

(33)

9/22/60

Memorandum No. 86(1960)

Subject: Study No. 33 - Survival of Actions

Earlier this week you received a copy of the final recommendation of the Commission on Survival of Actions. Although this recommendation has been finally approved by the Commission and is now at the printer, one matter is presented to the Commission for consideration at the September meeting, i.e., the effect of the Commission's proposed legislation on the assignability of causes of action.

Historically at common law the assignability of causes of action sounding in tort depended upon survivability. So causes of action for damage to property, since they survived the death of the parties, were assignable and causes of action for injury to the person, since they did not survive, were not assignable. Prior to Hunt v. Authier (this case made some personal injury actions survive), the rule had been settled that no cause of action for damage which arose from tortious injury to the person survived and, as a corollary, no such cause of action was assignable. In 1949 the Legislature adopted Civil Code Section 956, and in doing so, expressly provided against the assignability of the causes of action therein specified. By adopting this reservation against assignability, the Legislature placed the law as regards the causes of action therein provided for in the same position as all other causes of action arising from tortious injury to the person.

In Fifield Manor v. Finston, 54 A.C. 635 (Sept. 6, 1960), the court considered the effect of the last sentence of Section 956 of the Civil Code (repealed by Section 1 of the Commission's proposed legislation). This decision indicates that the Commission may be making tort actions for injury to the person assignable by providing that such actions survive. The last sentence of Section 956 was inserted in the 1949 survival legislation to prevent this possibility. This sentence provides: "Nothing in this article shall be construed as making such a thing in action assignable."

In the Fifield Manor case, the facts were as follows: Ross entered into a life-care contract with Fifield Manor. The contract required Fifield Manor to provide Ross with all essential medical care. Ross was injured and died as a result of an automobile accident caused by the defendant's negligence. Fifield Manor brought an action to recover the cost of essential medical care rendered by it to Ross, now deceased, pursuant to the life-care contract. The life-care contract contained a subrogation agreement.

Fifield Manor sought to recover on two grounds: (1) a direct right of recovery for the financial loss it suffered in providing medical care for Ross because of the defendant's negligence and (2) on the basis of the subrogation agreement in the life-care contract.

Held, Fifield Manor could not recover on the basis of a direct injury to it. A cause of action may not be based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties or renders its performance more expensive. Nor, in view of the express reservation against assignment in Civil Code Section 956, could Fifield Manor recover on the theory of subrogation expressly assigned under the contract for all expenses it incurred as a result of

the injuries inflicted on Ross by reason of the negligence.

Commissioner McDonough advises the staff that in making its recommendation the Commission did not intend to affect the assignability of a thing in action. Consequently, it is suggested that the following sentence be added at the end of revised Section 573 of the Probate Code as contained in the Commission's recommended legislation:

Nothing in this section shall be construed as making assignable a thing in action that was not assignable prior to the enactment of this section.

It is suggested that the members of the Commission read the Fifield Manor case if they have any question concerning the advisability of inserting a provision like the one set out above in the recommended legislation relating to survival of actions.

Respectfully submitted,

John H. DeMouilly
Executive Secretary