fund created by the malicious prosecution action through attachment proceedings in Connecticut, where one of the Ingersolls resided; and in New York the plaintiffs brought an action to enforce their lien. The first question facing the New York Court of Appeals was the relative priority as between the attorneys and the judgment creditor. In resolving this dispute the court initially noted that the attorneys' lien was not created by operation of law, but was consensual, arising out of the contractual agreement with Heath. The court was not troubled by the fact that the consensual lien was upon damages to be recovered in a personal, nonassignable cause of action because, under equitable doctrine, the assignment of a tort action automatically extended to any future proceeds.²⁰⁴ The court concluded that this automatic attachment in equity, coupled with the fact that the fund had a potential existence because the action against the Ingersolls was pending at the time of the assignment, was sufficient to make the assignment effective against the subsequent rights of the lien creditor who had not obtained a bona fide payment from the Ingersolls. Neither the Ingersolls' lack of notice of the attorneys' lien until after commencement of the Connecticut proceedings, nor the proceedings in Connecticut themselves, had any effect on the court's conclusion that the attorneys' lien had priority over the judgment creditor.

After discussing the *Williams* case, Professor Gilmore analyzed subsequent opinions of the New York Court of Appeals concerning the assignment of future funds and lamented that two of the opinions suggested a turning away from the sound position taken in *Williams* and the general trend in the United States. He argued that these two opinions should be narrowly restricted to their respective facts.²⁰⁵ The cases involved an

²⁰⁴ 89 N.Y. at 521, 54 N.Y.S. App. at 752.

²⁰⁵ 1 GILMORE § 7.12.

assignment of future proceeds from the sale of a seat on the New York Stock Exchange and the assignment of a future refund which would become due if the assignor's application for a liquor license was rejected, or if the license was granted and then surrendered or cancelled.²⁰⁶ These developments need not be analyzed here because in *Stathos v. Murphy*,²⁰⁷ decided after Professor Gilmore's treatise was published, the New York Court of Appeals affirmed an opinion of the appellate division restricting the application of the earlier two opinions. Although *Stathos* is not broad authority for the proposition that priority is to be measured from the date of assignment for all types of future funds derived from any source,²⁰⁸ it does hold that priority is to be measured in this manner when a cause of action is assigned after the suit to generate the fund has been commenced.²⁰⁹

Stathos involved an assignment of a claim for breach of contract after the suit had been filed. The assignment, which was made to satisfy a prior debt of the assignor, was absolute in form.²¹⁰ The assignee's right to the fund produced by the settlement of the action was challenged by judgment creditors of the assignor who had obtained their judgment after the assignment but prior to the creation of the settlement fund.

The New York Court of Appeals affirmed the opinion of the appellate division, which had distinguished the assignment of present rights which have not ripened into a fund, such as existing choses in action, from assignments of future claims, such as the cause of action arising out of some future tort or

²⁰⁶ These two opinions are *In re City of New York v. Beford Bar & Grill*, 141 N.E.2d 575, 161 N.Y.S.2d 67 (1957) and *In re Grunner*, 68 N.E.2d 514 (N.Y. 1946). *Williams* may arguably have been overruled in *Cordaro v. Cordaro*, 235 N.Y.S.2d 289 (App. Div.), *aff'd mem.*, 191 N.E.2d 676, 241 N.Y.S.2d 175 (1963). See discussion in note 212 *infra*.

²⁰⁷ 276 N.Y.S.2d 727 (App. Div. 1966), *aff'd*, 281 N.Y.S.2d 81 (1967).

²⁰⁸ See *Harold Moorstein & Co. v. Excelsior Ins. Co.*, 296 N.Y.S.2d 2 (App. Div. 1968), *aff'd*, 254 N.E.2d 766, 306 N.Y.S.2d 464 (1969).

²⁰⁹ 276 N.Y.S.2d at 733. See also *In re Law Research Serv., Inc. v. Martin Lutz Appellate Printers, Inc.*, 498 F.2d 836 (2d Cir. 1974).

²¹⁰ The opinion does not specify whether the assignment was intended solely as security. Under the best view it makes no difference, insofar as an assignee's priorities are concerned, whether his assignment is absolute in form or conditioned upon the happening of some event, such as a default in the repayment of a debt owed by the assignor to the assignee. In either case the assignee's priority should be measured from the time of the assignment when an immediately effective assignment is actually intended as is normally the case. See generally 4 CORBIN § 875 (1951); 1 GILMORE § 7.5, at 208-10.

unearned wages under some future contract of employment. The appellate division reasoned that in the former instance there is an effective assignment of present rights even though the value of the rights is uncertain. Unlike the *Williams* court, however, the court in *Stathos* placed little weight on the fact that the suit had been filed prior to assignment. It was satisfied that the accrual of the action to the assignor was enough to give the future fund sufficient present existence so as to be susceptible to a present assignment. The court attempted to draw a further, and possibly misleading, distinction between an assignment of a chose in action and an assignment of future settlement or judgment proceeds derived therefrom.²¹¹ As to the derivative proceeds, the priority of the assignee would, in the court's view, be measured from the genesis of the funds if the transfer was intended to take effect in the future. Although the distinction could be of practical importance to a lawyer drafting an assignment of a cause of action, the court did not intend to challenge the holding of *Williams*, which provided that an assignee's priority in rights derived from an existing cause of action should be measured from the date of the assignment when an immediately effective assignment is contemplated. To the contrary, the *Stathos* court concluded not only that *Williams* was the leading New York precedent and that it was in accord with the general doctrine as pronounced in the treatises, but also that it applied a fortiori to the instant case and required that the assignee be given priority in the settlement proceeds. The court took pains to reconcile the New York cases involving the assignment of the proceeds of nonassignable tort claims which reached or suggested a result contra to *Williams*.²¹²

²¹¹ 276 N.Y.S.2d at 729-30.

²¹² The *Stathos* court was most concerned with *Cordaro v. Cordaro*, 235 N.Y.S.2d 289, *aff'd mem.*, 191 N.E.2d 676, 241 N.Y.S.2d 175 (1963), which reaches a result contra to *Williams*, but without referring to *Williams*. See note 202 and accompanying text *supra*. The *Stathos* court distinguished *Cordaro*, and others like it, on the theory that because *Cordaro* involved nonassignable causes of action, it was necessary to find that the assignment did not take effect until the fund had been produced. See 276 N.Y.S.2d at 731. Since *Stathos* involved an assignable cause of action, *Williams* technically may remain overruled, although *Cordaro's* failure to deal with *Williams* and the broad reaffirmation of *Williams* in *Stathos* must cast considerable doubt on *Cordaro's* vitality. See 276 N.Y.S.2d 727, 732-33. Most of the New York cases which involved a priority contest between the assignee of the proceeds of a nonassignable tort

The statement in *Stathos* that *Williams* is in accord with the general view in this country that priority is measured from the time of the assignment should be qualified. Although generally accurate with respect to assignable choses in action not within the scope of Article Nine,²¹³ it must be noted that there are cases in other jurisdictions involving nonassignable tort causes of action which have reached the opposite result, measuring the assignee's priority not from the time of the assignment but from the time the claim is liquidated.²¹⁴ It must also be noted that even if priority is to be measured from the time of the assignment, this does not insure priority over all third persons. In some jurisdictions it would be necessary to notify the tortfeasor of the assignment in order to perfect it against subsequent assignees. This and many other pitfalls are concealed in the law of assignments, but these are the sort of matters which, as mentioned above, are adequately covered by other works.²¹⁵

IV. CONCLUSION

It was inevitable that attempts would be made to transfer tort claims for personal and commercial purposes given the frequency with which they arise and their potential value. The

and a subsequent judgment creditor are consistent in result with *Williams*. See, e.g., *Neilson Realty Corp. v. Motor Vehicle Accident Indem. Corp.*, 262 N.Y.S.2d 652 (Sup. Ct. 1965) (citing others). *Contra*, *In re Wood's Estate*, 144 N.Y.S.2d 880 (Sur. Ct. 1955). See generally Greenberger, *Contracts, Annual Survey of New York Law*, 19 SYRACUSE L. REV. 373-74 n.53 (1967).

²¹³ See generally Greenberger, *Contracts, Annual Survey of New York Law*, 20 SYRACUSE L. REV. 342 (1968). Cases in accord with *Williams* include: *Gannon v. American Airlines Inc.*, 251 F.2d 476 (10th Cir. 1958) (applying Oklahoma law); *Linder v. Lewis, Roca, Scoville & Beauchamp*, 333 P.2d 286 (Ariz. 1958); *Haupt v. Charlie's Kosher Market*, 112 P.2d 627 (Cal. 1941). It should be noted that the liens given priority in these cases were held by attorneys through whose skills the fund was ultimately produced, as was the lien in *Williams*. A court could find that the attorney's role in bringing the fund into existence is a sufficient basis for distinguishing these cases from a case in which the assignee was not an attorney. See *Harvey v. Cleman*, 400 P.2d 87 (Wash. 1965). Cf. *Harleysville Mut. Ins. Co. v. Lea*, 410 P.2d 495, 500 (Ariz. 1966).

²¹⁴ Cases contra to *Williams* include *Harvey v. Cleman*, 400 P.2d 87 (Wash. 1965) and *Di Giosio v. George*, 44 Pa. D. & C. 668 (C.P. Allegheny 1942). For New York cases contra to *Williams*, see note 212 *supra*. One should also not assume that an unliquidated nonassignable tort claim can be the subject of attachment, execution, or garnishment. See *Woody's Olympia Lumber, Inc. v. Roney*, 513 P.2d 849 (Wash. 1973).

²¹⁵ See note 198 *supra*.

law has evolved from the English prohibition of assignments of *all choses in action* to its current American status where the assignability of a tort claim is very often related to its survivability. Both statutes and case law reflect the notion that a claim is transferable *inter vivos* by its owner if it would pass to his personal representative upon his death.

The consequence of equating assignability with survivability is that property-related torts are generally assignable while personal torts are often nontransferable. In this respect, the law has not kept pace with the times. The equivalency has been adopted, for the most part, without serious evaluation, and few legal principles have been applied for so long with so little scrutiny. The reasons that may have once supported restricting the transferability of tort claims, such as the fear of maintenance and difficulties in valuation, are not persuasive in contemporary society.

Once it is determined that a tort cause of action is assignable, the law of assignments governs its transfer and its effect on the parties *inter se* as well as on third persons. Because there is no persuasive evidence that this body of law is unsatisfactory as it applies to security assignments of tort claims and derivative rights, there is no basis for recommending that Article Nine of the Uniform Commercial Code be amended to encompass these rights as original collateral or proceeds. Their inclusion could become warranted if such assignments take on sufficient commercial importance in the future to justify a filing requirement. Whether Article Nine would provide an appropriate vehicle for giving notice of the security assignment of tort claims and derivative rights remains to be fully evaluated.